

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

In the Consolidated Matters of:

STUDENT,  
Petitioner,  
v.

OAH CASE NO. N 2007050423

RIVERSIDE UNIFIED SCHOOL  
DISTRICT,  
Respondent,.

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RIVERSIDE UNIFIED SCHOOL  
DISTRICT,  
Petitioner,  
v.  
STUDENT,  
Respondent..

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OAH CASE NO. N 2007090134

DECISION

Administrative Law Judge Richard T. Breen, Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter in Riverside, California, on October 15 through 17, 2007.

Student was represented by his mother (Mother) and father (Father). Riverside Unified School District (District) was represented by Ricardo Soto, Attorney at Law. Stephen N. Morford, Ed.D., attended the hearing on all days on behalf of the District.

On May 14, 2007, Student filed a request for Due Process Hearing, which was found to be insufficient in part. Student filed a first amended Due Process Hearing request on July 12, 2007, and a continuance was granted on July 23, 2007. On August 23, 2007, the

District filed a request for Due Process Hearing and a Motion to Consolidate. The District's motion to consolidate was granted without opposition from Student on September 21, 2007. At the hearing, the parties requested, and were granted, permission to file written closing arguments. Upon receipt of written closing arguments on November 2, 2007, the matter was submitted and the record was closed.

## ISSUES

1. Whether Student was denied a free and appropriate public education (FAPE) between May 14, 2005 (two years prior to the filing of the due process complaint) and December 14, 2006,<sup>1</sup> because the District did not provide social skills training and the continuous services of a one-to-one classroom aide as specified in the March 8, 2005 individualized education plan (IEP).

2. Whether Student was denied a FAPE by the District's failure to hold an IEP team meeting between May 14, 2005 and December 14, 2006, and by preventing Mother and Father from speaking to school personnel.

3. Whether Student was denied a FAPE from May 14, 2005 through December 14, 2006, by the District's failure to assess him in all areas of suspected disability, in particular, social skills, occupational therapy, and whether behavioral interventions were needed.

4. Whether the District's assessments of Student pursuant to the October 24,

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<sup>1</sup>A related matter, OAH case number N2007020300, resulted in a decision that the District could exit Student from special education, effective December 14, 2006. Accordingly, Student's claims regarding the provision of special education end on that date.

2006 assessment plan were appropriate such that Student is not entitled to an independent educational evaluation (IEE).

## CONTENTIONS OF THE PARTIES

Student contends that the District failed to implement the services of an instructional aide and the provision of social skills training as describe in a March 8, 2005 IEP amendment. In particular, Student contends that the instructional aide was deficient by failing to supervise the frequency and location of Student's toileting. Student's parents believed that Student had stomach pain and health problems because he would not use the bathroom at school. In addition, Student contends that the aide supervision was inadequate to prevent Student from being teased by other students. Student also contends that social skills training should have been provided five days a week outside the classroom under the terms of the IEP and that Student never received social skills instruction. The District contends that Student's needs were fully met by the instructional aide and that the social skills program reflected in the IEP was the program taught as part of the general education curriculum.

Student further contends he was denied a FAPE because his Mother and Father were prevented from providing their input to Student's teachers and aide and that the District failed to hold Student's annual IEP as scheduled in November of 2005. The District contends that Student nonetheless received a FAPE.

Student's final contention is that the District failed to assess him in all areas of suspected disability, in particular social skills, occupational therapy, and behavioral intervention needs. Student contends that these areas of need were known because they were referenced in 2002 and 2004 reports from the Inland Regional Center (IRC), and no services had ever been provided in conformance with IRC recommendations. Student also contends that the observations of school personnel regarding Student were false because

they did not align with Mother and Father's perceptions of Student's behavior. The District contends that based on Student's performance in a school environment, none of these areas were areas of suspected disability.

Finally, the District contends that despite having sent a letter to Mother stating that psychoeducational and speech and language IEE's would be provided, it need not provide such IEE's because its assessments in these areas was adequate. Student disagrees, and contends that he is entitled to IEE's in both areas.

## REQUESTED REMEDIES

Student requests the following remedies: social skills training for 30-45 minutes per day, five days per week, for 20 months; assessments in physical therapy and occupational therapy; and five years of occupational therapy and behavioral intervention services based on the 2002 recommendations of the IRC.

The District requests an order that it need not provide psychoeducational and speech and language IEE's.

## FACTUAL FINDINGS<sup>2</sup>

### JURISDICTION AND BACKGROUND

1. Student is an English-speaking, 8-year-old Caucasian male with high-

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<sup>2</sup>On September 25 through 28, 2007 and October 15, 2007, a hearing was held in a related matter, OAH case number N2007020300. The parties stipulated that if called as a witness in this case, the following witnesses from OAH case number N2007020300 would have been asked the same questions and would have given the same testimony: Student; Student's older brother; Joanne Lasky; Sheila Rodriguez; Michelle Hill; Jean Aklufi; Sarah Johnson; Deborah Emett; Becky Higginson; Matthew Perry, Ed.D.; and Michelle Mahdavi.

functioning autism or Asperger's Syndrome, who, at all relevant times resided within the District.

2. Individual program plans (IPP's) for Student had been prepared by the IRC on September 19, 2002, and September 15, 2004. The September 15, 2004 IPP was prepared during a time that Mother had withdrawn Student from school and is therefore less relevant for purposes of determining Student's educational needs. (See Factual Findings 6 and 7, below.) The IPP's reflect that Mother and Father reported behavioral issues such as lip or toe biting, hitting others, behavioral outbursts and discomfort when others were too close to him. Student's parents also reported in the IPP's that Student was hypersensitive to some foods and textures, demonstrated decreased pain sensitivity, and had motor skills clumsiness.

3. An October 2, 2002, psychological assessment of Student by the IRC recommended: that Student be evaluated for special education preschool services; that "[a]n occupational therapy assessment is recommended to assess his motor skills and to determine the appropriateness of sensory integration therapy; and that a "behavioral consultation" was recommended "to assist with communicating his frustrations more effectively, transition between activities and the development of self-help skills."

4. On June 7, 2004, a transition IEP was held regarding Student's transition from preschool to kindergarten. The IEP team recommended that Student be exited from special education and be placed in a general education kindergarten class. Father signed the IEP.

5. Mother did not agree with the June 7, 2004 IEP because of concerns that Student would not be able to transition to general education. On July 9, 2004, mother signed an addendum to the June 7, 2004 IEP that provided an instructional aide for Student, with a follow-up meeting to be held prior to July 31, 2004 to discuss Student's progress.

6. Student attended Franklin Elementary School (Franklin) for kindergarten beginning in July of 2004.<sup>3</sup> Student was enrolled for a few days before being removed by Mother, who did not feel Student had sufficient transition support. As discussed below, Student was not re-enrolled until March 8, 2005.

7. An IEP team meeting was held on July 29, 2004 to re-enroll Student in special education. To accommodate Mother's concerns regarding the transition to general education, the IEP proposed a special day class (SDC) placement with gradual mainstreaming to regular education. The July 29, 2004 proposed IEP contained an offer of an SDC placement with gradual mainstreaming into a general education kindergarten. The IEP contained the following goals to be achieved by July 29, 2005: 1) Student would independently print his first and last name; 2) Student would follow teacher directions and take his turn with no more than one reminder four out of five trials; and 3) a social/emotional goal that Student would be able to identify his feelings and express them using language. The July 29, 2005 IEP reflected that Student had age-appropriate skills in all areas but that because of Mother's concerns about his behavior, Student would be "monitored." All services in the July 29, 2004 IEP were to be delivered by District personnel and the social/emotional goal was made the responsibility of the classroom teacher. Mother did not consent to the IEP.

8. An IEP team meeting was held on October 18, 2004 to discuss Student's placement. The IEP team recommended a general education placement with instructional aide support. Mother did not consent.

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<sup>3</sup>Prior to the 2006-2007 school year, Franklin was on a "track" system in which students alternated their attendance, resulting in school being in session for Student in July.

## COMPLIANCE WITH THE MARCH 8, 2005 IEP

9. An IEP team meeting was held on March 8, 2005, at which time Mother consented to an amendment to the July 29, 2004 proposed IEP. The March 8, 2005 IEP amendment provided that Student "will attend a regular kindergarten classroom at [Franklin] with instructional aide support." Mother understood that Student would have a 1:1 aide in the classroom. Dr. Steven Morford, the District's SELPA director, attended the March 8, 2005 IEP team meeting. Dr. Morford interpreted the phrase "instructional aide support" to mean a classroom aide who supported Student "as needed." Sheila Rodriguez (Rodriguez), who was hired to be Student's aide, understood her assignment to be an "inclusion" aide specifically for Student and that she was to help him in whatever way was needed. Because Rodriguez herself was not hired as a "classroom" aide, Dr. Morford's interpretation is rejected. Regardless of the label given Rodriguez, under the terms of this IEP, the District provided Student with an aide who was there to help Student as much or as little as needed to succeed in a general education classroom.

10. The March 8, 2005 IEP amendment also stated that Student will "receive social skills training during his school day, starting the week of March 28, 2005." Mother understood that the "social skills" referenced in the IEP was on a "pull out" basis for 30-40 minutes per day. Dr. Morford interpreted the IEP as providing curriculum-based social skills training because the IEP amendment did not designate social skills as a related service and did not indicate a duration, frequency or provider. The general education curriculum at Franklin included the "Mega Skills" program, a series of ten lessons at the beginning of the school year regarding social skills, appropriate peer interactions, kindness, respect and cooperation. The "Mega Skills" program included lessons on how to deal with conflict with other students such as telling other children to stop bothering you and walking away from conflict. At the time Student entered Franklin, the only other District social skills program was a pilot program being developed to teach basic social skills to

students, unlike Student who were on the lower-functioning end of the autism spectrum. The most plausible interpretation of the March 28, 2005 IEP is that the social skills training referenced in the IEP was the curriculum-based "Mega Skills" program because: the social-emotional goal was unchanged from the July 29, 2004 proposed IEP; the July 29, 2004 proposed IEP made the classroom teacher responsible for the goal; and no duration, frequency or provider was referenced in the March 8, 2005 IEP amendment. Student did not receive any "social skills training" other than as part of the general education curriculum.

11. While Student was in kindergarten (during the end of the 2004-2005 school year) Mother told Rodriguez that Student needed to be told when to go to the bathroom. According to Mother, Student could not feel pain and would not ask to use the bathroom on his own initiative with sufficient frequency.

12. During kindergarten, Rodriguez saw that Student needed minimal support. Rodriguez was credible in all areas of testimony based on her daily contact with Student in a school setting. Student's school work was not modified in any way and Student did not require support to socialize with the other children. Student would raise his hand to ask the teacher questions or request permission to go the bathroom. Rodriguez accompanied Student to the bathroom, but did not follow him in. Student needed some assistance with wiping himself after using the toilet and occasionally wet his pants, sometimes up to once a week.

13. Student's kindergarten report card shows that he was proficient or advanced in all areas and that he displayed satisfactory or strong performance in all areas that support learning such as getting along with others, working cooperatively in a group, following rules and seeking help when needed.

14. Joanne Lasky had Student in her first grade class at Franklin from July of 2005, through June of 2006. Lasky saw that Student only occasionally needed help from



Rodriguez with writing tasks. Lasky did not see Student requiring help with social interactions at any time. Although Rodriguez would accompany Student to the bathroom, Student was capable of going by himself and would do so when Rodriguez was on her lunch break. At recess, Student appropriately took turns playing basketball and handball with the other children. At no time did Lasky see Student experiencing difficulties with the other children. Lasky gave Student grades of "advanced" or "proficient" in all areas. Student showed "strong performance" in all "behaviors that support learning" including getting along with others, following rules, working cooperatively in groups, and seeking help when needed. Based on testing administered to all students, Student was found to be eligible for the Gifted and Talented Education (GATE) program for second grade. Given her experience with Student, Lasky persuasively testified that he would have been successful in general education even without the support of an instructional aide.

15. During first grade, Student needed Rodriguez's help in the classroom approximately one time per week. Student would participate in group work with other children and enjoyed taking turns playing handball during recess. The only assistance Student sought at recess was to have Rodriguez rule in his favor on whether the handball was out of bounds. Student would ask to go to the bathroom when he needed to, and never complained of stomach pains.

16. Michelle Hill (Hill) taught Student's second grade GATE class from August 28, 2006 through June 21, 2007. Hill was persuasive in her opinions regarding Student because she had experience working with children with autism in a District SDC. When Student started in Hill's class, he could write well, followed directions, worked well with other students in groups and did not show any indication of being frustrated, anxious or overwhelmed. It was immediately apparent to Hill that Student did not need Rodriguez's help in the class. By December of 2006, Student was working well in small and large groups and was able to help other children who needed assistance with school work. At

most, Student required redirection when he stated to another student, "you got the lowest grade in the class." Hill did not see Student having any difficulties at recess. Student had no difficulty rotating out of Hill's class for instruction in other areas such as art, music or physical education. Like the other children, Student would ask permission to go to the bathroom and would go by himself. Student achieved grades of "advanced" or "proficient" in all subjects, and showed "strong performance" in all behaviors that supported learning such as getting along with others, following rules, working cooperatively in groups, and seeking help when needed.

17. The students in Hill's class were new to Student. The GATE class was selected from students who had previously been enrolled in other first grade classes and prior to the 2006-2007 school year, Franklin had used a "track" scheduling system where not all children were in school at the same time. Student blended in well with the other Students and Hill did not observe Student having any difficulties with social interaction.

18. During second grade, Rodriguez sat in the back of the room, close to Student. Student did not want Rodriguez's help and would direct any questions to Hill. Student participated with other children in small group activities and mainly sought Rodriguez's help for handball court rulings. As in first grade, Student would ask permission to use the bathroom.

19. While enrolled at Franklin, Principal Jean Aklufi saw Student in class or at recess for a few minutes a week. Aklufi perceived that Student was indistinguishable from his typical peers and saw no unusual behavior. Aklufi never saw Rodriguez assisting Student in any way. Although Aklufi's observations of Student were limited, they corroborate the testimony of Rodriguez, Lasky, and Hill.

20. Student testified at hearing. Student turned and made eye contact when spoken to by the ALJ, counsel for the District or his Mother. Although Student's eye contact was not always sustained, he would reestablish eye contact with the speaker

during questioning or instructions. Student demonstrated that he understood the difference between telling the truth and telling a lie and understood all instructions and questions. During lulls in testimony or questioning, Student occasionally tapped his feet, patted his hands against his thighs, or slid down in his chair. Student sometimes used large emphatic hand gestures while speaking, particularly when he was excited about something like being named "star of the week" at school. Student varied his pitch and cadence when speaking, and occasionally threw his head back and took an exaggerated deep breath before speaking. However, Student admitted that he was speaking this way at the hearing because he felt like it, and that he did not speak this way in school or when he was assessed by Franklin school psychologist, Matthew Perry, Ed.D. (Dr. Perry). Student's behavior at hearing does not support an inference that the level of aide support and social skills instruction that Student received at school fell significantly short of that specified in the IEP.

21. Student admitted that he did not rely on Rodriguez for help and did not seek out her assistance. Student would use the bathroom when Rodriguez was on her lunch break. Student did not like Rodriguez because she took him to the bathroom, ruled against him in handball and would not let him cut in lines even when there was a gap.

22. Student recalled one incident where he wet his pants in kindergarten because he "didn't have time to ask to go to the bathroom" and had laughed hard. However, during first and second grade, Student would ask to use the bathroom at school. At school, Student would urinate and sometimes defecate in the school bathroom. Student did not need help to go to the bathroom.

23. Student could make a very realistic-sounding lion roar, which he demonstrated at hearing. Student was proud of his ability to do this and used it when he was mad at people. He recalled one incident when three students teased him about his "roar" in first grade. Brother also observed an incident during Student's second grade year

that occurred on the playground prior to the start of the school day. A sixth grader made fun of Student for making his “roar” after losing to the older student at handball. Mother thought that social skills training would prevent Student from being made fun of.

24. Student described an incident where he was crying at home because a female peer did not want to play with him. A male student had lied to Student by telling him that the female peer liked him and wanted to be around him. According to Mother, Student was sad about this incident for a month.

Student also recalled one incident where a fellow student said he had bad breath.

26. At some time while enrolled at Franklin, Student was punched in the back by another student during lunch. Mother thought that Rodriguez should have been present to intervene and that Student needed social skills training to teach him how to handle interactions like this with other children.

27. In December of 2006, Mother requested that school personnel keep a “log” of all of Student’s bathroom visits. Mother did not explain to Rodriguez, Hill or Aklufi what her intention was with the “log,” but Rodriguez and Hill attempted to comply, relying on Student to tell them if he went “number one” or “number two.” When Rodriguez was keeping the toileting log requested by Mother, Student reluctantly reported on the result of his bathroom trips. Student denied lying to school personnel about whether he had gone or not. Mother’s health concerns about Student eliminating at school, although very important to her, were not persuasive because they were contradicted by school personnel and Student himself, who testified that he used the bathroom at school.

28. A few weeks prior to the hearing, Student discovered some drops of blood in his underwear. Father took Student to an urgent care facility. The doctor told Student not to flush the toilet until an adult had checked his urine. In light of Student’s testimony that he urinated in the school bathroom, it cannot be inferred that Student had a medical problem that was caused by not using the school bathroom.

29. Mother believed that the failure to provide social skills training other than that contained in the general education curriculum, deprived Student of an opportunity to have lasting relationships with his peers. Mother believed that the instructional aide support provided in the March 8, 2005 IEP was not implemented because Rodriguez should have taken Student to the bathroom on a scheduled basis, Rodriguez should have ensured that Student eliminated when he did enter the bathroom and because Rodriguez should have prevented the lunchroom punching incident.

30. Mother testified that the compensatory education for social skills training should be calculated as 30-45 minutes per day, five days per week for a period of 20 months. Overall, Mother testified that she believed that Student was entitled to behavior services, which she calculated as five years worth based on the recommendation of the IRC in 2002. The 2002 IRC IPP did not recommend a frequency or duration of behavior intervention services. Other than Mother's testimony, no evidence was introduced regarding what actual level of service would meet Student's needs.

#### COMMUNICATION WITH SCHOOL PERSONNEL AND FAILURE TO HOLD ANNUAL IEP

31. Margaret Jacobson (Jacobson) was the Assistant Director of Special Education for the District at the time of hearing. Previously, Jacobson was the special education principal at Student's preschool and was the District coordinator of special education services at the time Student transitioned from preschool to kindergarten at Franklin. Jacobsen had extensive special education experience as a program specialist and teacher, had attended training in numerous autism-related subjects such as the picture exchange communication system and discrete trial training, and had been a behavior intervention case manager for special education students.

32. According to Mother, she did not communicate with Student's teachers because she had been told by Jacobsen not to talk to Student's teachers or aide. Mother's

belief that she was not to talk to Student's teachers was based in part on IEP team meeting notes dated July 9, 2004, which stated that parent concerns about Student's program would be shared with Franklin staff and that the "teacher or instructional assistant can contact either the Inclusion Specialist or the Coordinator of Special Education" if they had questions. This language was not a ban on Mother providing her input to District staff prior to IEP team meetings. Further, Jacobson plausibly explained that at the time that Student was transitioning from preschool to kindergarten she had asked Mother to contact her with any concerns about Student because she was familiar with Student from preschool. At no time did Jacobson tell Mother that she was never to communicate with teachers or other District personnel. Mother expressed at hearing that she would not have spoken to Jacobsen because in Mother's view, Jacobson was "manipulating" and "conniving" and there would have been no point in it. Mother never contacted Jacobsen after October 18, 2004.

33. At the beginning of the 2006-2007 school year, the District discovered that Student had not had an IEP team meeting since March 8, 2005 and that the District had failed to conduct Student's triennial IEP, which should have been held on November 12, 2005. The only IEP team meeting that was held within the statute of limitations period was on December 14, 2006.

34. If an IEP team meeting had been held between March 8, 2005 and December 14, 2006, Mother testified that she would have expressed the following: that she wanted more communication with Student's teachers and classroom aide to explain Student's behaviors such as head-banging if tired, spinning on the carpet if over-stimulated, or Student's preschool behaviors of hitting or biting other children. Mother also would have requested a goal that Student communicate when he needed to go to the bathroom; a goal that Student be able to identify feelings, a goal related to sensory issues and a goal regarding Student's speech cadence. In addition, Mother would have wanted to discuss all

of the behaviors she saw in Student while raising him, such as: rarely offering information, limited facial expressions, limited eye contact, lack of awareness of his role in a social situation, limited imaginative play, unusual interest in a restricted topic like Harry Potter, excessive talking, not understanding jokes, literal thinking, inappropriate facial expressions, preference for adults, behavior does not match environment, strong reaction to unscheduled events, repeated ritualistic behavior, depression (which Mother clarified was limited to the one incident regarding the female peer); attempts to impose his routine on others, temper tantrums, unusual reaction to unpredictable loud noise, limited wardrobe, limited diet, difficulty with fine motor skills, and clumsiness.

#### ASSESSMENT IN ALL AREAS OF SUSPECTED DISABILITY

35. On October 24, 2006, Mother signed her consent to assess Student in: academics, cognitive development, language/speech, social-emotional/behavioral development, self-help, and health. The assessment form provided an opportunity for Mother to indicate whether she had additional assessments or information that she wanted to have considered prior to the assessment or whether she wanted to meet with District employees to discuss the assessment plan prior to approving. Mother did not indicate that she had additional information or that she wanted further explanations prior to signing her approval. The assessments performed under this assessment plan were the only assessments performed during the statute of limitations period.

36. As part of the assessments, District Inclusion Specialist Deborah Emett observed Student in Hill's class. Emett was a credentialed school psychologist who had experience with autistic children as a teacher and instructional aide. During two multi-hour observations of Student, Emett observed Student's behavior to be on-task and appropriate at all times. In particular, Emett observed Student on a day when Hill was not present and Student's class had been combined with another. Emett saw Student help another child by

answering the child's question about school work. Emmett saw that Student's written work product was proficient for his grade level. Emmett concluded that Student did not require the help of an instructional aide and was "functioning beautifully" in a general education classroom.

37. District Resource Specialist Becky Higginson administered the Woodcock-Johnson Test of Achievement – III (WJ-III) to Student on November 3, 2006. The WJ-III is normed against a same-age population of students without disabilities. All of Student's scores were above his grade level at the time.

38. Speech and Language Pathologist Michelle Mahdavi (Mahdavi) assessed Student on November 14, 15, and 28, 2006 using both observation and standardized testing. Mahdavi possessed a Master of Science degree in speech and language pathology and was licensed in California. Mahdavi had experience working with high-functioning children with autism who were being included in general education. Upon Mahdavi's first visit to Student's class, she could not distinguish him from his typical peers. Mahdavi did not note the type of behavioral characteristics that she would have expected to accompany a diagnosis of autism. All standardized tests were given in conformance with the manufacturer's instructions. On standardized testing in semantics, morphology/syntax and pragmatics, Student was age-appropriate in all areas. Although she noted a slight lisp on "s" and "z" sounds, Student could correct it when the sound was modeled for him. In addition, on the Comprehensive Assessment of Spoken Language, Student achieved a standard score of 113 and percentile score of 81 on the pragmatic judgment subtest. The pragmatic judgment subtest measured whether Student could formulate the appropriate response in social situations. Mahdavi concluded that Student would not qualify for special education on the basis of speech and language impairment, nor would Student require speech and language therapy as a related service.

39. Dr. Perry assessed Student in the areas of cognitive ability and processing



ability on October 31, 2006 and December 12, 2006. Dr. Perry possessed an education doctorate in school psychology and was a California licensed school psychologist. All standardized testing by Dr. Perry was given in conformance with the manufacturer's instructions. At the time of hearing, Dr. Perry was assigned to a District school where he worked with two SDC's for children on the autism spectrum. Prior to the assessment, Dr. Perry reviewed the available information regarding Student, including a 2002 report from the IRC that was prepared when Student was three years, five months old.

40. Dr. Perry spoke to Hill, who did not report any social or emotional concerns regarding Student. Mother completed the Gilliam Autism Ratings Scale (GARS), which required Mother to report the frequency and types of behaviors that she observed in Student. Contrary to the observations of school personnel and Dr. Perry, Mother reported that Student had behaviors such as agitation with changes in routine, aloofness, inappropriate crying, ritualistic behaviors, hitting or biting self, flapping hands, spinning objects not meant for spinning, babbling, repetitive speech and looking away from someone speaking to him. The GARS indicated an "average" likelihood that Student had autism.

41. During testing in Dr. Perry's office, Student established a rapport with Dr. Perry, made eye contact, engaged in conversation and even made a joke by saying, "This is complicated, Doc." Dr. Perry noted that Student's social interaction abilities were advanced for his age, which was not atypical of GATE students. During observation of Student in a classroom setting, Student followed directions, listened attentively, worked independently, participated in a "choral response" answer to Hill's question, and was observed to whisper back and forth with another child. Dr. Perry noted that Student appeared to rebuff help from Rodriguez.

42. On the Wechsler Intelligence Scale for Children, fourth edition (WISC-IV), Student demonstrated a high average full scale IQ of 119, with strengths in verbal

comprehension and working memory. Student's lowest score was an "average" standard score of 100 in processing speed. The WISC-IV verbal comprehension subtest, on which Student achieved an above-average scaled score of 14, included questions that assessed Student's ability to judge socially appropriate responses. Dr. Perry also reviewed Student's scores on the WJ-III. Based on the above, Dr. Perry concluded that autism was not impacting Student's cognitive abilities or academic achievement.

43. On the Bender Visual Motor Gestalt Test II, Student achieved the following standard scores/percentile scores: Design Copy – 101/53 and Design Recall 116/86. Student used an unusual pencil grip, using his second and third fingers to support the pencil, with his index finger supporting the pencil above his grasp. Dr. Perry had no concerns regarding Student's visual-motor coordination because the test results were "average," and Student could perform the tasks required of him despite his unusual pencil grip. Dr. Perry's conclusion was corroborated at hearing. Although at hearing Student demonstrated the unusual pencil grasp noted by Dr. Perry, Student quickly produced a legible writing sample without difficulty.

44. Dr. Perry plausibly explained that he did not do any specific assessment of Student's self-help or adaptive skills because all observations of Student at school by school personnel, including Dr. Perry, showed no concerns in these areas.

45. Other than the assessments by Higginson, Mahdavi and Dr. Perry, no other assessments were performed by the District during the statute of limitations period. Nothing observed by Rodriguez, Lasky, or Hill in classroom setting would indicate a need for behavioral intervention assessments, occupational therapy or physical therapy assessments. (See Factual Findings 11 through 19.)

46. Student ate dinner at home by sitting in a chair with his body cocked to the side. Student did this so that he could see the television. Brother described that outside of school Student: kicked, bit and punched his siblings; resisted eating meat and vegetables;

ate his boogers; and resisted using toothpaste. These behaviors do not support an inference that Student should have been assessed for occupational therapy, physical therapy or behavioral intervention needs because there was no evidence that these behaviors occurred in school.

47. Student's fingers appeared reddened from nail biting. Some of the redness on Student's fingers may also have been flecks of blood from picking at slightly bloody chapped skin on his lips. Student did not do these activities during the hearing, and Student did not appear to be in distress. There was no evidence that these behaviors interfered with school performance.

48. Mother and Father had Student assessed by Cynthia Norall, Ph.D. (Dr. Norall) on September 4, 2007. Dr. Norall did not testify at hearing and no evidence of her qualifications was presented.

49. Dr. Norall's assessment was not persuasive evidence that the District failed to assess Student in all areas of suspected disability. Overall, Dr. Norall's assessment instruments were similar to Dr. Perry's in that they assessed academic achievement, cognitive ability and used an autism rating scale for diagnostic purposes. Dr. Perry reviewed Dr. Norall's assessment and raised numerous valid criticisms of it. For example, Dr. Perry noted that on the Comprehensive Test of Non-verbal Intelligence (C-TONI), Student performed better on "sequencing" tests that included social information, indicating proficient social development. On Dr. Norall's administration of the Visual Motor Index, Dr. Norall reported that Student scored in the first percentile, a score so low that if true, Student would be unable to play handball or write down what he saw on a classroom chalkboard. Dr. Perry's opinion regarding the inaccuracy of Dr. Norall's assessment of Student's motor functioning was corroborated by testimony from Student, Brother, his teachers and Rodriguez that he excelled at handball and by Student's school performance, which showed no major deficit in writing skills. Dr. Perry also noted that on

the Test of Problem Solving, third edition, and on the Wide Range Achievement Test, fourth edition, Student's lowest scores were all within the average range. The behavior inventories contained in Dr. Norall's report were based on Mother's subjective observations of Student in the community and included reporting of behaviors or incidents that had occurred years prior to the date of Dr. Norall's assessment. Dr. Norall did not contact anyone from Franklin or obtain information about Student's behavior in a school setting. The recommendations contained in Dr. Norall's report that Student should receive an occupational therapy evaluation, social skills instruction and facilitation of social interactions were not persuasive because they were not based on information or observation of Student in his school environment.

## IEE

50. On May 3, 2007, Mother sent a letter request to OAH seeking a continuance in OAH case number N20050423 so that she could obtain an IEE. The District interpreted Mother's continuance request as a request for an IEE and on May 16, 2007, sent Mother a letter saying that she could obtain psychoeducational and speech and language IEE's at public expense. The District's letter provided Mother with the names and resumes of psychologists and speech-language pathologists that the District was willing to contract with. The District's letter also provided Mother with information about the District's "minimum agency standards" for psychologists and speech pathologists, and stated that Mother was free to find her own assessors.

51. The District has a "policy" of responding to IEE requests with letters like that sent to Mother, but the District believes it can reserve its right to file a due process hearing request to defend the appropriateness of its own assessments after such a letter has been sent. Dr. Morford decided that despite having sent the May 16, 2007 letter to Mother, and prior to Mother actually obtaining an IEE, the District should file a due process hearing

request asserting that its assessments had been appropriate. On August 23, 2007, more than 60 days after sending the May 16, 2007 letter to Mother stating that an IEE would be provided, the District filed its due process hearing request in the instant matter.

52. No evidence was presented that Dr. Norall's qualifications did not meet District criteria for IEE's.

## CONCLUSIONS OF LAW

### GENERAL LEGAL PRINCIPLES

1. A due process complaint must allege a violation that occurred not more than two years before the date the parent knew or should have known about the contentions forming the basis of the complaint. (20 U.S.C. §§ 1415(b)(6)(B) and 1415(f)(3)(C); 34 C.F.R. 300.507(a)(2); 34 C.F.R. 300.511(e); Ed. Code, § 56505, subd. (l).)

2. The petitioning party has the burden of proof. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) Thus, under *Schaffer*, Student has the burden of proof on Issues One, Two and Three, and the District has the burden of proof on Issue Four.

3. Under the IDEA and state law, children with disabilities have the right to FAPE. (20 U.S.C. § 1400(d); Ed. Code, § 56000.) FAPE means special education and related services that are available to the child at no charge to the parent or guardian, meet State educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(a)(9).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(a)(29).) "Related services" are transportation and other developmental, corrective and supportive services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26).) In California, related services are called designated instruction and services (DIS), which must be provided if they may be required to assist the child in benefiting from special education. (Ed. Code, § 56363, subd.

(a.)

4. In *Board of Education of the Hendrick Hudson Central School District, et al. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that “the ‘basic floor of opportunity’ provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to” a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is “sufficient to confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.) In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district’s proposed program. (See *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) For a school district’s offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district’s offer of educational services and/or placement must be designed to meet the student’s unique needs, comport with the student’s IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. (*Ibid.*)

5. School districts may be ordered to provide compensatory education or additional services to a student who has been denied a free appropriate public education. (*Student W. v. Puyallup School District* (9th Cir. 1994) 31 F.3d 1489, 1496.) The conduct of both parties must be reviewed and considered to determine whether relief is appropriate. (*Id.* at p. 1496.) These are equitable remedies that courts may employ to craft “appropriate relief” for a party. An award of compensatory education need not provide a “day-for-day

compensation.” (*Id.* at p. 1497.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student’s needs. (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be “reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” (*Ibid.*) Relief may be provided even though the student is no longer eligible for special education services. (*Capistrano Unified School District v. Wartenburg* (9th Cir. 1995) 59 F.3d 884, 890; *Student W. v. Puyallup School Dist.*, *supra*, 31 F.3d 1496.)

#### FAILURE TO IMPLEMENT THE IEP

6. Student contends that the District failed to implement the March 8, 2005 IEP amendment because Student’s aide failed to supervise the frequency and location of Student’s toileting and spent insufficient time supervising Student. Student also contends that social skills training should have been provided five days a week outside the classroom. The District contends that the IEP was fully implemented.

7. When a student alleges a denial of FAPE based on the failure to implement an IEP, in order to prevail the student must prove that any failure to implement the IEP was “material,” meaning that “the services a school provides to a disabled child fall significantly short of the services required by the child’s IEP.” (*Van Duyn v. Baker School Dist. 5J* (9th Cir. 2007) 481 F.3d 770, 780.) “Minor discrepancies between the services provided and the services called for by the IEP do not give rise to an IDEA violation.” (*Ibid.*)

8. Here, the social skills instruction provided to Student did not fall significantly below the level specified in his IEP. To the contrary, Student received the general education services he was entitled to. Moreover, the incidents of unsuccessful social interactions that were testified to at hearing were minor, particularly when compared with Student’s overall success in the general education environment. (Factual Findings 7, 9, 10,

23, 24, 25, and 26.) Similarly, Student received the instructional aide support specified in his IEP. Despite Mother's concerns, Student did not have toileting problems at school and was able to be independent and use the bathroom like any other student. The evidence showed that any problems Student had interacting with other Students were few and far between and that Student was overwhelmingly successful in general education. Although undoubtedly difficult for any parent to accept, the one incident where Student was punched by a peer at lunch is not unusual over the course of many school years, and not demonstrate a material failure to provide an aide. (Factual Findings 9, 11 through 22, 27, 28, and 29.)

9. Student did not meet his burden of demonstrating a material failure to implement the March 8, 2005 IEP amendment.

#### COMMUNICATION WITH SCHOOL PERSONNEL AND FAILURE TO HOLD AN ANNUAL IEP

10. Student contends that Mother and Father were prevented from providing their input to Student's teachers and aide and that the District failed to hold Student's annual IEP as scheduled in November of 2005. The District contends that Student was not denied access to school personnel and received a FAPE.

11. In matters alleging procedural violations, a denial of FAPE may only be shown if the procedural violations impeded the child's right to FAPE, significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of FAPE, or caused a deprivation of educational benefits. (Ed. Code, § 56505, subd. (f)(2); see also *W.G. v. Board of Trustees of Target Range School District No. 23 (Target Range)* (9th Cir. 1992) 960 F.2d 1479, 1484.) Procedural errors that lead to a deprivation of educational benefits, such as failure to have the proper composition of the IEP team during the IEP process, are analyzed by determining whether: 1) a procedural



violation occurred and 2) whether the procedural violation resulted in a deprivation of educational benefits to the student. (*M.L., et al., v. Federal Way School District* (9th Cir. 2004) 394 F.3d 634, 653 (concurring opn. of Gould, J.).) Where a procedural violation is found to have significantly impeded the parents' opportunity to participate in the IEP process, the analysis does not include consideration of whether the student ultimately received a FAPE, but instead focuses on the remedy available to the parents. (*Amanda J. ex rel. Annette J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 892-895 (school's failure to timely provide parents with assessment results indicating a suspicion of autism significantly impeded parents right to participate in the IEP process, resulting in compensatory education award) *Target Range, supra*, 960 F.2d at pp. 1485-1487 (when parent participation was limited by district's pre-formulated placement decision, parents were awarded reimbursement for private school tuition during time when no procedurally proper IEP was held).)

12. The District did not prevent Mother or Father from expressing their concerns about Student to District personnel. Although Mother perceived that the language of a July 9, 2004 IEP forbade her to contact Student's teachers or aide, Mother's perception was incorrect. Jacobson did not instruct Mother to limit her interactions with District personnel to her. Student presented no other proof of alleged interference by District personnel with parental communications to the District. (Factual Findings 31 and 32.) Accordingly, this aspect of Student's claim fails.

13. The District procedurally violated Student's right to a timely IEP and annual parental participation in the IEP process by failing to hold Student's triennial IEP in November of 2005. However, Student did not meet his burden of demonstrating that as a result of the violation, he is entitled to a remedy. Despite the failure to hold an annual IEP in 2005, Student remained in special education under the terms of the March 8, 2005 IEP. Student thrived in the general education setting and demonstrated outstanding academic

and behavioral performance. Had an IEP been held, Mother would have expressed the same concerns that she did at earlier IEP's. Although Mother's experiences with Student in the home or community are valid and important, they did not reflect Student's educational needs or his ability to succeed in general education. In *Target Range, supra*, 960 F.2d at pp. 1485- 1487, the parents were reimbursed for expenses of a private school after the school district failed to conduct a procedurally proper IEP team meeting. Here, in contrast, Student did not produce evidence of any reimbursable expense, or evidence that Student was deprived of any educational opportunity by the failure to hold a timely IEP. Accordingly, despite the procedural violation of failing to have an IEP, Student is not entitled to a remedy on this issue. (Factual Findings 13 through 18, 20, 21, 22, 33 and 34; Conclusions of Law 2, 4, and 11.)

#### ASSESSMENT IN ALL AREAS OF SUSPECTED DISABILITY

14. Student contends that the District should have also assessed him in the areas of social skills, occupational therapy, and the need for behavioral interventions. The District contends that Student was assessed in all areas of suspected disability.

15. For purposes of evaluating a child for special education eligibility, the District must ensure that "the child is assessed in all areas of suspected disability." (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) The determination of what tests are required is made based on information known at the time. (See *Vasheresse v. Laguna Salada Union School District* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158 [assessment adequate despite not including speech/language testing where concern prompting assessment was deficit in reading skills].) After a child has been deemed eligible for special education, reassessments may be performed if warranted by the child's educational needs or related services needs. (34 C.F.R. 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).) Absent an agreement to the contrary between a school district and a student's parents,

reassessments must not occur more than once a year, or more than three years apart. (34 C.F.R. 300.303(b)(1); Ed. Code, § 56381, subd. (a)(2).) A school district is required to use the necessary assessment tools to gather relevant functional and developmental information about the child to assist in determining the content of the child's IEP. (34 C.F.R. § 300.304(b)(1)(ii).) A school district is also required to ensure that the evaluation is sufficiently comprehensive to identify all of the child's needs for special education and related services. (34 C.F.R. § 300.304(c)(6).)

16. Here, the evidence showed that Student did not have areas of suspected disability in social skills, occupational therapy and need for behavioral interventions. At all relevant times, between the end of Kindergarten and into second grade, Student performed extremely well in the general education environment. Not only did Student display advanced academic achievement, but his behavior, his successful interactions with other children and his physical skills were all developed to a level beyond being merely functional. In sum, Student was very successful in general education. Although Mother was concerned about Student's handwriting as a need, he displayed good penmanship and had no difficulty completing school work. Similarly, Student's success on the handball courts demonstrated that he did not have physical needs or social skills needs in that he was successfully playing with other children. Any problems with social interactions with other children were few and far between when compared to his overall success. (Factual Findings 12 through 26.)

17. Student was assessed in all areas of suspected disability.

## IEE

18. The District contends that Student is not entitled to IEE's in the area of speech language pathology and psychology because the District assessments conducted by Mahdavi and Dr. Perry were appropriate. Student disagrees.

19. The procedural safeguards of the IDEA provide that under certain conditions a student is entitled to obtain an IEE at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1); Ed. Code, § 56329, subd. (b) [incorporating 34 C.F.R. § 300.502 by reference]; Ed. Code, § 56506, subd. (c) [parent has the right to an IEE as set forth in Ed.Code, § 56329; see also 20 U.S.C. § 1415(d)(2) [requiring procedural safeguards notice to parents to include information about obtaining an IEE].) “Independent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question.” (34 C.F.R. § 300.502(a)(3)(i).) To obtain an IEE, the student must disagree with an evaluation obtained by the public agency and request an IEE. (34 C.F.R. § 300.502(b)(1) & (b)(2).)

20. The provision of an IEE is not automatic. Code of Federal Regulations, title 34, section 300.502(b)(2), provides, in relevant part, that following the student’s request for an IEE, the public agency must, without unnecessary delay, either:

- (i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or
- (ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§ 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria.

(See also Ed. Code, § 56329, subd. (c) [providing that a public agency may initiate a due process hearing to show that its assessment was appropriate].)

21. Here, the District’s “policy” of informing parents that an IEE would be provided at public expense, yet reserving the right to file its own due process hearing request, is inconsistent with Code of Federal Regulations, title 34, section 300.502(b)(2), which expressly provides that upon receipt of an IEE request, a district may, within a reasonable time, either file for due process or “ensure” that an IEE is provided. Here, the

District did not file for due process within a reasonable time, but instead unequivocally offered to provide IEE's in psychology and speech language pathology. Having offered to provide the IEE's, the District was obligated to "ensure" that they were provided. There is no statutory or regulatory support for the District's "policy" that it can offer IEE's to parents and then retract the offer by filing a due process hearing request that seeks to prove that its own assessments were appropriate. To the contrary, Code of Federal Regulations, title 34, section 300.502(b)(2) plainly states that Districts may timely take either course of action, not both.

22. Where a parent obtains an IEE and seeks reimbursement, the District is not without remedy. Code of Federal Regulations, title 34, section 300.502(b)(2)(ii) allows an agency to prove at a due process hearing that the "evaluation obtained by the parent did not meet agency criteria." Whether a district's assessments were appropriate in the first instance is not at issue under Code of Federal Regulations, title 34, section 300.502(b)(2)(ii). In other words, after an IEE has been requested and a district fails to timely file its own due process hearing request or fails to provide an IEE, the only defense available to a district is for the district to prove that the "evaluation obtained by the parent did not meet agency criteria."

23. Here, the District unequivocally offered to provide a psychoeducational and speech and language IEE at public expense. After it did so, the District did not have the option of filing a due process hearing request over 60 days later to demonstrate the adequacy of its assessments. Although the District put on evidence that its own assessments were appropriate, no evidence was introduced that Dr. Norall's qualifications did not meet agency criteria. (Factual Findings 50, 51 and 52.)

24. Accordingly, the District must reimburse Mother \$1500 for the IEE provided by Dr. Norall and provide a speech and language IEE at public expense.

## ORDER

Within 60 days of the date of this order, the District shall reimburse Mother \$1500 for the IEE conducted by Dr. Norall and shall provide Student with a speech and language IEE at public expense.<sup>4</sup>

## PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, the District prevailed on Issues One, Two and Three. Student prevailed on Issue Four.


## RIGHT TO APPEAL THIS DECISION

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

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<sup>4</sup>Mother and Father are advised that any speech and language pathologist they retain to conduct the IEE should have the qualifications set forth in the District's May 16, 2007 letter.

DATED: November 27, 2007

A handwritten signature in black ink, appearing to read 'R. T. Breen', written over a horizontal line.

RICHARD T. BREEN

Administrative Law Judge

Office of Administrative Hearings

Special Education Division