

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

STUDENT,

v.

COMPTON UNIFIED SCHOOL  
DISTRICT.

OAH CASE NO. 2008070703

DECISION

Administrative Law Judge Eileen M. Cohn, Office of Administrative Hearings (OAH), State of California, heard this matter in Compton, California, on October 10, 16, 22, 24 and 27, 2008.

LeeJanice Toback, Attorney at Law, represented Student. Student's legal guardians, his grandmother and grandfather (Grandparents), attended the hearing. Ms. Carol Sasa Kittler, Student's attorney for Superior Court-related matters, and Michelle Chabler, an assistant to Ms. Toback, attended the first day of hearing.

Daniel Gonzalez, Attorney at Law, represented Compton Unified School District School District (District). Michelle Holmes and Mathew Sharbaugh assisted Mr. Gonzalez. District representatives Zakiyya McWilliams, Program Administrator, and Jennifer O'Malley, Program Specialist, also attended the hearing on certain days.

Student filed his request for due process on July 21, 2008. Continuances were granted for good cause on September 12, 2008, September 29, 2008, and October 2, 2008.<sup>1</sup> At hearing, the parties requested, and were granted, permission to file written

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<sup>1</sup> The ALJ considered three pretrial motions: Student's Motion for Stay Put; Student's Motion for Sanctions; and District's Motion for Reconsideration or in the

closing arguments. The ALJ granted permission to file written closing arguments by November 10, 2008. Upon receipt of closing arguments on November 10, 2008, the matter was submitted and the record was closed.

## ISSUES<sup>2</sup>

(1) Whether the District failed to provide Student a FAPE by failing to timely assess Student in all areas of suspected disability, including, behavior, health, and occupational therapy needs?

(2) Whether the District failed to provide Student a FAPE during the 2007-2008 school year by failing to:

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Alternative, Stay (of the ALJ's sanction order). After careful consideration of the moving and opposition briefs the ALJ granted Student's motions and denied District's motion. The ALJ's rulings on these motions were memorialized in written orders dated September 10, 2008, October 1, 2008, and October 17, 2008, respectively.

<sup>2</sup> The issues were discussed extensively during prehearing conferences on October 2 and October 10, 2008. On the first and second hearing days, the issues were reviewed again. The ALJ modified the issues based upon rulings made at the prehearing conferences which were memorialized in the supplemental prehearing conference order issued October 17, 2008. As to Issue One, Student's claim encompasses a failure to assess in all areas of suspected disability whether or not it results in a denial of FAPE. As to Issue Three, the 2008-2009 school year was included to the extent it was part of the IEP offer made during the 2007-2008 school year. The ALJ organized and styled the issues for clarity.

- (a) develop goals and objectives that addressed all of Student's unique needs, including behavior, attention, compliance and impulsivity;
- (b) provide a behavior support plan (BSP);
- (c) provide appropriate services and;
- (d) provide an appropriate placement.

(3) Whether the District failed to offer Student a FAPE for the 2008-2009 school year by failing to:

- (a) develop goals and objectives that addressed all of Student's unique needs, including, behavior, attention, compliance and impulsivity;
- (b) offer a BSP;
- (c) offer appropriate services; and
- (d) offer an appropriate placement.

## FACTUAL FINDINGS

### JURISDICTION

1. Student is a six year-old boy, who, at all relevant times, lived within the District boundaries. Student was five years old during the 2007- 2008 school year.

### BACKGROUND

2. Grandparents became Student's legal guardian in the summer of 2007, after which Student and his sister moved into their home. Student received counseling services from Starview Community Services (Starview), an independent agency that contracted with the Los Angeles County Department of Mental Health (LACDMH). Student had never attended a District school but had attended a preschool program in another District. Grandparents registered Student with the District so that he could attend kindergarten in September 2007. As part of Student's registration paperwork, Grandparents filled out a

special needs survey where they indicated that Student had not previously been made eligible for special education and related services or received classroom accommodations.

#### STUDENT STUDY TEAM

3. In or about August of 2007, Student's biological mother provided Grandparents with a letter from Student's previous preschool stating that he had attention deficit hyperactivity disorder (ADHD). Grandparents did not provide this letter to District.

4. Student was placed in a general education kindergarten class taught by Ms. Rashanda McCruter (Ms. McCruter) at Clinton Elementary School (Clinton), for the 2007-2008 school year. Ms. McCruter had twenty students in her class and did not have an aide. Ms. McCruter had eight years of general education teaching experience. She received a bachelor's and master's degree and possessed the appropriate teaching credentials. Ms. McCruter had taken a special education course, but otherwise did not have in-depth training in special education. From her testimony it was plain that she associated special education with academic deficits. She was impressed with Student's academic ability and she did not consider him a candidate for special education based upon his academic performance. From the way she spoke about Student, it was apparent that she appreciated his abilities, cared about him and devoted a lot of time to him. She also developed a close relationship with Student's Grandparents, especially Grandmother, with whom she spoke regularly about Student.

5. Clinton has six general education kindergarten classes. All entering pupils are randomly assigned. Ms. McCruter did not know Student before he entered her class on September 4, 2007. At kindergarten "kick-off" Grandfather informed Ms. McCruter that Student would be the smartest pupil in her class. She did not receive any other information about Student at that time.

6. Student's behavior was challenging, but at first Ms. McCruter considered them typical for an entering kindergartner, especially a five year old boy. Fourteen of the

twenty pupils in her class were boys. She was accustomed to, and enjoyed, the more frenetic nature of boys. Student exhibited aggressive behaviors the first week of school. He would "hit and tap" other pupils and then apologize. Like other boys, he resisted her instructions, but complied after she explained her instructions to him.

7. About the time Student began kindergarten, Student also began receiving psychological counseling from Starview. Starview counselors provided social skills and behavior modification training to Student. Initially, his Starview counselors worked with him one-on-one at home. Student's Starview counselor testified that Student was assessed for psychological services on September 5, 2007, but if Starview conducted its own formal assessment, the assessment was not shared with Grandparents or District.

8. By October Ms. McCruter noticed that the frequency and intensity of Student's behaviors differed from other boys his age. His reaction to the command of "no" was extreme. On October 9, 2007, Ms. McGruter prepared a note for Grandparents describing examples of Student's behavior. She provided a copy of the note to the Principal.

Last week [Student] had a very bad week. A few instances are included but not limited to tearing his envelope for pictures and throwing the envelope on the ground when he found it had a check instead of cash inside; taking another student's envelope hoping to get the money inside; writing on the table; hitting numerous students and kicking them; intentionally disobeying the teacher and other authority figures.

9. Ms. McCruter disclosed to Grandparents that she understood from speaking with Student that he wanted to control his behavior but could not. On many days Student

would climb under the table, kick the wall, write on the table with crayons and run around when instructed to apologize to a peer. On his better days Ms. McCruter reported that Student was hitting other pupils less, but continued to have great difficulty sitting still for very long and paying attention.

10. Grandmother informed Ms. McCruter that Student might have ADHD. She told her that Student's mother had advised her that Student was diagnosed at age three, but she was waiting to get papers confirming Student's diagnosis from his doctor at the University of Southern California.

11. Ms. McCruter invited Grandparents to a Student Support Team (SST) meeting to discuss ways to improve Student's behavior. Grandparents agreed to participate in an SST. An SST is a general education team that is formed to address challenging academic or behavioral issues facing a pupil. The SST is comprised of key educators, administrators, and the pupil's caretakers. Generally, the SST agrees on a set of strategies to assist the Student and reconvenes approximately six weeks later to check on the effectiveness of the agreed upon strategies. The SST meeting did not occur until December 13, 2007. In her October letter, Ms. McCruter also informed Grandparents that she had advised the Principal of Clinton, Ms. Virginia Ward Roberts (the Principal), of Student's behavior and asked the Principal for her support in identifying positive behaviors.

12. Ms. McCruter consulted the Principal and the school counselor about behavior strategies. Prior to the SST meeting, Ms. McCruter was assisted with Student's behaviors by the school counselor and to a lesser extent the Principal. Ms. McCruter learned to speak with Student more about his behaviors when they occurred and to give him time to calm down. When she could not mitigate his behaviors, she referred Student to the school counselor or the Principal. They would speak with him privately. Student was comfortable with the school counselor and the Principal. He would often return to the classroom calm and happy.

13. Student continued to exhibit inappropriate and extreme behaviors. The school year was divided into four quarters of approximately six weeks. At the end of each quarter Clinton's classroom teachers complete a quarterly report card. The first quarter ended on November 5, 2007. Ms. McCruter included these comments on Student's first quarter report card. "[Student] is an intelligent child who does not use his time wisely. I have problems with him and his behavior everyday." Regarding academics, on a scale of one- to-three with three being "proficient" and two "basic," Ms. McCruter considered Student proficient in all areas except copying words, writing left to right and top to bottom and writing letters and numbers legibly. In these areas she graded Student two, or basic.

14. In social skills Ms. McCruter reported that Student needed improvement in the following areas including: follow class and playground rules, cooperate with adults, demonstrate self-control, take responsibility for own actions, and work and plays well with others.

15. On November 21, 2007, Ms. McCruter completed a behavior rating scale, referred to as the Vanderbilt Teacher Behavior Evaluation Scale (Vanderbilt Scale). Ms. McCruter was required to rate the listed behaviors as either zero (never), one (occasionally), two (often) and three (very often). According to Ms. McCruter Student "very often" committed one-half of the 35 aberrant behaviors listed. Student "very often"

Had difficulty sustaining attention in tasks or activities

Did not listed when spoken to directly

Had difficulty organizing tasks or activities

Was easily distracted by extraneous stimuli

Talked excessively

Interrupts or intrudes

Loses temper

Actively defies or refuses to comply with adults

Bullies threatens or intimidates others

Initiates physical fights

Is physically cruel to others

16. Ms. McGruter placed asterisks, or a note next to the following "very often" behaviors to indicate that even though observed "very often" these behaviors were especially pronounced:

Fidgets with hands or feet or squirms in seat  
Runs about or climbs excessively in situations in which remaining seated is expected  
Is "on the go" or often acts as if "driven by a motor"  
Deliberately destroys other property (noting that he only writes on the table instead of paper)

17. Ms. McCruter did not rate whether Student felt worthless or inferior, but instead noted that "he used to feel this way, but we have worked on it."

18. Under the category of classroom behavior, using a scale of one through five with one being problematic and five being well above average, Ms. McCruter rated as problematic Student's relationship to peers, following directions and rules and disrupting class. In contrast, Student was well above average in his organizational skills and completion of assignments. Similarly, in all areas of academic performance included in the rating scale, reading, mathematics, written expression and homework completion, Ms.

McCruiter rated Student a five, or well above average. Overall, Ms. McCruiter observed that Student was very intelligent and that regardless of his attention and behavior difficulties he understood and retained the information presented.

19. On November 29, 2007, Student's pediatrician prepared a letter to "teacher" requesting a complete evaluation by the school psychologist to determine if Student required a plan pursuant to Section 504 of the Rehabilitation Act of 1973 (504 Plan) to address his behavioral problems.<sup>3</sup> Student's pediatrician advised Student's teacher that her "medical management of Student depended on the evaluation that the District psychologist and other members of the SST could provide." Grandparents did not consider this letter a request for special education. Student's physician did not mention special education to them at the time she wrote the letter. She had known Student most of his life. Grandparents relied upon the physician's recommendations and intended for District to address Student's behaviors only.

20. In December 2007, Starview began working with Student at school. They consulted with Clinton personnel and Grandparents to identify Student's behavior issues and to develop behavior interventions. With the cooperation of Clinton's administrators, Starview's counselors removed Student from his class once a week throughout the 2007-2008 school year. They did not generally share the strategies and progress of Student's therapy with Clinton personnel. Through games they worked on Student's difficulties with

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<sup>3</sup> Section 504 plans are authorized by the federal Rehabilitation Act. (29 U.S.C. § 794 (1973).) Pupils are eligible for Section 504 protection if they have a physical or mental impairment that substantially limits one or more life activities, or if they have a record of or is are regarded as having such an impairment. (*Ibid*; 34 C.F.R. § 104.3(j) (2004).)

following directions and working in a group. Student was generally removed from class right before lunch so as not to miss any academic instruction. From the perspective of Starview, Student was able to sit down and work one-on-one with success. Student could not transfer his one-on-one success to the classroom. When Student's counselor observed the classroom, Student was not interacting with a group of pupils, but was "doing his own thing."

21. The SST convened on December 13, 2007. Present at the meeting were the Principal, Mr. Byron Wilson (Mr. Wilson), the school psychologist, the school counselor, the school speech and language pathologist, Grandparents, and Ms. McCruter. This was the first opportunity for the Principal to obtain a comprehensive report about Student's performance and behavior in class.

22. The SST members discussed Student's behaviors at home and at school. The reasons for Grandparent's guardianship of Student were discussed. Ms. McCruter informed the SST that Student was performing above grade level. She outlined his behaviors and noted his attentional challenges and inability to work independently. The SST was informed that Student's maladaptive behaviors were more pronounced after he visited his mother. Ms. McCruter received guidance from Clinton SST members regarding behavioral strategies but the SST did not prepare a formal behavior plan for Ms. McCruter's use. Mr. Wilson suggested that given Student's more advanced academic abilities she should try to make him a leader and give him more responsibility in the classroom and to keep them informed of any information that would help Student stay on task. Grandparents shared that Student was meeting with a psychiatrist. The SST noted that Student was receiving outside counseling, including counseling from Starview once a week at the school. Clinton SST members reminded Grandparents to inform the school of any medical reports. Mr. Wilson suggested that Grandparents pursue outside activities for Student.

23. By the time the SST met, Ms. McCruter concluded that Student's behavior was not typical of other pupils his age. On the contrary, Ms. McCruter acknowledged that Student's conduct was extreme and his behaviors were becoming a problem at school. She thought he needed a behavior management plan, but did not express her opinion to the Principal, as she thought the matter was being handled by Starview and the school counselor.

24. On December 17, 2007, five days after the SST meeting, Student became extremely violent at the start of the school day. He started hitting other pupils on the play yard before entering the classroom and continued to hit them in the classroom throughout the morning. Due to his continued aggression on the play yard at lunch recess, the teacher monitoring lunch recess removed him from the play yard to complete his recess in Ms. McCruter's classroom. In reaction to being placed in the classroom, he yelled at the teacher, threw a library bench and then left the classroom. When Ms. McCruter arrived, she provided him crayons and paper to color, sat with him and spoke to him. After speaking with her for a while he calmed down. Grandparents were called but Student was calm when they arrived. He stayed calm for an hour, but then resumed hitting, kicking and generally bothering the other pupils in the class. He also bit one pupil, hit one pupil, and took another pupil's money. He repeatedly apologized for his actions, but could not stop. After Ms. McCruter told him he could not go to the Christmas party because of his conduct, his behaviors escalated further. He screamed, cried, kicked and threw things, including a chair. Ms. McCruter moved him closer to her to prevent him from hurting himself or other pupils. He did not calm down. He kicked her school supplies and the wall. Student also spit on the ground.

25. Ms. McCruter memorialized Student's December 17, 2007, conduct in writing. The principal reviewed and co-signed her memorandum on December 21, 2007.

Ms. McCruter provided the original note to Grandparents so they could share it with Student's social worker.

26. After the SST meeting Ms. McCruter used a variety of strategies to manage Student's behavior. She allowed Student to hold a toy car during instruction. She found that when Student held the car he was able to focus on his lessons and his attention did not wander. When his behaviors escalated or when he engaged in physical aggression with other pupils, she removed him from the situation and left him alone. He eventually would apologize. She gave him more time to complete assignments. To calm him, she spoke with him. She had him sit next to her. By now she had become accustomed to his mood shifts on the days after he visited his mother. Grandparents would notify her of these visitations and instead of saying "no," to him she tried to offer him alternative activities. When her interventions failed Student was removed from the classroom setting to be with the school counselor or the Principal.

27. Ms. McCruter did not need guidance from the SST about Student's academic needs. Ms. McCruter remained impressed with his capabilities. Student could hold conversations with adults on par with a ten to fifteen year old pupil. His homework was always completed and neat. He was a perfectionist. He wanted everything to be "of quality." He liked books and loved stories. He could repeat a story verbatim after hearing it once. His only area of difficulty was penmanship. Ms. McCruter had very strict standards for forming letters which Student could not meet. Many kindergarten pupils have problems with penmanship. The kindergarten curriculum addressed penmanship with motor activities such as picking up beans, tracing letters, and practicing with a white board. Ms. McCruter was confident that Student would improve by the end of kindergarten without additional interventions.

28. Ms. McCruter's recollection of events was clear. Her testimony was carefully considered in establishing Student's performance and behavior, as well as District's actions.

Ms. McCruter's testimony was given little weight where her opinion about Student's behavior and social skills departed from school records, some of which she created at the time of the events. At the time she recorded her observations of Student, it was clear that his behavior was not typical of his same-aged peers, but in many respects was extreme. However, when summarizing Student's behaviors in both her teacher report and at hearing, Ms. McCruter tended to discount how extreme these behaviors were.

29. Clinton recessed for winter break on December 21, 2007, one week after the SST meeting.

#### INITIAL PSYCHOEDUCATIONAL ASSESSMENT

30. Student's psychiatrist prescribed the medication Adderal for Student on January 2, 2008. This medication is prescribed to control the behaviors associated with ADHD. In a letter dated January 4, 2008, Grandparents advised the Principal of Student's prescription, including dosage. In that letter, Grandparents also requested Clinton to prepare an IEP and repeated Grandparent's previous request for a 504 Plan for Student's behaviors.

31. The last day of winter recess was January 4, 2008. Classes resumed on Monday, January 7, 2008. On January 7, 2008, Grandparents attended a juvenile dependency hearing before the Superior Court of the State of California. Also in attendance were the Mother, the attorneys for Student's parents, and the Student's dependency court attorney. At that hearing, Grandparents' right to make educational decisions for Student was reaffirmed. In addition, the court ordered Grandparents, as Student's educational representatives, to submit a referral to District for special education assessment and assessments under section 504. The court further ordered Grandparents to appear at court and report to the court about Student's education on July 7, 2008.

32. In a letter dated January 12, 2008, Grandfather made a second written request to the Principal for an "IEP including a 504 Plan." In that letter Grandfather advised

the Principal that Starview had assessed Student and determined that he had ADHD. He also notified Principal that Student began taking Aderall for his ADHD on January 3, 3008. He thanked the Clinton staff, "especially you, Ms. McCruter and the other kindergarten teachers for their patience."

33. The second quarter ended on January 25, 2008. Ms. McCruter prepared the second quarter report card. Student continued to perform at or above his peers academically. Ms. McCruter was particularly impressed with Student's ability to recite every story he heard read out loud after hearing it read for the first time. She considered him a good speller, but noted that he needed to work on his handwriting. Student's handwriting was improving. It was understandable and in the proper form. Ms. McCruter believed that Student's handwriting would improve by the end of the year by working on the kindergarten curriculum. By the end of the second quarter she considered Student to be proficient in all areas graded. She raised Student's grade from "basic" to "proficient" in writing, specifically in the areas of "copies words," "writes left to right and top to bottom," and "writes letters and numbers legibly."

34. Student was very athletic and did not exhibit any motor deficits. While in Ms. McCruter's class he played and won the game of "duck, duck, goose." He could run very fast and won races. He didn't get upset when he lost. Ms. McCruter recommended that Grandparents enroll him in an organized sport.

35. Student's report card continued to reflect Ms. McCruter's concerns about Student's behavior. In his second quarter report card Ms. McCruter noted that he continued to "need improvement" in: following class and playground rules; cooperating with adults, demonstrating self-control; taking responsibility for his own actions; and working and playing well with others. Ms. McCruter concluded that Student could not control his behavior.

36. After winter recess, the Principal became more directly involved in managing

Student. Student would sometimes sit with the Principal in her office. She would give him puzzles and other things to work on. By February the Principal concluded that Student's behaviors were extreme and not typical of a kindergarten pupil adjusting to the routines of school. The Principal is familiar with pupils like Student, that have been removed from their parent's care. District also has an abundance of pupils that have been exposed in utero to their mother's alcohol and drug abuse. Student's behaviors were more extreme. The Principal was not trained in special education. She contacted District-level administrators with the responsibility for special education for assistance and guidance. She was informed that a representative would attend the IEP team meeting when it was scheduled.

37. In approximately early February 2008 Student bit Ms. McCruter. Ms. McCruter did not make a report but told the Principal about it.

38. After Student bit Ms. McCruter, the Principal transferred Student to Mr. Robert Slechter's (Mr. Slechter's) kindergarten class. Ms. McCruter had not requested the transfer. She had a great affection for Student and became close to Grandparents. After Student left her class, on at least one occasion, Student approached her and gave her a hug during recess. The Principal reassigned Student to Mr. Slechter because she wanted to see if changing Student's environment to include a male instructor would have a positive effect on Student's behavior.

39. Mr. Slechter was familiar with Student as the six kindergarten classes shared many activities, including snack, recess and lunch. In addition, the kindergarten teachers regularly worked together and observed all kindergarteners. The teachers rotated yard duty, met together weekly, and discussed general issues. All kindergarteners used the same curriculum. There was no difference academically between kindergarten classes. Mr. Slechter was an experienced credentialed general education elementary school teacher and, like Ms. McCruter, he worked hard to develop a close and trusting relationship with

Student. Grandmother testified that she felt that Student benefited more from Ms. McCruter's instruction. However, she admitted that Grandfather was the primary contact with Mr. Slechter and he was more familiar with Mr. Slechter's instruction and classroom interventions. Mr. Slechter spoke to Grandfather regularly when he came to pick up Student and shared with him his observations of Student's behavior. Student trusted Mr. Slechter and confided in him. Student told him when he was sad or felt bad. On occasion, Student told him that he felt his "heart racing."

40. Including Student, Mr. Slechter had 21 pupils. He did not have a classroom aide. Like Ms. McCruter, Mr. Slechter was impressed with Student's ability to sustain a mature conversation with him. It was also obvious to him, as it was to Ms. McCruter, that Student could not control his behavior. From the first day Student entered his class, Student's behaviors impeded his learning. Mr. Slechter tried to minimize Student's intrusive behaviors and keep him focused by sitting him next to him. This intervention only worked for two or three minutes before Student resumed his behaviors. Mr. Slechter believed at the time that Student required intensive interventions to address his attention and behavior difficulties. Student's ability to complete work was erratic and dependent upon his mood. Mr. Slechter observed that Student had more trouble in the afternoon when Student's medication wore off. Mr. Slechter was aware of Student's medication regime and thought the medication was affecting him.

41. On February 7, 2008, Mr. Wilson prepared an initial assessment plan and submitted it to Grandparents. Mr. Wilson identified the suspected disability as ADHD/specific learning disability. He listed the assessment areas as: academic performance; self-help, social, and emotional status; general ability; health, development, (to determine the health/medical factors which may impact educational or participation); vision and hearing (for initial and three year review only); and family history. Grandparents consented to the assessment that day. The assessment plan indicated that the IEP was due

on April 7, 2008. Mr. Wilson testified at the hearing. He was a well qualified and credentialed school psychologist. Prior to becoming a school psychologist he was a school nurse and school guidance counselor. He has been a District school psychologist for over seven years and in that capacity conducts 60 psychoeducational assessments a year. Mr. Wilson is one of fifteen District school psychologists. Admittedly, his time to address Student's eligibility and unique needs was limited. In addition to Clinton, he was the school psychologist for three other District schools. On average he was present at Clinton one day a week. Mr. Wilson testified candidly about his assessments and practices. When pressed as to why certain data was not considered or why the FAA was not performed, he was not defensive or hostile but was forthcoming about his own or District's omissions.

42. One day later, on February 8, 2008, Grandparents made a written request for an additional assessment in the area of functional analysis assessment (FAA). The Grandparents also requested an assistive technology assessment. Grandparents were not provided with a supplemental assessment plan. Mr. Wilson testified that he did not know why a FAA was not performed.

43. To obtain information on Student's development, Mr. Wilson requested that Grandparents complete the Structural Development History of the Behavior Assessment System for Children, Second Edition (BASC-2-SDH). On February 20, 2008, Grandparents completed the BASC-2-SDH. Grandparents disclosed that Student had been diagnosed with ADHD by a child and adolescent psychiatrist and exhibited all three patterns of ADHD: hyperactivity, impulsivity, and inattention. Grandparents confirmed that he recently had a psychiatric exam to determine if he had ADHD and that he was receiving twice weekly psychological counseling. Consistent with the psychiatrist's observations, Grandparents noted that Student was unable to focus or sit still for a period of time, had a short attention span, lacked self-control, was overly energetic, impulsive and overacted when

faced with a problem. Mr. Wilson also spoke with Grandparents about Student. Grandparents confirmed Student's diagnosis of ADHD.

44. Grandparents did not have a complete understanding of Student's developmental history. Grandparents were not fully apprised of Student's birth and early development. They wrote "unknown" across questions regarding pregnancy, birth and development milestones. Grandparents did not know the answers to questions about Mother's pregnancy, including whether she used alcohol or drugs during pregnancy. Under family health history, they disclosed that Student's mother and father were alcohol/drug abusers and that his father had a behavior disorder. Under the category of educational history, they revealed that Student had a problem with fighting in preschool. They disclosed other problems, including his separation from his Mother, his frequent stomach pains, and his fears at night after he went to bed. They revealed that Student had problems with bed wetting. Grandparents conceded that Student required a lot of parental attention.

45. According to Grandparents, Student did not exhibit motor deficits. They stated that he did not have any motor problems associated with walking, riding a bike, learning to skip or throwing or catching a ball. They noted that he enjoyed playing ball, bike riding, among other physical activities.

46. At Mr. Wilson's request, on March 6, 2008, and March 7, 2008, Ms. McCruter completed a "teacher report for IEP team," and a "classroom performance screening, respectively." Ms. McCruter noted that Student angered easily, lost attention easily, although he worked hard to focus, did not follow verbal directions, and would not do anything he did not want to do. Contrary to her earlier observations in the Vanderbilt Scale, Ms. McCruter maintained that Student "ha[d] good relations with peers." At the hearing, Ms. McCruter explained that Student was able to play sports with his peers and he did not always exhibit aggressive behaviors. When pressed during cross-examination

about whether Student was observed to fight with other pupils, Ms. McCruter stated that she did not consider Student's aggressive behaviors, including biting and kicking, as fighting, since the other pupils did not reciprocate by kicking and biting Student. Overall, in Ms. McCruter's view, Student's peer relationships were not poor because he did not isolate himself from peers, played sports with them and did not always hit, push, or otherwise confront peers. In view of her responses to the Vanderbilt Scale, her earlier reports, and the observations of Starview, Ms. McCruter's opinion that Student did not have a poor relationship with peers was not supported by his overall behavior.

47. On March 7, 2008, Mr. Slechter completed the Attention Deficit Hyperactivity Disorder Test (ADHD-Test). The test as described on the test form is a method for identifying individuals with ADHD. The ADHD-Test listed a total of 36 behaviors divided unevenly between subtests for hyperactivity, impulsivity, and inattention. On a scale of zero to two, zero being "not a problem," one a "mild problem," and two a "severe problem," Mr. Slechter rated all but four behaviors "severe problems" which impaired Student's functioning. Based upon Mr. Slechter's responses, Student had a very high probability of having severe ADHD in all areas. Mr. Slechter added his own comments to the form.

Student appears to have difficulty controlling his actions. He hits and kicks other students on a daily basis. He produces very little work unless I sit with him one on one. He stops others from doing their work and is a major distraction in the classroom!

48. The ADHD-Test did not include questions which directly addressed Student's more severe and violent or aggressive behaviors, such as hitting and kicking. According to the measurements used for ADHD-Test, Student's behaviors did not have to be violent or physically aggressive to meet the criteria for ADHD. The impulsivity subtest measured certain behaviors that affect other classmates, including: failing to wait one's turn, difficulty waiting turn, blurts out answers, impulsive, interrupts conversations, intrudes on others,

fails to follow rules of games. In all these areas Student's behavior was a "severe problem."

49. On March 13, 2008, Ms. McCruter also completed the ADHD-Test. She did not rate Student a "severe problem" in as many areas as Mr. Slechter did. Nevertheless, Ms. McCruter's answers also indicated that Student likely had ADHD.

50. Mr. Wilson prepared Student's initial psychoeducational assessment report on February 21, 2008, through March 13, 2008. His report of Student's emotional and adaptive behavior skills was derived from his interview and observation of Student, information the Grandparent's supplied on the BASC-2-SDH, information Ms. McCruter supplied in the teacher report, and the responses of McCruter and Grandparents to the ADHD-Test. Outside of the SST, Ms. McCruter did not share information directly with Mr. Wilson. She conferred with the Principal about Student and left it to the Principal to provide information to the school psychologist and school counselor. The Principal was not in regular contact with Mr. Wilson and did not routinely share information she received about Student with him.

51. Mr. Wilson did not consider all the data about Student available to District at the time of his assessment. Ms. McCruter thought she completed the Vanderbilt Scale for Mr. Wilson. However, Mr. Wilson testified that he had never sent this report. It was not a test that he would administer as it was a test more commonly used by clinical, not school, psychologists. Mr. Wilson explained that clinical psychologists assess a child's overall psychological status, whereas school psychologists focus on how the child's psychological status affects his access to education. In Mr. Wilson's psychoeducational assessment report he lists all the testing instruments used. The Vanderbilt scale was not included in the list of testing instruments. Mr. Wilson first saw Ms. McCruter's responses to the Vanderbilt Scale during the hearing.

52. Mr. Wilson did not receive Ms. McCruter's October 9, 2007 note, or the letter dated December 21, 2007, co-signed by Ms. McCruter and the Principal. He did not know

about the December 17, 2007 incident memorialized in the letter. Mr. Wilson did not obtain or review Student's first or second quarter report cards. Mr. Wilson agreed that these documents would have provided information relevant to his initial assessment of Student.

53. Mr. Wilson was not advised of the November 26, 2007, letter from Student's physician requesting a full evaluation by the school psychologist to determine if there was a need for a 504 Plan to handle Student's behavior problems.

54. Mr. Wilson did not consider Mr. Slechter's March 7, 2008, responses to the ADHD-Test in his initial psychoeducational assessment report. In his report, he did not list Mr. Slechter as a member of the psychoeducational assessment multidisciplinary team or refer to him as a source of information. He did not interview Mr. Slechter.

55. Prior to preparing the initial psychoeducational assessment report, Mr. Wilson observed Student in his class on several occasions. Mr. Wilson referred to the members of his psychoeducational team in his report. Mr. Slechter was not mentioned as a member of the team. For this reason, it is likely that Mr. Wilson only observed Student in Ms. McCruter's class and did not observe him in Mr. Slechter's class. Mr. Wilson memorialized his observations in his psychoeducational assessment report. During his observations Student was not physically aggressive toward other pupils and Student "on occasion" was seen attending to his classwork, and "constantly talking to peers around him." Mr. Wilson noted Student's disjointed attention span and impulsive conduct, including his active movement during the time other pupils were engaged in quiet activity, his abrupt movement from his seat to the door to speak with an adult entering the room, his constant turning in his seat, or standing next to his seat. Although Mr. Wilson learned from Student's developmental history report that Student had "bouts" of physical aggression in preschool, he did not note that he observed any such aggression in kindergarten, including kicking.

56. Mr. Wilson relied upon Ms. McCruter's teacher report for additional classroom observations. From this report, he concluded that Student's "interactive pattern with his peers tends to be good." However, "teacher states that [Student] gets angry when told 'no.'" Mr. Wilson did not refer to any of the more extreme behaviors known to the District at the time he completed his assessment. In his assessment summary, he acknowledged Student's physical aggression with peers and defiance with adults. However, his recommendations did not directly address his aggressive behaviors, but instead included a standard list of interventions to address the attentional and organization deficits traditionally associated with ADHD.

57. Mr. Wilson insisted that although it would have been preferable at the time of his initial assessment if he had been made aware of the depth of Student's behaviors toward other pupils, (e.g., his kicking and biting), he still would not have broadened his assessment to suspected disabilities other than ADHD. In making his determination of Student's eligibility for special education, Mr. Wilson, as a school psychologist, generally did not refer to the Diagnostic and Statistical Manual, Fourth Edition (DSM-IV). The DSM-IV is used by psychiatrists and clinical psychologist, to identify the full range of recognized psychological conditions using medically accepted criteria. Unlike clinical psychologists or psychiatrists, school psychologists are generally focused on disabilities that impact pupils' access to education, not their overall psychological profile. However, in the area of ADHD, Mr. Wilson, like other school psychologists, relied upon the definitions of ADHD as set forth in the DSM-IV.

58. The ADHD-Test includes ten key questions for the assessor to consider before concluding that a pupil has ADHD. One question asks the assessor whether "there are other conditions that could possibly be causing the behavioral problems and, if so, what are the conditions?" Although it is not Mr. Wilson's practice to directly assess for possible DSM-IV diagnoses in determining Student's eligibility for special education, it is

his practice to consider co-morbidity with ADHD, by looking at the Student's overall profile, so that he can determine the level of behavioral support Student requires.

59. On cross-examination, Mr. Wilson agreed that, like ADHD, Student's conduct was also consistent, and may be co-morbid, with other psychological conditions recognized in the DSM-IV, including conduct disorder. At the time of his initial assessment, Mr. Wilson believed Student had ADHD and a conduct disorder. By themselves, conduct disorders or other psychological disorders do not qualify Student for special education. Mr. Wilson conceded that Student's behavior suggested an oppositional defiance disorder as well. He agreed that the behaviors he observed to be symptomatic of ADHD were also evident in those pupils diagnosed as bi-polar or pupils exposed to substance abuse in utero. Mr. Wilson did not include a discussion of possible co-morbid conditions in his report.

60. Mr. Wilson was confident that Student was eligible for special education under the singular category of ADHD-OHI. Mr. Wilson relied on the determination of Student's medical doctor that he had ADHD. Mr. Wilson did note in his report that "Student gets angry easily, will become physically aggressive with peers and defiant with adults."

However, he also considered Student's young age, his recent entry into kindergarten, and his family dynamics and determined that these factors combined to produce willful and defiant behaviors resulting from his inability to get what he wanted. According to Mr. Wilson, there was no indication from the reports and observations that Student's behavior at school was indicative of depression and anxiety, or that he was alienated from his peers. If Student's behaviors were indicative of internal psychological processes, as opposed to external factors, Mr. Wilson would have considered emotional disturbance or other psychological conditions. Mr. Wilson's testimony and opinion were given less weight where, as here, it was based upon incomplete information that should

have been known to him at the time of his assessment.

61. Mr. Wilson testified that he was also guided in his initial assessment by the need to place Student in the least restrictive environment.

62. Mr. Wilson did not perform a FAA as requested by Grandfather on February 8, 2008. A functional analysis assessment is performed by a behavior intervention case manager (BICM). It requires extensive and systematic data collection in a variety of environments and time periods so discrete behaviors and responses to the behaviors can be clearly identified, the frequency of the behaviors calculated, and the effectiveness of responses analyzed. For example, an FAA, unlike a BSP, would not only identify that the Student hits other pupils, but for each time the Student hit another pupil, would isolate the time of day the Student hit, the circumstance, and the environment. By systematically isolating behaviors in this manner, the assessor can identify behavior triggers, and effective interventions.

63. Student relied upon the expert testimony of Dr. Robert Patterson (Dr. Patterson) regarding the District's assessments, services and Student's placement. Dr. Patterson is an educational and clinical psychologist. He is licensed by the state of California to provide general psychological services, as marriage, family and child counseling and educational counseling services. Dr. Patterson served 12 years as the school psychologist for Tustin Unified School District. In that capacity he performed approximately 150 assessments a year. Dr. Patterson possesses California certifications for the provision of administrative and general educational services in the school environment. For 14 years, Dr. Patterson has had nonpublic agency status from the California Department of Education for the provision of therapy, counseling and behavioral interventions and assessments. Since 1991, he has been in private practice, providing assessment and psychotherapy for a wide range of matters, including violence in families. In addition to NPA services, as a private practitioner, Dr. Patterson is a vendor for California

regional centers as a psychologist and behavioral specialist. He has also been retained by school districts to provide independent assessments.

64. Dr. Patterson demonstrated an extensive knowledge of best practices regarding behavioral and social/emotional assessments and services. Where Mr. Wilson's testimony conflicted with the best practices as set forth by Dr. Patterson, Dr. Patterson's testimony was given more weight. His testimony was also given great weight in determining the school psychologist's when District should have performed social/emotional assessments, including an FAA or whether it should have implemented social/emotional/behavioral programs, including a behavior support plan, and behavior intervention plan. Dr. Patterson's expert testimony was confined to his review of documents, including assessments, and IEPs, and assumptions of what the District should have known about pupil at the time it assessed Student. Dr. Patterson never directly interviewed Grandparents, District personnel or Student. His opinions were derived from his documents or interview with Student's attorney. To the extent that his assumptions about what District should have suspected as a disability did not square with evidence in documents or testimony, his opinion was discounted.<sup>4</sup>

65. Dr. Patterson maintained that given Student's severe behaviors District

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<sup>4</sup> Dr. Patterson disagreed with Mr. Wilson's choice of cognitive assessments as violative of the Ninth Circuit prohibition of providing IQ tests to African-American pupils in *Larry P. v. Riles* (N.D. Cal. 1979) 495 F.Supp. 926 *affd.* 79 F.2d 969 (9th Cir. 1986). Student's cognitive score impacts Mr. Wilson's determination of whether Student had a specific learning disability. However, Student did not claim that Mr. Wilson's test instruments were inappropriate or object to his eligibility for special education as ADHD-SLD or ED, so Dr. Patterson's testimony about the validity of Mr. Wilson's test instruments was irrelevant and discounted.

should have evaluated Student for suspected behavioral conditions which would explain Student's behaviors, including in utero drug exposure, bi-polar disorder, and conduct disorder. Dr. Patterson testified that information gleaned from Student's developmental history provided notice of Student's possible exposure to in utero drug abuse by his biological mother. Exposure to drugs in utero would be reflected in Student behaviors. Dr. Patterson also maintained that a neuropsychologist was the most qualified to evaluate Student for psychological and neurological conditions that impact his behavior. According to Dr. Patterson, knowing the clinical reasons for Student's behaviors is important for developing appropriate behavior interventions.

66. According to Dr. Patterson, Mr. Wilson failed to provide any formal guidance to Clinton personnel as to how to respond to Student's maladaptive behaviors. He did not prepare a behavior support plan (BSP) for the IEP team. A BSP can be implemented without an assessment. It is the product of anecdotal and unsystematic observations of the pupil's teachers and counselors. It can be useful in addressing behaviors that do not endanger the target pupil or his peers. The BSP broadly identifies behaviors that impede Student's learning and interfere with class instruction, triggers for the behaviors, intervention strategies and alternative behavior goals, teaching strategies and reinforcements, and replacement behavior goals. It is the most basic of the behavior plans offered in the school environment and usually is the first formal behavior plan to be implemented. Mr. Patterson testified that the process for developing effective interventions for Student should have begun at the SST. At that time Mr. Wilson should have identified specific interventions, and the personnel responsible for the interventions. After the SST he should have observed Student in many different settings, including the home, to ascertain the effectiveness of the interventions.

#### THE INITIAL IEP TEAM MEETING OF MAY 8, 2008

67. Student's aggressive behaviors continued unabated between the time Mr.

Wilson completed his assessment and May 8, 2008 IEP team meeting. Beginning on April 21, 2008, Mr. Slechter kept a journal of Student's extreme class behaviors. Mr. Slechter's notes often described Student as "very violent." His behaviors included:

Generally antagonistic and physically aggressive to other pupils after lunch recess;

Kicking several other pupils really hard;

Hitting other pupils for no apparent reason;

Digging his nails into other pupils for no apparent reason;

Hitting another pupil very hard in the ear;

Biting other pupils;

Standing on head and doing headstands;

Extreme agitation manifested by pacing the room several times,

Running around the room from one end of the room to another;

Repeatedly jumping down from a chair;

Breaking crayons into pieces and throwing pieces around the room;

Telling other pupils to "kiss my butt" and "kiss my weenie";

Putting his feet and legs through the arms of his sweater and running around the room.

68. Mr. Slechter informed the RSP teacher on April 24, 2008, of Student's low productivity and advised her that "little work is produced by Student unless I am in one-on-one mode with him." At the hearing, Mr. Slechter estimated that due to his behaviors, Student at most could access the kindergarten curriculum 50 percent of the time. By the third quarter of the 2007-2008 school year, which began in February 2008, Student's spelling skills had deteriorated and no longer matched his abilities as reflected in Mr. Wilson's assessment scores. Mr. Slechter had provided Student opportunities to repeat spelling tests numerous times and yet his spelling remained poor.

69. Mr. Slechter thought Student's medication was affecting his conduct and performance in class. He noticed that Student's maladaptive behaviors became more pronounced in the afternoon, after the medication wore off, or when Grandparents forgot to give Student his medication.

70. On May 2, 2008, Mr. Slechter observed Student pacing "like a person possessed" and saying to himself three or four times that "I think I'm going to kill myself." Student's behavior was highly unusual for a five year old. Mr. Slechter asked him why he was saying that and he responded that he didn't want to come to school. Mr. Slechter informed the Principal and the school counselor. The counselor spoke to Student and contacted Grandparents.

71. Mr. Slechter tried to support Student and encourage him to control his behaviors as best he could. As in Ms. McCruter's class, Student sometimes could complete the school day untouched by his more extreme behaviors. On May 1, 2008, Mr. Slechter noted that Student was following instructions and being good all day. Between May 2 and May 12, 2008, Mr. Slechter did not report any unusual behaviors.

72. The Principal reviewed Mr. Wilson's initial assessment report before the initial

IEP team meeting. She was dissatisfied with the report because it did not adequately address Student's behaviors. She shared her concerns about the deficiencies in Mr. Wilson's assessment report with Grandparents. She also considered District's proposed offer of a general education placement with minimal pull-out resource specialist program services (RSP) as inappropriate in view of Student's behaviors. She told Grandparents that she did not agree with the proposal to limit Student's services to RSP. The Principal was conscious of the policy not to over-identify pupils of African-American descent as special education pupils, particularly as pupils with emotional disturbances. The District was cautious in making any pupil eligible for special education under the category of emotional disturbance because over time the label limits a pupil's education and career opportunities. To the Principal, it was clear by February that general education accommodations and interventions were not working and that Student needed behavioral services. She believed that it was important to fully explore the possible causes for Student's behaviors so that appropriate services could be provided to him. The Principal insisted that the policy against over-identification did not prohibit it from providing pupils a full range of behavioral services.

#### MAY 8, 2008 IEP TEAM MEETING

73. The initial IEP team meeting was scheduled for April 24, 2008. Grandparents requested that District continue the IEP team meeting to May 8, 2008, so that Student's social worker, dependency court attorney, and psychiatrist would have the opportunity to attend. Grandparents also wanted their educational advocate to attend.

74. On May 8, 2008, Student's initial IEP team meeting convened. The IEP team met for two hours. All required members of the IEP team were present. Those attending included: Grandparents, their educational advocate, the Principal, Mr. Wilson, the school nurse, Clinton's resource specialist, Student's general education teachers, and Student's his counselor from Starview.

75. District presented a draft IEP. The draft indicated that Student was eligible for special education under the category of OHI due to his ADHD. The draft indicated that Student performed at grade level but his disability affected his ability to attend to his academic tasks for a prolonged period of time. The draft was not carefully reviewed before it was presented. In the health section of the draft IEP, it wrongly stated that Mr. Wilson's psychoeducational report did not indicate that Student was diagnosed with ADHD and was currently taking the ADHD medication Aderall. This mistake was repeated in the June 12, 2008, IEP. As a measure of Student's present levels of academic achievement and development, District incorporated the highlights of Mr. Wilson's psychoeducational assessment. In the IEP Mr. Wilson reiterated Ms. McCruter's report of Student's ability to recall a story after hearing it once. Mr. Wilson noted Student's deficits in penmanship and writing.

76. The draft IEP, like Mr. Wilson's assessment report, did not fully account for Student's present levels of functional performance. Under the category of social/emotional/behavioral, Student's impulsivity and inattention were mentioned, but there was no discussion of Student's more aggressive behaviors.

77. Based upon the stated present levels of performance, District personnel prepared one annual writing goal for the period of April 24, 2008 through April 24, 2009. The goal addressed spelling accuracy and penmanship. No behavioral goals were prepared.

78. Behavior was not addressed in other sections of the draft IEP as well. In a section entitled "special factors," the IEP indicated that Student's behavior did not "impede learning of self or others," and confirmed that Student's behavior was not being addressed through goals, a BSP or a BIP.

79. District presented its proposal to offer Student its RSP program on a pull-out and push-in basis, several times a week. Student would remain in his regular education

class 90 percent of the time and would be in the RSP room for ten percent of the time. District's draft IEP provided that Student did not require other supplemental aids, services, or other supports for school personnel at this time.

80. The Grandparents were concerned that the proposed IEP did not address Student's behaviors. They questioned why the District was recommending special education when Student's academic ability was not a problem. They wanted to know how the District was going to assist Student with his behaviors. They questioned how RSP pull-out services would address Student's behaviors. They wanted to know why his behaviors could not be accommodated by a 504 Plan.

81. At the IEP team meeting, the RSP teacher explained the process involved in performing a functional behavior analysis (FBA) of Student's behaviors. Grandparent's educational advocate requested that the District conduct an FBA. Mr. Wilson agreed. The IEP team discussed who would perform the FBA.<sup>5</sup>

82. There was no discussion of Grandparent's previous request for an assistive

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<sup>5</sup> Mr. Wilson and Mr. Patterson stated that the BSP and BIP are essentially the same thing. However, under the California Education Code, a BIP is developed after a functional analysis assessment and accordingly, is based upon more exacting observations than a BSP. A functional behavior assessment (FBA) is not defined under the California Education Code, but is referred to as an appropriate intervention for pupils subject to a disciplinary change of placement under federal law. (34 C.F.R. § 300.530 (d)(2) & (f).) An FBA can be applied to a non-disciplinary situation as well. (20 U.S.C. § 2014(d)(3)(B)(i).) Student's advocate prepared the request for an FAA earlier. There does not appear any difference between her request for an FAA and a FBA and her use of the terms were interchangeable as both times she requested District to perform a systematic assessment of Student's behavior.

technology assessment. The draft IEP stated that assistive technology was not required.

The IEP team meeting adjourned without completing the IEP and agreed to meet at a later date.

#### MAY 15, 2008 IEP TEAM MEETING

83. After the May 8, 2008 IEP team meeting Student continued to exhibit extreme aggression in Mr. Slechter's class. Mr. Slechter recorded that Student threw a folder at another pupil, hitting him in the face. After Mr. Slechter admonished him about the dangers of his behavior, he stopped for five minutes, before directing his aim at another pupil's face. On another day, Student dug his nails into one pupil, and hit another pupil in the ear.

84. Student's behaviors intensified. On May 13, 2008, Student declared that "I just want to kill myself." When Mr. Slechter asked him why, he replied "because I am bad everyday." Mr. Slechter kept Student at the desk next to him. Student took out a pencil from the desk and wrote on his face and then began coloring his face and head with orange and purple crayons. When asked why, he said, "I don't know." Mr. Slechter reported Student's declaration and behavior to the Principal.

85. The Principal took immediate action. She spoke with the Student to determine whether he understood what his declaration meant and to gauge his intentions. The Principal contacted Grandparents and requested that they come into the office to meet with her. She informed them of Student's declaration and behavior. She had met with Grandparents many times. This time she asked Grandparents to be completely candid with her and share with her everything they knew about Student's developmental history that explained his behavior. Grandparents informed her that Student's parents were drug abusers. They told her that they discussed Student's overall behavior with Student's father. Student's father informed them that he recalled having similar behavior problems when he was Student's age. Student's father also told Grandparents that he was diagnosed as bi-

polar in prison. The Principal was not surprised to learn that Student's mother abused drugs and assumed if she was using drugs now, she probably exposed Student to drugs in utero. She was not trained in special education, but worked daily with a large population of pupils exposed to drugs in utero. Clinton personnel accommodated these Students in the general education classroom. However, Student's behavior was abnormal even for pupils exposed to drugs in utero. She wanted to make sure he was provided appropriate services. She did not report the conversation to Mr. Wilson, the school psychologist.

86. On May 15, 2008, on his way to the continued IEP team meeting Mr. Slechter observed Student pick up a used candy sucker stick and throw the stick in another pupil's face. He also ran up and down the line of pupils waiting to enter class kicking people.

Mr. Slechter had him sit next to him during silent reading. Student wrote his name on twenty books used for silent reading.

87. The IEP team met again on May 15, 2008, to continue their discussion of Student's eligibility, services and placement. The IEP team met for 35 minutes. All necessary members of the team were present. The Starview counselor, Mr. Wilson,

Mr. Slechter, the RSP teacher and the Principal were present. Student's social worker was not present. The team members reaffirmed Student's eligibility for special education under the category of OHI due to his ADHD.

88. The IEP team addressed Student's recent declaration to kill himself. They shared their concerns about his emotional state, including possible depression. Grandparents agreed to execute releases so that the District could obtain records from Student's psychiatrist. Mr. Slechter relayed his observation of Student that day. He expressed his concern for Student's safety in the classroom. Grandparents informed the team that at home Student had recently set a napkin on fire and threw it in the trash. He had also placed push pins with the pins facing out all around his bed. Student's advocate requested that the psychiatric emergency team (PET) be called whenever Student

expresses suicidal ideations. A PET team is called as an emergency intervention to determine whether a pupil requires hospitalization to address suicidal ideations. District also discussed making an expedited referral (an "AB3632 referral") to LACDMH with the assistance of Student's social worker so that Student could obtain a mental health assessment.

89. The IEP team did not finalize Student's IEP on May 15, 2008. Instead, District made the following recommendations and agreed only to schedule another IEP team meeting at a future undetermined date:

The PET team would be called immediately to interview [Student]

Mr. Wilson would conduct a "behavioral inventory" for the PET team

District would assign an additional adult assistant (AAA) exclusively to [Student].

Mr. Wilson would continue his behavior assessment of [Student].

Starview would notify the social worker so that a referral to LACDMH could be expedited.

IEP would be reconvened at a later time depending on outcome of PET team

The IEP team meeting was adjourned without any offer of services or placement.

## EVENTS THROUGH THE SECOND PSYCHEDUCATIONAL REPORT

90. The PET team came to Student's home to interview him. The PET team was comprised of two mental health professionals from LACDMH. After speaking with Student alone, they informed Grandparents that no further action was needed. They were very impressed with Student's ability to communicate. They acknowledged that Student had emotional problems which needed to be addressed, but they concluded that he would not act upon his suicidal ideations.

91. District assigned an experienced AAA to provide one-on-one support to Student throughout his school day. The AAA was not provided a behavior plan and there was no evidence that she was given any guidance by anyone from the District, including the school psychologist, about effective behavior management techniques for Student. Student only had an aide for a short time. One day when Mr. Slechter was absent, Student bit another pupil in response to that pupil's attempt to push him down the schoolyard slide. The AAA requested that the pupil bitten by Student bite Student in return. The pupil refused. The AAA then asked Student to lie down on the classroom floor which he did. She pulled down his pants and bit him on his buttocks. Unaware of the AAA's actions, the Principal suspended Student for biting the other pupil. When Student informed Grandparents of the AAA's conduct, Grandfather took a picture of Student's buttocks and showed it to the Principal. The Principal contacted Child Protective Services (CPS) and reported the incident. The AAA never returned to Clinton. Student was left without any one-on-one assistance for the remainder of the school year.

92. Student continued to exhibit extreme aggression. On May 17, 2008, two days after the IEP team meeting, Student told the class he needed to kill particular pupils. He explained to Mr. Slechter that one pupil touched his "butt" when he wasn't looking and another pupil was mean to him. That same day, he bit another pupil on the arm. On June

5, 2008, Student placed a chair on top of the table and sat or stood on the chair. On June 9, 2008, Student bit another boy on the finger.

93. There is no evidence that Mr. Wilson provided a behavioral inventory to the PET team. Mr. Wilson conceded that he did not observe Student in class. He was qualified to perform an FAA, but he did not have time available to observe Student and complete the detailed analysis of Student's behaviors required for an FAA. There is no evidence that Mr. Wilson sought or obtained records from Student's psychiatrist. Mr. Wilson acknowledged that he never facilitated an AB3632 referral to LACDMH, that it "fell through the cracks." A referral was never made until fall 2008, after Student filed this action.

## SECOND PSYCHOEDUCATIONAL ASSESSMENT

94. As agreed to by the May 15, 2008 IEP team, Mr. Wilson prepared an additional psychoeducational report of Student's behavior and emotional status. Mr. Wilson repeated his previous finding that Student was eligible for special education under the category of ADHD-OHI. He also concluded that Student met the eligibility criteria for special education as a pupil who is ED. He reached this conclusion from a review of Mr. Slechter's anecdotal notes, the information he obtained about Student's conduct from the IEP team meetings, including the Principal, school counselor, and Student's teachers, and the results from standardized rating scales as noted below.<sup>6</sup>

95. Grandparents completed the parent rating scale of the Behavioral Assessment System for Children (BASC-2) on or about June 1, 2008. BASC-2 is designed to identify a variety of behavioral and social disorders and to aid in the design of treatment

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<sup>6</sup> Mr. Patterson critiqued Mr. Wilson's test administration and selection as contrary to best practices. Student did not state a claim challenging Mr. Wilson's test administration or Student's eligibility as ED. Therefore, Dr. Patterson's critique of Mr. Wilson's testing for ED was irrelevant to this action and not given any weight.

plans. Clinically significant scores indicate a high degree of maladjustment. Grandparents indicated that Student continued to exhibit clinically significant behaviors indicative of ADHD. In addition, this rating scale included behaviors which also identified Student's internal psychological challenges. Grandparents identified clinically significant behaviors in the area of internalizing problems, depression and somatization. The results of Grandparents BASC-2 ratings were consistent with a diagnosis of a major depressive disorder. Grandparent's BASC-2 ratings also confirmed that Student exhibited clinically significant behaviors common to ADHD.

96. On or about June 1, 2008, Grandparents, Mr. Slechter and the school counselor completed the Scale for Assessing Emotional Disturbance (SAED) which is a standardized norm-referenced scale that is used to identify pupils who qualify for special education under the category of ED. The SAED focused on identifying characteristics that reflect the five qualifying conditions of ED: inability to learn; relationship problems; inappropriate behavior; unhappiness or depression; physical symptoms or fears. Grandparents rated Student's physical symptoms or fears as highly indicative of ED, and the other categories, excepting inability to learn, as indicative of ED. Mr. Slechter and the school counselor indicated that Student's inappropriate behavior and physical symptoms were highly indicative of ED, and the other categories, excepting inability to learn, were also indicative of ED. All raters determined that Student did not demonstrate an inability to learn and rated this category as not indicative of ED. All raters agreed that Student's physical symptoms and fears were highly indicative of ED and his relationship problems and unhappiness and depression were indicative of ED. In addition, Mr. Slechter and the school counselor agreed that Student's inappropriate behaviors were highly indicative of ED.

97. The following behaviors were among the behaviors that all raters considered severe problems:

Cruel to peers

Inability to work well in group activities

Verbally abuses, teases, or taunts people

Makes threats

Does not independently complete assignments

Disruptive, loud, rowdy

Destroys and ruins things

Physically assaults or fights people

Anxious, worried, tense

Talks about suicide or own death

Feelings of worthlessness

Feels picked on or persecuted

Feels excessively guilty

Overly sensitive

#### JUNE 12, 2008 IEP

98. The IEP team met again on June 12, 2008. The IEP team characterized the meeting as "a continuation of the initial IEP which was begun on 5/8/08." All necessary team members were present including Grandparents, Mr. Wilson, the Principal, the RSP teacher, the school counselor, Ms. McCruter and Mr. Slechter, the Starview counselor,

Student's advocate, Student's social worker and Ms. Jennifer O'Malley (O'Malley), District program specialist. The draft IEP indicated ED as the primary disability and did not indicate that Student was eligible as ADHD-OHI as had the last draft IEP. Everyone, including Grandparents, agreed that Student was eligible for special education under the additional category of ED.

99. The present levels of performance were not updated from the initial May draft IEP and referred only to the first psychoeducational report. Student's present level of performance in writing referred to his superior understanding and recall of every story he has heard or read once. It also referred to teacher reports indicating that Student needed to improve his writing/penmanship.

100. Student's present levels of performance under the category of social emotional/behavioral referred to the initial psychoeducational report and indicated Student's ADHD-like behaviors of impulsivity and inattentiveness. No mention was made of his severe and aggressive behaviors as indicated in the second psychoeducational report dated June 1, 2008.

101. The same annual writing goal which was one part spelling and one part penmanship (to be addressed in the general education class) was included. The time period of the goal was amended to conform with the continued IEP team meeting. Instead of commencing on April 24, 2008, the date of the first IEP team meeting, the twelve month period commenced on June 12, 2008 and ended on June 12, 2009. The goal did not fully address Student's needs. From Mr. Slechter's report, Student was having difficulty in spelling which needed to be addressed. The same goal however included a penmanship portion which appeared to address Student's ability to use his motor skills appropriately.

102. The June 12, 2008, IEP did not contain any behavior goals and expressly acknowledged that Student's behaviors were not being addressed through goals. In contrast to the earlier draft, it acknowledged that Student's behavior impeded "learning of

self or others” due to “verbal and physical aggression.” In the section requiring District to specify positive intervention strategies and supports, “verbal praise, tangible rewards” were mentioned. However, the boxes indicating that a BSP or BIP were attached were left blank.

103. Mr. Wilson prepared a BSP and provided it to the resource specialist at Clinton, Mr. Udo. The BSP was never presented or discussed at the June 12, 2008 IEP team meeting. Mr. Wilson testified that he intended to present the plan at the IEP team meeting, but he “ran out of time.” It was not attached to the June 12, 2008, IEP. It was never provided to Grandparents.

104. The IEP team meeting discussed placement options which involved removing the Student from general education. Ms. Jennifer O’Malley (Ms. O’Malley), District program specialist, was responsible for placement and monitoring of District pupils in nonpublic schools (NPSs). She attended the IEP team meeting to present District’s proposal to place pupil in an NPS. It was her first IEP team meeting. In preparation for the IEP team meeting, Ms. O’Malley prepared a letter authorizing Grandparents to pursue admission to a nonpublic school (NPS). The letter was prepared to expedite placement in the event the IEP determined a NPS placement was appropriate. Two schools were listed in the letter without explanation of the services available at the schools and how the school could meet Student’s needs. There was no guarantee that Student would be accepted at either school listed. One school identified did not have an entering first grade class so was not a placement option. Ms. O’Malley was not aware of this fact when she prepared the NPS offer letter or presented District’s proposal to place Student at an NPS at the June 12, 2008 IEP team meeting. The letter also indicated that Student would be required to remain at his current placement pending acceptance at an NPS.

105. Ms. O’Malley consulted with the program specialist previously assigned to Student’s IEP, Jonathan Savinar, and the school psychologist in formulating the NPS referral. According to Ms. O’Malley, Student’s academic needs were the same as general

education pupils, but the District did not have a placement that could address Student's severe behavioral challenges. District believed that the identified NPS placements could also challenge Student academically while addressing his behaviors. In contrast to the general education environment, the identified NPS placements were staffed with trained mental health counselors that could address his needs throughout the day. The NPS placements could also provide more support than a District SDC. There were no District SDCs that were designed to serve elementary school children like Student who need extensive behavioral support and intervention, but who also require a general education curriculum. According to Ms. O'Malley, the only advantage of the District SDC were the lower teacher to pupil ratio which allows the teacher to spend more time on each pupil. However, Student would still have to rely on general education campus resources for counseling and other behavior support. District's resources were stretched and ineffective in handling Student's behaviors at the time of the June 12, 2008 IEP team meeting.

106. Grandparents could not determine an appropriate placement, including an NPS, without knowing more about the cause of Student's behaviors, appropriate interventions, and any services he needs to address his behaviors or deficiencies. Grandparents expressed concerns about removing Student from general education because of his academic abilities. They did not like the label of special education because Student was intellectually capable of performing at or above grade level. They knew that Student did not need any special programs for his educational needs and did not understand how the various programs would address Student's behavioral needs. Student had yet to receive any formal behavior plan or services and Grandparents did not feel they could make a decision about his placement without knowing how his behavior would be addressed. They were also concerned about moving Student to another school. Student was very close to his sister who also lived with Grandparents and attended Clinton. Grandparents as well as Student's social worker, who provided input to Grandparents, were

concerned about separating them. The social worker was concerned about moving Student to an NPS which completely isolated Student from the general education environment before trying a placement such as an SDC which still exposed Student to the general education population on campus. She was concerned that the dependency court Judge overseeing Student's case would disapprove of NPS placement without a showing that another placement, like an SDC on a general education campus was unsuccessful. Grandparents were also concerned that if Student were to be placed at an NPS he would be transported by bus a long distance from home each day.

107. Based upon the IEP team discussion, District offered Student placement in a District SDC. District also offered a AAA in Student's classroom. The IEP specified that District offered placement at an SDC on the Clinton campus for the period of June 12, 2008 through June 12, 2009. However, this portion of the IEP was not reflective of the IEP discussion or Grandparent's understanding. The ESY SDC placement was located at another elementary school, Emerson, not Clinton. Having failed to reach a consensus that Student should be placed in an NPS, and without knowing whether Student would be accepted into an NPS, District agreed to review Student's placement within 30 days of this meeting.

108. Grandparents would not sign the IEP at the meeting. Grandparents explained that they were awaiting assignment to a court appointed educational rights attorney and wanted to consult with that attorney before signing the IEP. However, Grandparents also wanted Student to attend ESY and District informed Grandparents that it would not place Student in the ESY program unless they signed the IEP. About one week later, Grandparents went to District offices and signed the IEP with the understanding that Student would be placed in an ESY program at Emerson for the summer only. At that time, Ms. O'Malley modified the IEP notes to delete a reference to Grandparent's statement regarding their need to consult with an attorney. She also wrote additional comments to

IEP notes. She added that the IEP would be reviewed in 30 days to discuss any necessary adjustments and to add appropriate social/emotional goals.

## SUMMER ESY

109. Student was assigned to the classroom of Ms. Kristin Lee (Ms. Lee) at Emerson for a five week ESY SDC program. Ms. Lee is a credentialed special education teacher experienced in mild to moderate disabilities. There were seven other pupils in the class with mild to moderate learning disabilities. Student was the only kindergarten pupil and only pupil identified as ED. The ESY program is designed as a "readiness" program. It is individualized according to each Student's needs and IEP, but Ms. Lee does not measure pupil's progress as she would during the regular academic school year. Nevertheless, Ms. Lee concluded from her review of Student's work and her observations, that reading and math were areas of strength for Student as he entered the first grade. Student was a good sight reader and she had him lead other pupils in the area of reading. Ms. Lee reported that Student often did not complete his work.

110. Ms. Lee received Student's IEP with its one writing goal about four days after summer ESY commenced and implemented the goal throughout the remainder of ESY. Student continued to have difficulty copying items from the board, holding a pencil and forming letters. Most kindergarteners have problems in this area, but Student exhibited more muscle weakness than other pupils. To encourage pupil to copy from the board, Ms. Lee reduced the number of items he was required to copy. Ms. O'Malley also worked with Student on his writing since it was the source of frustration for him. Student had difficulty correctly forming letters.

111. District attempted to address Student's behavior challenges in ESY without much success. Mr. Wilson's BSP was partially implemented. The behavior plan was very broad and covered every possible trigger for Student's behavior problem with every possible support. For example, possible reasons for the behavior include medication, type,

dose, frequency; insecurities/self-esteem; contact/relationship/feelings with the mother. Predictors for behavior include situations where: Student does not get his way; unexpected changes in routine, transition from indoors to outdoors; feels not getting attention; perceives others bothering him. Interventions included: changes in routine with added transitions; alternative setting when agitated; choice of academic work; quiet time after lunch; opportunities to work alongside other pupils and teach Student to request appropriate peer interaction for socializing and communication.

112. Student's behavior problems continued throughout ESY. Ms. Lee, an AAA assigned to Student and Ms. O'Malley worked with pupil during ESY. Ms. O'Malley attended to Student about three times a week. She is qualified as a behavior intervention case manager (BICM). She reported using most of the recommendations, but did not work on peer interaction, or transitions because the school day ended at lunch time. She admitted that Student had difficulty with group activity and did much better on his own. She did not use a reward system with Student as recommended. Ms. O'Malley did not keep any records of the interventions and from her testimony it appears that the chief intervention she used was removing him from the classroom. Ms. Lee recorded Student's behavior problems. Overall, Student's behaviors remained unchanged from the regular school year. Student had trouble listening. He continued to: run around the class; go under the table or stand on top of the table; and hit and bite other pupils. He was also defiant to Ms. Lee and the AAA and refused to comply with the AAA. Ms. Lee tried to keep Student calm by having him sit next to her. Ms. Lee relied upon the Principal, Ms. O'Malley, or the AAA to remove Student from the classroom. The most common interventions recorded were time outs with the program specialist, the Principal or Ms. O'Malley. Grandparents were also contacted.

#### CANCELLATION OF IEP TEAM MEETING OF JULY 21, 2008

113. On July 17, 2008, counsel for Student and Grandparents notified District in

writing by facsimile transmission to District's Senior Director of Pupil Personnel Services, of her intent to attend the IEP team meeting and to record the meeting.

114. The IEP team meeting was scheduled for July 21, 2008. One hour was reserved for the meeting. Grandparents arrived with their legal counsel. All necessary District representatives were assembled to begin the meeting. Ms. O'Malley's colleagues at the District had not informed her of counsel's facsimile to District. Student's counsel provided her with a copy of the letter. Ms. O'Malley cancelled the meeting. Student filed for due process that day.

#### COMPENSATORY EDUCATION AND SERVICES

115. Grandmother testified about Student's current needs. His behavior has not improved. It remains the same as it was during his time at Clinton. Student currently attends a District general education class pursuant to a stay-put order. Student missed several days of class before he was provided with a general education placement. District had placed Student in an SDC for slow learners. District assigned an aide to Student that also works with other pupils in the class. The first day of the hearing Grandparents were called to pick up Student. Within a month of Student's enrollment for the 2008-2009 school year, Grandparents had been called about a half dozen times about Student's behaviors. Student remains defiant, disruptive, angry, and destructive in his classroom. In fall 2007, Starview appointed a psychologist to work with Student because Student's previous counselors did not succeed in modifying his behaviors.

116. On September 29, 2008, Grandparents executed a consent for referral to LACDMH for purpose of determining if mental health services are necessary for Student to benefit from special education. By signing the consent form Grandparents consented to the release of school records to LACDMH and gave permission to the LACDMH to observe Student in his classroom and discuss Student with District personnel.

117. Grandparents are looking for a program to address Student's behaviors. Grandparents can not determine an appropriate placement, including an NPS without knowing more about the cause of Student's behaviors, appropriate interventions, and any services he needs to address his behaviors or deficiencies.

## LEGAL CONCLUSIONS

### BURDEN OF PROOF

1. The petitioning party has the burden of persuasion. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) Therefore, Student has the burden of persuasion on all issues.

### ANALYSIS OF ISSUE ONE

2. In Issue One, Student contends that he was denied a FAPE because the District failed to timely assess Student in all areas of suspected disability after Grandparents made a referral for assessment. Student first contends that he was denied a FAPE because the initial assessments were not timely. Student further contends that he was not assessed in all areas of suspected disability because the District failed to perform a comprehensive behavioral assessment, including an FAA, an ED assessment and an assessment of conditions co-morbid with ADHD that could explain Student's behaviors, at the time of the initial psychoeducational report. The District disagrees, contending that District cooperated with Grandparents, and as required considered regular education resources and then worked expeditiously once Grandparents referred Student for a special education assessment. Further, it was reasonable for District to limit its initial psychoeducational assessment to ADHD given the recommendations of Student's medical doctor, Student's age, transition to kindergarten and family circumstance. Student's behaviors did not escalate until after the initial assessment at which time District moved quickly to assess Student for ED. Finally, District's actions are consistent with the

prohibition against over-identification of African American pupils for ED. As discussed below, Student met his burden of persuasion on Issue One as to his principle claim that District failed to assess in all areas of suspected disability related to Student's behaviors. Student did not meet his burden of persuasion on health occupational therapy needs.

3. Under the IDEA and state law, children with disabilities have the right to free appropriate public education (FAPE). (20 U.S.C. § 1400(d); Ed. Code, § 56000.) The right to a FAPE arises only after a pupil is assessed and determined to be eligible for special education. (Ed. Code, § 56320.)

4. A referral for a special education assessment means any written request for assessment to identify an individual with exceptional needs made by a parent, teacher, or service provider of the individual. (Ed. Code, § 56029, subds. (a)-(b).) All referrals for special education and related services shall initiate the assessment process. (Cal. Code Regs., tit. 5, § 3021, subd. (a).)

5. A school district shall develop a proposed assessment plan within 15 calendar days of referral for assessment, unless the parent agrees in writing to an extension. (Ed. Code, § 56043, subd. (a).) A parent or guardian has 15 calendar days from the receipt of the referral to agree to the assessment plan. (Ed. Code, § 56043, subd. (b).) Within 60 days of receiving parental consent for an initial assessment, A district must conduct an IEP team meeting to determine whether the pupil is eligible for special education and the educational needs of the pupil. (Ed. Code, § 56043, subd. (c).) The 60 day timeline for the initial IEP team meeting shall be enlarged by school vacations in excess of five days. (Ed. Code, § 56344, subd. (a).)

6. 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 *Vasherese 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].) The pupil must be tested, where appropriate, in areas related to the suspected disability including, health and development, vision, hearing, language function, general intelligence, academic performance, social and emotional status, communicative status, and motor abilities. (20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4); Ed Code, § 56320, subd. (f).) 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 whether or not commonly linked to the disability category in which the child has been classified. (34 C.F.R. § 300.304(c)(6).) 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).)

7. Pupils are eligible for special education if they have other health impairments, a serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, a specific learning disability, speech, language, visual, and hearing impairments, or mental retardation. (20 U.S.C. § 1402(3)(a)(II); 34 C.F.R. § 300.7(A).)

8. "Other health impairment" means "having limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that [...] is due to chronic or acute health problems such as [...] attention deficit hyperactivity disorder...and [a]dversely affects a child's educational performance." (34 C.F.R. § 300.8(c)(9); see also Cal. Code Regs., tit. 5, § 3030, subd. (f) [defining OHI as "[a] pupil has limited strength, vitality or alertness, due to chronic or acute health problems...which adversely affects a pupil's educational performance"].)

9. "Serious emotional disturbance" means a pupil exhibits one or more of the following characteristics over a long period of time and to a marked degree, which adversely affect educational performance: (1) an inability to learn which cannot be explained by intellectual, sensory, or health factors; (2) an inability to build or maintain satisfactory interpersonal relationships with peers and teachers; (3) inappropriate types of behavior or feelings under normal circumstances exhibited in several situations; (4) a general pervasive mood of unhappiness or depression; and (5) a tendency to develop physical symptoms or fears associated with personal or school problems. (Cal. Code Regs., tit. 5, § 3030, subd. (i).) Where African American children are suspected of emotional disturbance, the IDEA acknowledges that "[g]reater efforts are needed to prevent the intensification of problems connected with mislabeling and high dropout rates among minority children with disabilities" as "African-American children are identified as having mental retardation and emotional disturbance at rates greater than their White counterparts." (20 U.S.C. § 1400 (c)(12)(A) & (C).)

10. When a child's behavior impedes the child's learning or that of others, the IEP team must consider strategies, including positive behavioral interventions, and supports to address that behavior. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.346(a)(2)(i), (b); Ed. Code, § 56341.1, subd. (b)(1).) Federal law does not contain a specific definition of "behavioral intervention" and does not impose any specific requirements for how to conduct or implement a functional analysis assessment or behavior intervention plan. (Alex R. v. Forrestville Valley Community Unit School Dist. #221 (7th Cir. 2004) 375 F.3d 603, 615.)

11. California has specific regulations regarding FAA's and BIP's. California has defined "behavioral intervention" as the systematic implementation of procedures that result in lasting positive changes in behavior through skill acquisition and the reduction of problematic behavior. (Cal. Code Regs., tit. 5, § 3001, subd. (d).) "Behavioral interventions"

are designed to provide the individual with greater access to a variety of community settings, social contacts and public events and to ensure placement in the least restrictive environment. (Ibid.)

12. An FAA may be conducted as part of the initial assessments for eligibility. (Ed. Code, § 56320; Cal. Code Regs., tit. 5, § 3052, subd. (b). An FAA includes: 1) systematic observation of the occurrence of the targeted behavior for an accurate definition and description of the frequency, duration, and intensity; 2) systematic observation of the immediate antecedent events associated with each instance of the display of the targeted inappropriate behavior; 3) systematic observation and analysis of the consequences following the display of the behavior to determine the function the behavior serves for the individual, i.e., to identify the specific environmental or physiological outcomes produced by the behavior; 4) ecological analysis of the settings in which the behavior occurs most frequently by looking to factors such as the physical setting, the social setting, the activities and the nature of instruction, scheduling, the quality of communication between the individual and staff and other students, the degree of independence, the degree of participation, the amount and quality of social interaction, the degree of choice, and the variety of activities; 5) review of records for health and medical factors that may influence behaviors such as medication levels, sleep cycles, health, and diet; and 6) review of the history of the behavior to include the effectiveness of previously used behavioral interventions. (Cal. Code Regs., tit. 5, § 3052, subd. (b)(1).)

13. Based on the FAA, interventions may include: 1) altering the antecedent event to prevent the occurrence of the behavior (e.g., providing choice, changing the setting, offering variety and a meaningful curriculum, removing environmental pollutants such as excessive noise or crowding, establishing a predictable routine for the individual); 2) teaching alternative behaviors that produce the same consequences as the inappropriate behavior (e.g., teaching the individual to make requests or protests using

socially acceptable behaviors, teaching the individual to participate with alternative communication modes as a substitute for socially unacceptable attention-getting behaviors, providing the individual with activities that are physically stimulating as alternatives for stereotypic, self-stimulatory behaviors); 3) teaching adaptive behaviors (e.g., choice-making, self-management, relaxation techniques, and general skill development) which ameliorate negative conditions that promote the display of inappropriate behaviors; and 4) manipulating the consequences for the display of targeted inappropriate behaviors and alternative, acceptable behaviors so that it is the alternative behaviors that more effectively produce desired outcomes (i.e., positively reinforcing alternative and other acceptable behaviors and ignoring or redirecting unacceptable behaviors). (Cal. Code Regs., tit. 5, § 3052, subd. (d).) Acceptable responses to the targeted behaviors are: 1) the behavior is ignored, but not the individual; 2) the individual is verbally or verbally and physically redirected to an activity; 3) the individual is provided with feedback (e.g., "You are talking too loudly"); 4) the message of the behavior is acknowledged (e.g., "You are having a hard time with your work"); or 5) a brief, physical prompt is provided to interrupt or prevent aggression, self-abuse, or property destruction. (Cal. Code Regs., tit. 5, § 3052, subd. (e).)

14. Under California regulations, the following criteria apply to BIP's: 1) they must be developed by the IEP team, which must include the behavior intervention case manager; 2) they must be implemented by, or under the supervision of, staff with documented training in behavioral analysis and shall only be used to replace maladaptive behaviors with alternative, acceptable behavior; 3) they must be based on an FAA, be in the IEP and used in a systematic manner; 4) emergency interventions shall not be a substitute for a BIP; 5) behavioral interventions cannot cause pain or trauma; and 6) to the extent possible, the BIP must be developed and implemented in a consistent manner appropriate to each of the individual's life settings. (Cal. Code Regs., tit. 5, § 3052, subd. (a).)

15. California defines a "behavioral intervention plan" as a written part of an IEP "that is developed when the individual exhibits a serious behavior problem that significantly interferes with the implementation of the goals and objectives of the individual's IEP." (Cal. Code Regs., tit. 5, § 3001, subd. (f).) The BIP must contain a statement of the frequency of consultation between the behavior intervention case manager and the parents and staff responsible for implementing the plan. In addition, the BIP must contain: 1) a summary of relevant and determinative information gathered from a functional analysis assessment; 2) an objective and measurable description of the targeted maladaptive behavior(s) and replacement positive behavior(s); 3) the individual's goals and objectives specific to the behavioral intervention plan; 4) a detailed description of the behavioral interventions to be used and the circumstances for their use; 5) specific schedules for recording the frequency of the use of the interventions and the frequency of the targeted and replacement behaviors, including specific criteria for discontinuing the use of the intervention for lack of effectiveness, or replacing it with an identified and specified alternative; 6) criteria by which the procedure will be faded or phased-out, or less intense/frequent restrictive behavioral intervention schedules or techniques will be used; 7) those behavioral interventions which will be used in the home, residential facility, work site or other noneducational settings; and 8) specific dates for periodic review by the IEP team of the efficacy of the program. (Ibid.) The California Legislature intended that if behavior interventions were used for a special education student, that the behavioral interventions "ensure a pupil's right to placement in the least restrictive environment." (Ed. Code, § 56520, subd. (b)(1); Cal. Code Regs., tit. 5, § 3001, subd. (d).)

16. In matters alleging procedural violations, a denial of FAPE may only be shown if the procedural violations that occurred impeded the child's right to FAPE, significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of FAPE, or caused a deprivation of educational benefits.

(Ed. Code, § 56505, subd. (f)(2); *M. L., et. al., v. Federal Way* (9th Cir. 2004) 394 F.3d 634, 653.) The failure to perform an FAA when one is warranted is a procedural denial of a FAPE and an IEP that does not appropriately address behavior that impedes a child's learning denies a student a FAPE. (*Park v. Anaheim high School Dist.*, supra, 464 F.3d 1025, 1032; *Neosho R-V School Dist. v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028; *Escambia County Bd. of Ed.* (S.D. Ala. 2005) 406 F.Supp.2d 1248.)

17. 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. Supportive services include psychological services, counseling services, occupational therapy, therapeutic recreation, and social work services. (20 U.S.C. § 1401(26); Ed. Code, § 56363, subd. (a) [In California, related services are called designated instruction and services].) To be eligible for special education, the pupil must require instruction, services, or both that cannot be provided with modification of the regular school program. (Ed. Code, § 56026, subd. (b).)

18. In order to provide a student with a FAPE, the district must determine his unique needs and design a program to meet those needs. Districts are not required to maximize a child's potential. They are merely required to provide a "basic floor of opportunity." (*Rowley v. Bd. of Education of Hendrick Hudson* (1982) 485 U.S. 176, 208, 102 S.Ct. 3034, 3051, 73 L.Ed.2d 680.) De minimus benefit, or only trivial advancement, however, is insufficient to satisfy the Rowley standard of "some" benefit. (*Walczak v. Florida Union Free School District* (2d Cir.) 142 F.3d 119, 130.) The Ninth Circuit Court of Appeals has endorsed the "snapshot" rule, explaining that the actions of a school district

cannot "be judged exclusively in hindsight" but instead, "an IEP must take into account what was, and what was not, objectively reasonable . . . at the time the IEP was drafted." (Adams v. State of Oregon (9th Cir. 1999) 195 F.3d 1141, 1149, citing Fuhrman v. East Hanover Bd. of Education (3d Cir. 1993) 993 F.2d 1031, 1041.)

19. The IEP team shall review the assessment results, determine eligibility, determine the content of the IEP and make program placement recommendations. (Ed. Code, § 56342, subd. (a).)

20. 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 with removal from the regular education environment occurring only when the nature and severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56031.) The measure of whether a Student received an educational benefit under the IDEA is not limited to academic needs, but includes social and emotional needs that affect academic progress, school behavior, and socialization. (San Diego v. SEHO (9th Cir. 1996) 93 F.3d 1458, 1467. The Student's IEP defines what goals are relevant in providing a measure of whether a pupil received an educational benefit in the placement. (Ibid.)

21. As to Issue One, while Student provided persuasive evidence that District failed to timely assess Student in all areas of suspected disability, timeliness alone is not determinative. Grandparents admittedly did not intend to refer Student for a special education assessment prior to January 4, 2008. Grandparents were participating in the SST and District was attempting to exhaust all regular education resources to assist Student. Grandparents did not intend the November 29, 2007 referral from Student's doctor as a

referral for a special education assessment. After winter recess, however, Grandparents submitted two letters referring Student for special education, dated January 4, 2008 and January 12, 2008. District was in recess until January 7, 2008. On that day Grandparents were ordered by the Superior Court to refer Student for a special education assessment. Based upon the Superior Court order, there is no doubt of Grandparents' intent as of January 12, 2008 (the January 12 referral). Accordingly, the January 4, and January 12, letters, taken together constitute Grandparents initial referral of Student to District for special education assessment. The assessment plan should have been completed by January 28, 2008. Mr. Wilson did not prepare an assessment plan until February 7, 2008, nine days later. Grandparents signed the assessment plan the same day. School was recessed for ten days between March 21 and March 31, 2008, so the deadline for scheduling an IEP team meeting was extended by 10 days. The IEP team meeting should have been held no later than April 18, 2008. District scheduled an IEP team meeting for April 24, 2008. In light of spring recess, Student's IEP was delayed approximately two weeks. Grandparents requested a continuance of the scheduled April 24, 2008 IEP team meeting so any delay between the IEP team meeting date of April 24, 2008 and May 8, 2008, was by agreement. While the failure to provide an assessment plan by January 22, 2008, was a procedural violation of the IDEA and the Education Code provisions governing FAPE, it only rises to the level of a denial of FAPE if it resulted in the denial of educational benefits to Student or the deprivation of Parents rights or opportunities to participate in the decision-making process. Although the assessment plan was untimely, there is no evidence that the nine day delay denied Student an educational benefit or denied Grandparents participation in the IEP.

22. Student met his burden of proof that District failed to assess Student in all areas of suspected disability related to his behaviors. District denied Student a FAPE by failing to conduct an FAA. Grandparents referred Student for a FAA on February 8, 2008.

The FAA if timely conducted would have been completed and discussed at the initial IEP team meeting on May 8, 2008. Mr. Wilson never responded to this request and couldn't explain why an FAA was never done. Mr. Wilson was right to confirm Student's diagnosis of ADHD based upon Student's medical diagnosis. However, the general education resources to effectively manage Student were exhausted by the time Student came back from winter break. At the time Mr. Wilson presented Grandparents with the assessment plan, District was presented with unequivocal information that Student's behaviors were extreme and were not limited to inattention and misbehaviors attendant to ADHD. Student was kicking and biting others, including his teacher, and was generally engaging in behavior that was dangerous to himself and to others. Mr. Wilson maintained that Student's behaviors were manifestations of external factors, such as his age, adjustment to school and his family situation, until he expressed suicidal ideations. However, by February the Principal concluded that Student's behaviors could no longer be attributed to adjustment problems common to kindergartners.

23. Grandparents again requested an FAA at the initial IEP team meeting on May 8, 2008, and District agreed to conduct one. By that time Student's behaviors included suicidal ideations. District's slim resources did not excuse its failure to conduct an FAA upon referral by Grandparents, especially where District had ample time to administer standard regular education behavior interventions, the interventions failed, and Student's behavior was dangerous and disruptive. District's referral of Student to the PET team on May 15, 2008, did not discharge its responsibility to perform an FAA as the PET team was an emergency intervention only. Mr. Wilson did not have time to conduct the extensive observations and data collection required of an FAA. Presumably he knew of his time limitations in February, when Grandparents referred Student for an FAA, and again on May 8, 2008, when they repeated their request to the IEP team. District should have retained an independent agency qualified to perform an FAA instead of avoiding Grandparent's

multiple requests. As a result of District's failure to conduct an FAA, critical assessment information was not available to the IEP team to develop measurable behavior goals, identify services and a placement that was consistent with Student's unique needs. Student's behavioral challenges were the centerpiece of his eligibility for special education and his IEP. The FAA was essential to the development of behavior goals and objectives and behavior interventions, including a BIP if warranted. District's failure to make a firm offer until June 12, 2008, and then to make an offer that did not include behavior goals indicates that even District personnel did not have sufficient guidance to develop an IEP with measurable behavior goals and interventions without an FAA. At each IEP team meeting Grandparents asked how District intended to address Student's behaviors. District failed to articulate Student's unique behavioral needs and behavioral interventions, through behavior goals and a behavior plan. Furthermore, Grandparents could not make a determination of the appropriateness of District's June 12, 2008, offer, and ultimately could only agree to a temporary placement in an SDC during ESY to make sure Student had available a summer school program. District's actions thereby denied Student an educational benefit and also deprived Grandparents of the ability to properly participate in the IEP process

24. District denied Student a FAPE by failing to assess Student for ED until June 1, 2008. As a result of the Principal's concerns about Mr. Wilson's initial psychoeducational assessment, Mr. Wilson was instructed by the Principal and the IEP team at the May 8, 2008 IEP team meeting to prepare an additional assessment of Student's behaviors. Mr. Wilson did not prepare his assessment report for ED until June 1, 2008. Mr. Wilson should have investigated Student's eligibility for ED earlier. Some of the information obtained from the rating scales Mr. Wilson used to determine whether Student had ED were reflected in earlier rating scales, including the Vanderbilt Scale, which Mr. Wilson did not review. Mr. Wilson stated that he was guided in his initial assessment by his desire to place Student in

the LRE. Mr. Wilson's delay in assessing Student's extreme behaviors can not be rationalized by the policy against over-identification of African-Americans as ED. The policy does not prohibit assessments or require that assessments be delayed. The measure of whether Student received an educational benefit extends to his social and emotional needs that affect academic progress. District's failure to fully assess Student's emotional needs before June 1, 2008, further delayed an educational program that addressed Student's severe behavior and emotional challenges.

25. District's failed to conduct a sufficiently comprehensive assessment to identify all of Student's needs whether or not commonly linked to ADHD. Dr. Patterson convincingly testified that District should have identified psychological conditions which are co-morbid with ADHD to aide in the development of a behavior intervention plan. School psychologists, unlike clinical psychologists, or neuropsychologists, are generally not required to conduct a comprehensive psychological evaluation of a pupil. Here, Student's behaviors were extreme and could not be effectively controlled with general education interventions. District was on notice that ADHD was not the only explanation for Student's behaviors. Student was aggressive and was kicking and biting; Student's parents were drug abusers; Student's ADHD medication was not controlling his behavior in the classroom; Student could not control his own behavior; Student was suicidal; Student's father was bi-polar. District's failure to assess for other psychological or neurological conditions, including in conduct disorder, in utero drug exposure, bi-polar disorder was a procedural violation that denied Student educational benefit. Until the assessments are performed it is unknown as to what, if any, psychological and neurological conditions exist that inform Student's behaviors and are responsive to specific interventions.

26. Student did not meet her burden of proof that District failed to assess Student's health. The evidence showed that District requested and received information

from Grandparents as part of the developmental history and was advised of Student's medication.

27. Student did not provide any evidence that at the time of the initial assessment or second assessment that Student required an occupational therapy assessment to fully address all areas of suspected disability. In pleadings, Student claimed that he had a "sensory" problem. Student failed to define what he meant as "sensory" and sensory is not an area of suspected disability. The record only identified Student's motor abilities. Student was athletic. He had problems with his penmanship, but all kindergartners do and at first it was expected that his penmanship would improve over time. At the time Mr. Wilson performed his two assessments Student had difficulty with penmanship, but there was no indication that he had a physical problem with writing. Student's suspected disabilities were all behavior-related. Ms. Lee, Student's ESY teacher was the first teacher to notice that Student's displayed atypically weak muscles when writing and she communicated her observation at the hearing. Accordingly, during the snapshot of time within which Mr. Wilson conducted his assessments and District made its offer of services and placement at the June 12, 2008 IEP team meeting, Student did not present with a suspected disability that would require an occupational therapy assessment.<sup>7</sup>

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<sup>7</sup> Grandparents requested assistive technology but Student did not claim that District failed to provide assistive technology as requested. Assistive technology is not an area of suspected disability. District was not obligated to conduct an assistive technology assessment until Student had a suspected disability that would be served by assistive technology. Student produced no evidence to show that Student's behaviors could be mitigated by assistive technology. The June 12, 2008 IEP stated that assistive technology wasn't required.

28. In sum, Student met his burden of proof that District failed to assess Student in all areas of suspected disability, including a FAA and ED, and thus failed to provide Student a FAPE. (Legal Conclusions 1-20; Factual Findings 1-112.)

#### ISSUE TWO AND THREE

29. In Issues Two and Three, Student claims that District failed to provide a FAPE for the 2007-2008 school year, and to offer a FAPE for the 2008-2009 school year. Both issues address the sufficiency of the offer contained in the June 12, 2008 IEP and accordingly will be addressed together. District maintains that it wasn't required to provide Student a FAPE during the 2007-2008 school year as Grandparents didn't consent to the IEP until after the 2007-2008 school year ended. District also maintains that Student wasn't deprived of a FAPE during the 2007-2008 school year as Student performed well academically and received an educational benefit. Finally District maintains that it made an appropriate offer of placement for the 2008-2009 school year. As set forth below, Student fulfilled his burden of proof on these issues.

30. In order to provide a student with a FAPE, the district must determine his unique needs and design a program to meet those needs. Districts are not required to maximize a child's potential. They are merely required to provide a "basic floor of opportunity." (*Rowley v. Bd. of Education of Hendrick Hudson* (1982) 485 U.S. 176, 208, 102 S.Ct. 3034, 3051, 73 L.Ed.2d 680.) De minimus benefit, or only trivial advancement, however, is insufficient to satisfy the Rowley standard of "some" benefit. (*Walczak v. Florida Union Free School District* (2d Cir.) 142 F.3d 119, 130.) A child's academic progress must be viewed in light of the limitations imposed by his or her disability and must be gauged in relation to the child's potential. (*Mrs. B. v. Milford Board of Education* (2d Cir. 1997) 103 F.3d 114, 1121.) The IDEA and state law require that, in order to provide FAPE, a

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school district must develop an IEP that is reasonably calculated to provide the child with an educational benefit. (Rowley, Supra, at p. 203.)

31. Each local educational agency shall have an IEP in effect for each individual with exceptional needs within its jurisdiction at the beginning of each school year. (Ed. Code, § 56344, subd.(c).)

32. Whether an IEP offered a student a FAPE is determined based on what was reasonable at the time and not in hindsight. (Adams v. State of Oregon, supra, 195 F.3d at p. 1149.)

33. When developing an IEP, the IEP team must consider the child's strengths, the parent's concerns, the results of recent assessments, and the academic, developmental and functional needs of the child. (Ed. Code, § 56341.1, subd. (a).) An IEP must contain a statement of measurable annual goals related to "meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum" and "meeting each of the child's other educational needs that result from the child's disability." (20 U.S.C. § 1414(d)(1)(A)(ii); Ed. Code, § 56345, subd. (a)(2).) The IEP must also contain a statement of how the child's goals will be measured. (20 U.S.C. § 1414(d)(1)(A)(viii); Ed. Code, § 56345, subd. (a)(3).) The IEP must show a direct relationship between the present levels of performance, the goals, and the educational services to be provided. (Cal. Code Regs., tit. 5, § 3040, subd. (c).)

34. Extended school year services means special education and related services that are provided to a child with a disability beyond the normal school year of the public agency in accordance with the child's IEP and at no cost to the parents of the child and meet the standards of the state educational agency. (34 C.F.R. § 300.106 (b)(1) & (2) (2006).) Extended school year services must be provided only if a child's IEP team determines, on an individual basis, that the services are necessary for the provision of FAPE to the child. (34 C.F.R. § 300.106 (a)(2) (2006); Ed. Code, § 56345, subd. (b)(3).)

35. The continuum of program options includes, but is not limited to: regular education; resource specialist programs; designated instruction and services; special classes; nonpublic, nonsectarian schools; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; and instruction using telecommunication instruction in the home or instructions in hospitals or institutions. (Ed. Code, § 56361.) School districts must ensure, to the maximum extent appropriate: 1) that children with disabilities are educated with non-disabled peers; and 2) that special classes or separate schooling occur only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56031; 34 C.F.R. 300.114 (a).) To determine whether a special education student could be satisfactorily educated in a regular education environment, the Ninth Circuit Court of Appeals has balanced the following factors: 1) "the educational benefits of placement full-time in a regular class"; 2) "the non-academic benefits of such placement"; 3) the effect [the student] had on the teacher and children in the regular class"; and 4) "the costs of mainstreaming [the student]." (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (Rachel H.)) [adopting factors identified in *Daniel R.R. v. State Board of Ed.* (5th Cir. 1989) 874 F.2d 1036, 1048-1050]; see also *Clyde K. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 35 F.3d 1396, 1401-1402 [applying Rachel H. factors to determine that self-contained placement outside of a general education environment was the LRE for an aggressive and disruptive student with attention deficit hyperactivity disorder and Tourette's Syndrome].) If it is determined that a child cannot be educated in a general education environment, then the LRE analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R. v. State Board of Ed.*, *supra*, 874 F.2d at p. 1050.)

36. Here, as to Issues Two and Three Student persuasively established that District failed to provide Student a FAPE. Although the first IEP team meeting was held on May 8, 2008, and Student was identified as eligible for special education at that time, District did not make a firm offer until the third IEP team meeting on June 12, 2008. Overall, as set forth in issue one above, the record unequivocally established that District's offer of services and placement for the 2007-2008 and 2008-2009 school year was made without the benefit of a comprehensive assessment of all areas of suspected disability, specifically an FAA and ED. As a result, the IEP was developed without sufficient information to develop an appropriate IEP, including behavior goals and objectives, appropriate behavior interventions, appropriate services, and an appropriate placement. Without an FAA and without the full understanding of how Student's serious emotional disturbance affected his access to education, the IEP team could not develop an appropriate IEP.

37. As to Issues Two and Three (a), the record unequivocally established that District failed to offer and provide measurable annual goals and objectives that addressed all of Student's unique needs, including behavior, attention, compliance and impulsivity. Student's behaviors were the impediment to his education. Student's behavior challenges were well-documented and the IEP acknowledged that Student's behaviors impeded learning of self and others due to verbal and physical aggression. Yet District failed to develop behavior goals as part of the June 12, 2008 IEP. Despite Student's unrelenting behavior challenges and physical aggression, the IEP limited behavior intervention and strategies to verbal praise and tangible rewards. Moreover, Student's ADHD was uncontroverted as was his attention, compliance, and impulsivity challenges. Nevertheless, District failed to develop any behavior goals, including goals which addressed ADHD related behaviors such as attention, compliance, and impulsivity.

38. As to Issues Two and Three (b), the record also unequivocally established that no appropriate behavior interventions, whether through a BSP or a BIP, were presented or discussed at the June 12, 2008 IEP team meeting. Mr. Wilson testified that he intended to present BSP at the IEP team meeting, but he "ran out of time." District did not notify Grandparents that there was a BSP or ever provide Grandparents the BSP, and it was not attached to the June 12, 2008, IEP. Mr. Wilson may have prepared the plan and provided it to Ms. O'Malley for summer ESY, but it was not part of the June 12, 2008 offer. Further, as set forth in issue one above, by the time of the June 12, 2008 IEP team meeting, given the severity of Student's behaviors, and the failure of general education interventions, Student required behavior goals and interventions that were more specifically tied to the factors considered in an FAA. District's ability to make an informed proposal was defeated by its failure to conduct an FAA. As a result of its failure to conduct an FAA, its June 12, 2008, offer was wholly deficient.

39. As to Issues Two and Three (c), Student persuasively established that District failed to offer or provide appropriate services. As stated above, without comprehensive assessments, the IEP team was deprived of necessary information to determine what services to provide Student. As of May 8, 2008, the IEP team determined that Student required a one-on-one aide and provided Student a one-on-one aide. This aide turned out to be untrained and unprofessional and only worked with Student a few weeks. In the June 12, 2008 IEP, District offered a AAA assigned to the SDC placement District offered. District did not offer Student a one-on-one aide trained in behavior interventions. District's offer of a general classroom aide untrained in behavior interventions was inappropriate.

40. As to Issues Two and Three (d), Student persuasively established that District failed to offer or provide an appropriate placement in the least restrictive environment. Between May 8, 2008 and June 12, 2008, District and Grandparents discussed the full range

of educational placement options, including general education, an SDC and an NPS. As the factual findings make clear, Student required regular education academics, but at the time of the June 12, 2008 IEP, there was an indication that Student was a danger to himself and to others in the general education class. Although Student had support from his general education teachers, Starview, the Clinton's counselor and Principal, to date an indepth behavioral plan had not been implemented with the assistance of a trained one-on-one aide. While the circumstances up to that point indicated that Student's behavior challenges were not a fit for the general education environment, an FAA had not been conducted and behavior goals or a appropriate behavior interventions developed to ascertain whether Student could function with appropriate behavior services and supports in the general education environment. In short, there was insufficient information about appropriate behavior interventions, for Grandparents or District to consider alternative placements.

41. At the time of the June 12, 2008, IEP team meeting, District's offer of placement in a District SDC was not an appropriate placement in the least restrictive environment. At the time of its offer, District was not convinced a District SDC was appropriate for Student. District admitted that there was no appropriate SDC for an elementary pupil, like Student, with severe and dangerous behaviors, but with academic abilities equivalent to his general education peers. At the time District offered placement in the SDC for ESY, the principle advantage of the SDC was the smaller teacher-student ratio and a AAA assigned to the class. Student still had to rely upon the resources available at the general education campus which at that time were insufficient to address his behavioral needs. At the time it made its offer, District knew that it did not have an appropriate SDC available to Student during the for the regular 2008-2009 school year.

42. District was prepared to offer Student NPS placement at the June 12, 2008 IEP meeting for summer ESY and the 2008-2009 school year. The NPSs District intended to

offer were the most restrictive environment as they were located on campuses that did not include general education populations. Before identifying possible NPS placements, District failed to ascertain which NPSs schools were enrolling first grade pupils, like Student, for the 2008-2009 school year. District claimed that the NPSs selected had trained counselors and staff that could address Student's needs throughout the school day and a smaller teacher-student ratio. However, Grandparents were concerned about placing Student in a more restrictive environment. They could not make a determination of whether an NPS was appropriate for Student because they had insufficient information about necessary behavior supports and services to make a decision. District failed to offer Student an appropriate placement for the 2008-2009 school year.

43. District maintains that Student wasn't denied a FAPE for the 2007-2008 school year because Student didn't consent to the IEP until after the regular school year ended. (Ed. Code, § 56344(c).) District knew its assessment was not comprehensive and that its offer of the RSP program for writing was deficient and decided to continue the IEP team meeting without completing the IEP. District further maintains that Student was performing at grade level in most areas so District did not deprive him of a FAPE as he was receiving some academic benefit. However, Student was only accessing about 50 percent of his classroom instruction or activities due to his behaviors.

44. In sum, as to Issues Two and Three, the evidence supports a finding that Student was denied a FAPE for the 2007-2008 and 2008-2009 school year. The June 12, 2008 IEP was wholly deficient as it was prepared without the guidance of comprehensive assessments in all areas of suspected disability regarding Student's behavior and failed to address Student's unique needs with measurable goals, behavior interventions, and an appropriate placement. (Legal Conclusions 1, 3, 6, 10-20, 29-34; Factual Findings 1-114.)

## REMEDIES

45. As set forth below, and in consideration of Student's current needs

referenced in factual findings 115-117, Student is entitled to remedies for District's failure to timely assess Student in all areas of suspected disabilities and to provide Student a FAPE. Compensatory education is an equitable remedy; it is not a contractual remedy. (Parents of Student W v. Puyallup Sch. Dist., No. 3 (9th Cir.1994) 31 F.3d 1489, 1497.) The law does not require that day-for-day compensation be awarded for time missed. (Ibid.) Relief should be designed to ensure that the student is appropriately educated within the meaning of the law. (Ibid.) An award to compensate for past violations must rely on an individualized analysis, just as an IEP focuses on the individual student's needs. (Reid ex rel. Reid v. District of Columbia (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."

46. Due to District's failure to offer Student a FAPE, Student is entitled to remain in a general education placement at his home school until District and Grandparents agree to another placement at the IEP team meeting, or it is determined at a due process hearing that the District has offered Student a FAPE. District shall provide Student with a one-on-one aide with documented training in behavior analysis with an emphasis on positive behavioral interventions so long as Student remains in a general education placement at a District school.

47. Under the facts and circumstances of this case, District will be required to fund an independent FAA, and if warranted by the FAA, a behavior intervention plan. Within 15 days of the date of this decision District shall contract with a qualified independent assessor of Student's choice and shall pay the independent assessor directly to perform an FAA, and prepare an assessment report. The District shall pay for the independent assessor's attendance at IEP team meetings. The District shall also fund the development of a behavior intervention plan by this independent assessor as determined appropriate by the IEP team.

48. District will also be required to fund a neuropsychological assessment. Student's ADHD may be co-morbid with other conditions which may impact the effectiveness of behavior interventions. There was sufficient evidence that a neuropsychologist would be qualified to rule out other co-morbid psychological conditions or neurological conditions and recommend appropriate interventions responsive to these conditions which will permit Student access to his education. Student's ED assessment identified his behaviors but not necessarily the reasons for the behaviors or appropriate interventions.

49. The evidentiary record does not support a finding that Student requires compensatory education or play therapy. Student failed to provide sufficient evidence of Student's subject matter weaknesses other than spelling that can not be addressed in the classroom. Further, it is unclear from the evidentiary record whether Student's spelling difficulties are behavior related and would be effectively resolved once Student's behaviors are addressed, or are related to his medicine. Similarly, Student failed to provide evidence of social skills classes which could benefit Student before an appropriate behavior plan is developed.

## ORDER

1. Student is entitled to remain in a general education placement at his home school. District shall also provide Student with a one-on-one aide throughout the school day with documented training in behavior analysis with an emphasis on positive behavioral interventions. The placement and aide shall remain in place until District and Grandparents agree to another placement at the IEP team meeting, or it is determined at a due process hearing that the District has offered Student a FAPE.

2. District shall fund an independent FAA. Within 15 days of this decision District shall contract with and fund a qualified independent assessor of Student's choice and shall pay the independent assessor directly to perform an FAA and prepare an

assessment report, which includes specific recommendations for the IEP team. The District shall pay for the independent assessor's attendance at IEP team meetings and for any further behavior intervention strategies which need to be developed as considered appropriate by the IEP team, up through and including a BIP if determined necessary. District shall cooperate with Student and supply Student with a list of qualified independent assessor and the agency criteria for selecting independent assessors.

3. District shall fund an independent neuropsychological assessment to identify other psychological and neurological conditions that explain Student's behaviors, including, but not exclusive to, bi-polar disorder, conduct disorder, in utero drug exposure, and to recommend appropriate services, interventions and placement. Within 15 days of this decision District shall contract with a qualified independent assessor of Student's choice and shall pay the independent assessor directly to perform a neuropsychological assessment, prepare a report, and attend IEP team meetings. District shall cooperate with Student and supply Student with a list of qualified independent assessor and the agency criteria for selecting independent assessors.

4. District shall convene an IEP team meeting within 60 days of this order, unless extended by agreement, to develop a complete and appropriate IEP. The IEP team will specifically review the FAA and the neuropsychological assessment, and develop appropriate behavior intervention strategies, including a BIP if warranted by the FAA. The District shall pay for the independent assessors' attendance at the IEP.

5. Student's other requests for relief are denied.

## 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, Student substantially prevailed on Issue One and prevailed on Issues Two and Three. District partially prevailed on Issue One.

## 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).)

DATED: December 1, 2008

\_\_\_\_\_/s/\_\_\_\_\_

EILEEN M. COHN

Administrative Law Judge

Office of Administrative Hearings