

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

In the Matter of:

STUDENT,

Petitioner,

v.

DEPARTMENT OF CORRECTIONS AND  
REHABILITATION, JUVENILE JUSTICE  
DIVISION,

Respondent.

OAH CASE NO. N 2007070131

DECISION

Judith A. Kopec, Administrative Law Judge, Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter on October 29 through November 1, 2007, in Stockton, California.

Christian M. Knox and Erika Hinchee, Attorneys at Law, represented Student. Student's parents attended the hearing on October 29 and 30, 2007.

Christine M. Murphy, Deputy Attorney General, represented the Department of Corrections and Rehabilitation, Juvenile Justice Division (Department). TiAnne Rios, Assistant Superintendent of Education, and Nancy Hanley, Superintendent, N. A. Chaderjian High School (Chad), also attended.

Student filed a request for due process hearing on July 6, 2007. On August 8, 2007,

OAH granted a continuance of the hearing. The record remained open until November 19, 2007, when closing briefs were received, and the record was closed.

## ISSUES

1. Did Department deny Student a free appropriate public education (FAPE) during the 2005-2006 and 2006-2007 school years and extended school years, beginning July 6, 2005, by:

- a. Failing to meet Student's needs in the areas of core academics, social and emotional functioning, and behavior?
- b. Failing to place him in an appropriately-structured special day class?
- c. Failing to have a behavior support plan?
- d. Failing to provide appropriate mental health therapy services?

2. Did Department fail to provide Student three hours a week of services by a Resource Specialist, as required by the individualized education program (IEP)?

3. Did Department fail to provide Student a referral for mental health services under Government Code, Chapter 26.5?

4. Did Department fail to hold a timely annual IEP team meeting on or before May 31, 2006?

## CONTENTIONS OF THE PARTIES

Student contends that during the 2005-2006 and 2006-2007 school years and extended school years, beginning July 6, 2005, Department failed to meet his unique needs in the areas of reading, spelling, writing, math, social and emotional functioning, and behavior. He contends that the IEPs did not include reading, spelling and mental health goals, or an adequate behavior goal.<sup>1</sup> Student contends he required a special day class

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<sup>1</sup> Student alleged for the first time in his closing brief that Department did not

with a structured, therapeutic environment to meet his needs.

Department contends it met Student's needs by providing three hours a week of resource specialist support in general education classes and one-half hour a week of counseling from a school psychologist. Department contends Student benefited from general education classes and made satisfactory progress toward attaining a high school diploma.

Student claims that he required, and Department failed to provide, a behavior support plan. Department contends it met Student's behavioral needs by implementing a behavior goal and a behavior support plan until January 2007. Department claims the January 2007 IEP met Student's behavioral needs through a behavior goal, and a behavior support plan was not required.

Student contends he required comprehensive mental health services to meet his needs, including one hour a week of individual counseling, two hours a week of group counseling, family therapy, and medication management. Department contends it met Student's mental health needs through counseling services provided by a school psychologist. Department further contends that while Student did not need additional mental health services to access his education, he received mental health services as part of his juvenile justice program.

Student contends Department failed to provide him three hours a week of services from a resource specialist, as required by his IEP.<sup>2</sup> Student contends the assigned resource

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provide measurable goals or adequate present levels of performance in his IEPs. These claims were not at issue in the hearing and are not decided.

<sup>2</sup> Student alleged for the first time in his closing brief that Department failed to provide the counseling services required by his IEP. This claim was not at issue at hearing and is not decided.

specialist did not provide the required amount of services, reported more time providing services than he actually did, and improperly included services from a teaching assistant in the time he reported. Department contends its resource specialist provided Student more services than required by the IEP.

Student contends Department was required to refer him for mental health services under Government Code section 26.5 because he needed more intensive mental health therapy to meet his educational needs.<sup>3</sup> Department contends it was not required to provide Student such a referral because it met his mental health needs.

Student contends Department failed to timely hold an IEP team meeting in May 2006. Department acknowledged it did not hold a timely meeting in May 2006, but contends that since Student's services did not change when the meeting was eventually held, he was not denied a FAPE as a result.

## REQUESTED RELIEF

Student requests compensatory education in the form of one-to-one instruction, five hours per day, five days a week, for one year; individual, group and family mental health therapy, and medication management services for one year; and training of Department's staff in specified areas, including the requirements for convening IEP team meetings, the relationship between mental health and educational needs, and the difference between a special day class and resource specialist services.

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<sup>3</sup> Student alleged for the first time in his closing brief that Department did not assess him in the area of mental health. This claim was not at issue in the hearing and was not decided.

## FACTUAL FINDINGS

### BACKGROUND INFORMATION

1. Student is 20 years old and is eligible for special education services in the categories of emotional disturbance and, as a result of attention deficit hyperactivity disorder, other health impairment. He entered Department in 2002 in the ninth grade. He attended Johanna Boss High School (Boss) from July to October 2005, when he transferred to Chad, which he currently attends. Student remained in the ninth grade during the 2005-2006 and 2006-2007 school years. Department operates both Boss and Chad and was responsible for providing Student special education and related services.

### STUDENT'S UNIQUE NEEDS BEGINNING JULY 2005

2. A local educational agency (LEA) must provide special education and related services to meet a student's unique needs, including the student's academic, social and emotional needs.

3. Student's triennial review was conducted on May 31, 2005. The information available to the IEP team at that time is the primary source of information about Student's needs as of July 2005.

### EDUCATIONAL AND PYSCHOEDUCATIONAL ASSESSMENTS OF MAY 2005

4. David Fudala, Student's special day class teacher at Boss, conducted an educational assessment.<sup>4</sup> He administered the Woodcock Johnson III Tests of Achievement (WJ-III). Student's standard score in broad reading was 94, with a grade equivalent of 10.1;

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<sup>4</sup> Mr. Fudala holds single subject, learning handicapped, and resource specialist credentials. He has been a special day class instructor with Department since 2001, and had previously been a resource specialist with Department.

broad math was 78, with a grade equivalent of 6.2; and broad written language was 83, with a grade equivalent of 6.5.<sup>5</sup> Student's standard score in reading fluency was 100, with a grade equivalent of 11.9; and passage comprehension was 83, with a grade equivalent of 5.8. His standard score in math calculations was 81, with a grade equivalent of 6.7; and math fluency was 87, with a grade equivalent of 8.2. His standard score in spelling was 84, with a grade equivalent of 6.6; writing fluency was 93, with a grade equivalent of 8.4; and writing samples was 61, with a grade equivalent of 2.5.

5. Dr. Mary Ann O'Neill, school psychologist for Department, conducted a psychoeducational assessment of Student.<sup>6</sup> She administered the Differential Test of Conduct and Emotional Problems and determined that Student's emotional problems were in the average range, and his conduct problems were in the significant range. Student's elevated scores on the Millon Adolescent Clinical Inventory indicated the development of antisocial and borderline personality disorder traits; the need for counseling in the areas of social skills, family relationships, and unresolved trauma; and continued risk for conduct disorder, substance abuse, and depression.

6. Dr. O'Neill determined that Student did not exhibit any processing deficits or significant discrepancies between ability and achievement. She concluded that Student's emotional disturbance, which was more pervasive than his attention deficit disorder, was affecting his educational performance.

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<sup>5</sup>A grade equivalent score is expressed as a grade and number of months in the grade. For example a grade equivalent of 6.2 is sixth grade, two months.

<sup>6</sup>Dr. O'Neill holds master's and doctoral degrees in counseling psychology, and a credential in school psychology, and is a licensed counselor and educational psychologist. She has worked for over 18 years with Department as a school psychologist and has extensive experience as a therapist.

7. Dr. O'Neill recommended that Student remain in a special day class; a positive behavior support plan be developed to facilitate school attendance, on-task behavior, and completion of class assignments; counseling services continue to monitor his academic and behavioral progress in school; and a referral be made to Department's mental health staff to evaluate whether Student suffered from depression and needed medication. In addition, she recommended the following accommodations: following a less desirable task with a more desirable one in order to motivate Student; incrementally providing directions so that Student completed one step before being instructed on the next; providing assignments in small batches; and preparing a contract outlining behavioral expectations and available reinforcements for proper behavior. Dr. O'Neill also noted that experiencing repeated failure may cause Student to refuse to attend school.

#### NEEDS IN THE AREA OF CORE ACADEMICS BEGINNING JULY 2005

8. Student contends he had needs in the areas of math, written expression, reading and spelling. Student had been in the ninth grade since entering Department in 2002, and as of May 2005, he had earned a total of only 15.5 of the 200 credits needed for high school graduation.

9. Student was unable to meet the benchmarks for the math goal in his June 2002 IEP, which involved math calculations with fractions, decimals, and percentages. Student was unable to meet any of the benchmarks for the math goal from the April 2004 IEP, which involved fractions, chart graphs, and geometric measurements. Mr. Fudala noted on Student's May 2005 IEP that he cannot perform math calculations with fractions, percentages, ratios, or decimals. Student's broad math and math calculation scores from the WJ-II and his lack of progress on his prior math goals establish that he had a unique need in the area of math calculations.

10. Student was unable to meet the benchmark for the June 2002 writing goal requiring him to write a three-paragraph essay. Student was unable to meet any of the

benchmarks for the writing goal from the April 2004 IEP, which required him to write one-, two-, and three- paragraph essays. The broad written language and writing sample scores from the WJ-III and Student's lack of progress on his prior writing goals establish that he had a unique need in the area of writing.

11. Student contends that he had a unique need in reading as indicated by his WJ- III scores. Student's standard score in reading fluency was 100, with a grade equivalent of 11.9, and passage comprehension was 83, with a grade equivalent of 5.8. According to Dr. O'Neill, Student's reading fluency and passage comprehension scores on the WJ-III were not significantly different because his reading fluency score was a "strong average" and passage comprehension was a "high borderline average" score. Mr. Fudala administered a curriculum-based assessment that indicated Student read at the 8.0 grade level. According to Mr. Fudala, Department developed the curriculum-based assessment from textbooks and materials used in the school. Student obtained the highest score obtainable on it, which was the eighth grade level. Student offered no evidence challenging or refuting this testimony. The evidence does not show that Student had a unique need in the area of reading.

12. Student contends that he had a unique need in spelling as indicated by his WJ- III scores. His standard score in spelling was 84, with a grade equivalent of 6.6. Student offered no additional evidence to support this claim, such as his classroom performance in spelling, or evidence showing a relationship between his performance in spelling and other areas in which he had a unique need, such as written expression. His WJ-III scores alone do not establish that Student had a unique need in the area of spelling.

Needs in the Areas of Behavior, Social and Emotional Functioning, and  
Mental Health Beginning July 2005

13. Student contends that he had needs in the areas of behavior, social and emotional functioning, and mental health concerning his lack of motivation, need to



express his feelings, and interactions with peers for the 2005-2006 school year.

14. Student partially met the benchmarks for the June 2002 behavior goal concerning strategies for self-control, maintaining focus, and staying on task. He also partially met the benchmarks for the April 2004 behavior goal, which required him to demonstrate proper social behavior, communicate his needs to staff, follow through on assignments, and exhibit proper problem-solving techniques. In her assessment, Dr. O'Neill determined that Student needed assistance with school attendance, on-task behavior, and completion of assignments. In the area of social and emotional functioning, the May 2005 IEP noted that Student's depressive symptoms affected his academic progress, particularly the rate at which he earned academic credits.

15. As Dr. O'Neill determined in her assessment, Student had needs in the areas of improving school attendance, on-task behavior, and completion of assignments. Implicit in these specific needs is the need for Student to be motivated to fully participate in school. Student offered no additional evidence concerning his need in the area of motivation beginning July 2005.

16. Student neither articulated what needs he had concerning peer interactions, nor offered evidence concerning any deficits he had concerning peer interactions or peer relationships. The April 2004 IEP included a goal addressing social behavior, and Dr. O'Neill's assessment recommended therapy for social skills, but these are insufficient to support Student's contention. The evidence does not support Student's contention that he had a need concerning peer interactions beginning in July 2005.

17. In her assessment and in her comments on the May 2005 IEP, Dr. O'Neill expressed concern that Student's depressive symptoms had a negative impact on his educational functioning. She recommended that Department's clinical mental health staff evaluate Student for depression and the need for medication. She did not determine that Student had a need to express his feelings in order to address his depressive symptoms

and their impact on his educational progress. The April 2004 IEP included a goal concerning Student communicating his needs to staff, but there is no evidence about Student's needs at that time and whether they continued to July 2005. For these reasons, the evidence does not support Student's contention that he had a unique need to express his feelings.

18. In summary, Student had unique needs in the area of behavior concerning school attendance, on-task behavior, and completion of assignments beginning July 2005. He had no additional needs in the areas of social and emotional functioning or mental health at that time.

#### STUDENT'S UNIQUE NEEDS AT THE TIME OF THE IEP TEAM MEETING OF JANUARY 9, 2007

##### Needs in the Area of Core Academics in January 2007

19. Student contends he had needs in the areas of math, written expression, reading and spelling. Student was unable to meet any of the benchmarks for the math goal from his May 2005 IEP. John. Morgan, Student's resource specialist at Chad, determined that Student could perform calculations with whole numbers, but needed assistance with fractions, decimals and percentages.<sup>7</sup> Student had been working on math goals involving calculations with fractions since June 2002, and remained unable to do them. Student continued to have a need in the area of math calculations in January 2007.

20. Student met two of his three writing goals from the May 2005 IEP. He was able to match the correct writing format, such as a business letter, poem, or report, with a specific purpose, and was able to give examples of formats for specific purposes. He was

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<sup>7</sup> Mr. Morgan holds single subject, learning handicapped, and resource specialist credentials. He has worked at Department since 1993. Before becoming a resource specialist, he taught special day classes for Department.

unable to select the correct format, and then write and edit it. Mr. Morgan determined Student was able to write basic sentences, but needed assistance with writing topic sentences, supporting details, and correct grammar. Student continued to have a need in the area of written expression.

21. Mr. Morgan noted on the January 2007 IEP that Student read at the eleventh grade level and his reading comprehension was at the tenth grade level. Student relies on his WJ-III scores from the 2005 psychoeducational assessment to show that he had a unique need in the area of reading that needed to be addressed by the January 2007 IEP. However, Student did not offer any evidence showing that he had a need in the area of reading. For these reasons, and as determined in Factual Finding 11 concerning Student's scores on the WJ-III, Student did not have a unique need in the area of reading in January 2007.

22. Student offered no evidence concerning his need in the area of spelling in January 2007 other than his WJ-III scores from 2005. Student offered no additional evidence to support this claim, such as his classroom performance in spelling, or evidence of a relationship between his performance in spelling and other areas in which he had a unique need, such as written expression. His WJ-III scores, without more, are insufficient to establish that he had a unique need in the area of spelling in January 2007.

#### Needs in the Areas of Behavior, Social and Emotional Functioning, and Mental Health in January 2007

23. Student contends that he had needs in the areas of behavior, social and emotional functioning, and mental health concerning his lack of motivation, expression of his feelings, and interactions with peers for the 2006-2007 school year.

24. Student was unable to meet any of the benchmarks for his behavior goal from the May 2005 IEP, which used a behavior contract to assist with on-task behavior, completion of class work, and compliance with class rules. Dr. O'Neill described Student as

avoidant, often appearing emotionally “down” or depressed, and not interested in participating in school. At times Student responded to encouragement and feedback and would complete work, but this would taper off, and he returned to being discouraged and not wanting to try. This continued even with the use of the behavior contract in the May 2005 IEP. Edward Collins, school psychologist, worked with Student at Chad during the 2005-2006 school year.<sup>8</sup> His description of Student was consistent with Dr. O’Neill’s: Student sometimes was interested in his school work, and at other times he was not. Chandra Clarkson, Student’s resource specialist at Boss during the 2005-2006 school year, persuasively opined that Student was not motivated to complete assignments on his own.<sup>9</sup> However, he was motivated and did complete his school work when she worked individually with him.

25. As shown above, during the course of the 2005-2006 school year, it became clear that developing and maintaining Student’s motivation to remain on-task with school work and complete his assignments was a unique need. This remained true in the 2006-2007 school year. While Student had a need during the 2005-2006 school year to improve his school attendance, there is insufficient evidence that this remained a need for the following school year. No attendance records were introduced or other evidence of

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<sup>8</sup> Mr. Collins holds master’s degrees in education and school psychology, and credentials in school psychology, general education, and school administration. He worked for more than 30 years with the Department as a teacher, school psychologist, assistant principal, and principal. He has worked as a retired annuitant school psychologist since retiring in 1999.

<sup>9</sup> Ms. Clarkson holds teaching and resource specialist credentials. She has worked for Department for about 15 years, six years as a special day class teacher, and the rest as a resource specialist.

Student's absences were provided.

26. The IEP team properly determined that Student needed to increase his self-esteem and reduce his depression and self-destructive thoughts. Student contends he had a need to express his feelings during the 2006-2007 school year. Student received mental health therapy as part of his juvenile justice intensive treatment program. While attending Chad during the 2005-2006 school year and through mid-March 2007, Student received individual therapy, weekly group therapy, and family therapy from Department's clinical mental health staff. This treatment focused on Student's mental health needs as part of his juvenile justice program; it did not address his educational needs. While expressing his feelings may be a means for Student to meet his needs to increase his self-esteem, reduce depression, and reduce self-destructive thoughts, Student did not present evidence showing that he had a unique need to express his feelings in the educational context.

27. Student contends he had a need regarding his interactions with peers during the 2006-2007 school year. He did not present evidence concerning this and none is found. Student did not have a unique need regarding peer interactions for the 2006-2007 school year.

#### EXTENDED SCHOOL YEAR

28. Student contends Department failed to meet his needs during the 2006 and 2007 extended school years. However, there is no evidence in the record concerning the school calendar and the duration of the school year or extended school year. The record includes monthly reports of school psychologists and resource specialists reporting services to Student during July and August of 2005 and 2006, suggesting that Department operated on a year-round school calendar. In addition, Department acknowledged in its closing brief that Student received counseling and resource specialist services year round. Accordingly, for the purpose of this decision, a school year runs from August through July of the following calendar year.

DID DEPARTMENT MEET STUDENT'S NEEDS IN THE AREAS OF CORE ACADEMICS, SOCIAL AND EMOTIONAL FUNCTIONING, AND BEHAVIOR IN THE 2005-2006 AND 2006-2007 SCHOOL YEARS, BEGINNING JULY 6, 2005?

2005-2006 School Year: Annual Goals

IEP OF MAY 31, 2005

29. The May 31, 2005, IEP governed Student's special education and related services throughout the 2005-2006 school year and the 2006-2007 school year until a new IEP was developed in January 2007. An IEP must include annual goals designed to meet the student's needs that result from his disability so that he can make progress in the general curriculum, and to meet his other educational needs resulting from his disability.

30. As determined in Factual Finding 9, Student had a unique need in math calculations, particularly with fractions. The math goals developed for the May 2005 IEP required Student to add and subtract fractions and mixed numbers. Unlike the goal from the April 2004 IEP, which required Student to add, subtract, multiply and divide fractions, read chart graphs and solve problems involving measurements, the May 2005 goals focused on adding and subtracting fractions and mixed numbers. This adjustment was reasonable in view of Student's inability to accomplish the more expansive goal in the April 2004 IEP. The math goals met Student's needs.

31. As determined in Factual Finding 10, Student had a unique need in the area of writing. The writing goals included in the May 2005 IEP required him to choose the correct writing format, such as a personal letter, report, or narrative, for a specified purpose, to provide examples of writing formats to match specific purposes, and to select the appropriate format, write and edit it. Adjusting Student's writing goals was reasonable in view of his inability to accomplish the June 2002 and April 2004 goals requiring him to write essays. While the goal was less ambitious, it continued to develop Student's writing skills. This goal met Student's need in the area of writing.

32. As determined in Factual Findings 15 and 18, Student had a need in the area of behavior concerning improving school attendance, remaining on task, and completing assignments. The stated purpose of the behavior goal in the May 2005 IEP was for Student to demonstrate the ability to express feelings appropriately in the classroom. However, the benchmarks did not relate to Student's ability to express his feelings.<sup>10</sup> Instead, the benchmarks incorporated a behavior contract to motivate Student to remain on task in the classroom, complete classroom work, and to follow classroom rules. The behavior goal and behavior contract addressed Student's needs in the areas of remaining on task and completing assignments. Neither the behavior goal nor the behavior contract addressed Student's need to improve school attendance. As determined in Factual Findings 16 and 17, since Student did not have needs in the areas of relationships with peers or expressing his feelings, goals were not required in these areas.

33. Student contends he required a behavior support plan during the 2005-2006 school year. Department contends that the behavior goal and behavior contract were appropriate. Department's contention has merit. The addition of the behavior contract to the behavior goal provided Student additional support to meet his behavior needs. The behavior contract was designed to motivate Student by rewarding him for engaging in desired behavior, such as remaining on task, completing work, and following instructions. It was a reasonable step toward modifying Student's behavior and reducing problematic behavior. The evidence does not show that Student required a behavior support plan.

#### 2006-2007 School Year: Annual Goals

#### IEP OF JUNE 9, 2007

34. An IEP team meeting was held on January 9, 2007. The IEP included two math

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<sup>10</sup> As determined in Factual Finding 17, Student did not have a unique need to express his feelings.

goals and four goals concerning behavior and social and emotional functioning. The IEP provided the same special education and related services as provided in the prior IEP: three hours a week of resource specialist services, and one-half hour a week of counseling from a school psychologist. Student remained in the ninth grade and had 37 credits toward graduation.

35. The IEP's two math goals again involved fractions, and were similar to the math goals in his May 2005 IEP. One math goal involved calculations with fractions, decimals, and percentages; the other involved word problems with fractions, decimals, and percentages. Student had been unable to meet his math goals involving calculations with fractions since 2002. Student's continued lack of success on similar goals required Department to do more than merely continue similar goals from one year to the next without modifying either the goal or another element of his program. The math goals did not meet Student's needs.

36. The January 2007 IEP included one writing goal, which involved completing a business form, and writing essays of two, four and five paragraphs. According to Mr. Morgan, who wrote Student's academic goals, the purpose of this goal was to prepare Student to write a five-paragraph essay, which is necessary to pass the California high school exit exam. He said this was the same objective for all of the students. However, Student's lack of progress on prior writing goals indicated he did not have the requisite foundational skills necessary to write an essay. The writing goal did not meet Student's needs.

37. The January 2007 IEP included four goals regarding Student's behavior and social and emotional functioning. They addressed completing class work, following a schedule for classroom activities, using success-oriented tasks to improve self-esteem, and using problem-solving strategies. The behavior goal no longer incorporated a behavior contract.



38. As determined in Factual Findings 25 and 26, Student's needs in behavior and social and emotional functioning included increasing motivation to remain on task and complete work, increasing self-esteem, reducing depression, and reducing the occurrence of self-destructive thoughts. It is reasonable to determine that using success-oriented tasks and problem-solving strategies would increase Student's motivation to remain focused on tasks and complete class work, and increase his self-esteem. While the goals address Student's needs in the areas of increasing motivation to remain on task and complete work, and increasing his self-esteem, they do not meet his needs in these areas. These are longstanding needs for Student resulting from his disability. Student has not been successful with similar behavior goals since 2002, even when a behavioral contract was used during the prior school year.

39. Moreover, these goals do not address Student's needs to reduce depression or reduce the occurrence of self-destructive thoughts. Mr. Collins suggested that by working on these goals, Student would also reduce his depression and the occurrence of self-destructive thoughts. While this might be a by-product of Student's overall success toward these goals, given the substantial role that Student's depression had in preventing educational progress, these goals were not adequate.

#### 2005-2006 School Year: Classroom Placement

40. Department was required to provide Student specially designed instruction to meet his unique needs and to assist him to benefit from instruction. In June 2005, Department moved Student from a special day class to general education classes with the support of a resource specialist for three hours a week. Student contends that Department was required to place him into an appropriately-structured special day class.

41. According to both Dr. O'Neill and Mr. Fudala, Student's standardized test scores supported moving him from a special day class to a general education class with the assistance of a resource specialist. According to Dr. O'Neill, a Student with a reading level

of fifth grade or higher is ready to be moved from a special day class to a general education class. Dr. O'Neill opined that Student's WJ-III passage comprehension score of 5.8 and reading fluency score of 11.9 met the minimum level required to succeed in general education classes with resource support. According to Mr. Fudala, most students in his special day class were reading at the second or third grade level and a student reading at a higher level, such as Student, would not want to be in a class with them.

42. According to Dr. O'Neill, Student had not been interested in attending the special day class. It was hoped that moving Student to a general education environment with resource assistance and the support of a behavior contract would facilitate his attendance. Mother did not believe that Student was making adequate progress while he was in a special day class, which is why she agreed to move him into general education classes with resource support.

43. According to Dr. Paula Solomon, Student required a small classroom with a mental health component that could provide him consistent and intensive educational services and meet his mental health needs.<sup>11</sup> She has extensive experience working with children and adolescents who have emotional disturbance, and understands the interface between mental health and educational services. Nevertheless, Dr. Solomon neither treated Student, nor observed him in Department's classrooms, and is not familiar with the programs and services Department offers. Because of this, her testimony in this regard is given limited weight.

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<sup>11</sup> Dr. Solomon holds master's and doctoral degrees in psychology and is a licensed clinical psychologist. She has been the clinical director for over 16 years of an agency providing residential and outpatient treatment for emotionally disturbed children and adolescents. She also has a private clinical practice working primarily with children and adolescents.

44. Moving Student from a special day class to general education classes with resource support for three hours a week significantly reduced the amount of special education services he received. Department reduced Student's services even though he failed to meet any of the benchmarks for the prior year's math and writing goals; continued to have difficulty remaining on task and completing class work; suffered from chronic depression that diminished his ability to academically perform; and remained in ninth grade for another year. The weight of the evidence shows that Department reduced Student's special education services based on his WJ-III achievement scores, without considering his failure to make progress, or what was needed to meet his unique needs. For all of these reasons, Department failed to meet Student's academic needs during the 2005-2006 school year by providing three hours a week of resource specialist services. This classroom placement was not reasonably calculated to provide Student educational benefit.

45. Student needed more than three hours a week of specialized instruction from a resource specialist. Nevertheless, the evidence does not support Student's contention that he required a special day class in order to meet his needs. Dr. Solomon's testimony is given little weight because of her lack of familiarity with Student or Department's programs. Student had not performed successfully in a special day class in the past. It would have been reasonable for Department to provide a plan to transition Student from a special day class to resource support, with more intensive services initially, and close monitoring and review to determine how he responded to the change.

#### 2006-2007 School Year: Classroom Placement

46. The June 9, 2007, IEP continued to place Student in general education classes with three hours a week of resource support. Student contends Department was required to place him in an appropriately-structured special day class.

47. According to Mr. Collins, the Department's IEP team members discussed

Student's lack of progress in his classes and what would be needed so he could function and earn credits. The team determined that the solution was to have Student attend school, do his work, and not misbehave. There is no other evidence of the nature or scope of the IEP team's discussion of Student's lack of progress on his goals, or how Student responded to the resource support that was offered. There was no discussion of whether different teaching methodologies or strategies could assist Student to make progress.

48. As determined in Factual Findings 67 and 68, Mr. Morgan relied upon Student to identify his need for assistance and to request it in class. Yet, the evidence shows that Student was not a motivated, self-directed learner, and that he had consistently failed to request assistance in the past. Student's withdrawal and disengagement are symptoms of his underlying disability. The evidence shows, and it was obvious at the hearing, that there was no rapport between Mr. Morgan and Student. Mr. Morgan appeared frustrated by Student's inability or unwillingness to ask for help. In addition, Mr. Morgan was unable or unwilling to work with Student to attempt to motivate him to do his class work. Mr. Morgan did not utilize any strategies to motivate Student to pay attention in class or to complete his class work.

49. Department reduced Student's special education services in May 2005, and subsequently made little effort to meaningfully review his progress to determine whether three hours of resource support met his needs. Mr. Morgan's method of delivering resource support did not provide effective individualized instruction to Student. The overwhelming evidence establishes that three hours of resource support, as offered and provided by Department, did not meet Student's needs and was not reasonably calculated to result in educational progress.

50. Student contends that Department was required to place him in an appropriately-structured special day class. However, the evidence does not support his contention. Dr. Solomon's opinion that this was what Student required is given little

weight. As determined in Factual Finding 65, Ms. Clarkson had some success providing resource services to Student. She provided one-to-one, individualized assistance and was able to motivate him to complete his work. In addition, as determined in Factual Finding 70, Ms. Scott found that she was able to motivate Student to complete work when she committed herself to doing so. All of this shows that Student required intensive, consistent, individualized instruction, which Department failed to provide him.

#### 2005-2006 School Year Related Services: Counseling

51. The May 2005 IEP provided Student one-half hour of counseling services with a school psychologist. No other related services were provided.

52. Dr. O'Neill recommended in her psychoeducational assessment that Student be referred to Department's mental health staff for an evaluation for depression and possible medication. According to Dr. O'Neill, Dr. Bowlds's participation in the May 2005 IEP team meeting, during which she confirmed Student's diagnosis of chronic depression, satisfied her recommendation.<sup>12</sup>

53. According to Dr. Solomon, one-half hour of counseling by a school psychologist was not sufficient to meet Student's needs. She opined that he needed individual counseling once or twice a week, group therapy, and family therapy. Dr. Solomon did not differentiate between the services Student needed in order to make educational progress, those he may need in order to address other issues, such as his commitment offense, and those he needed to compensate for a denial of a FAPE. Because of this, Dr. Solomon's testimony in this regard is given limited weight.

54. Department reduced Student's counseling services although he made little if any progress toward his academic or behavioral goals. However, the IEP team added a

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<sup>12</sup> Dr. Bowlds holds a doctoral degree in forensic psychology and is a licensed clinical psychologist. She has worked as a clinical psychologist for Department since 2004.

behavior contract to support his behavioral goals. Dr. O'Neill persuasively testified that the counseling coupled with the behavior contract was adequate to meet Student's needs. Student did not offer sufficient evidence to show that his needs were not met. The evidence shows that the offered counseling services met Student's needs.

#### 2006-2007 School Year: Related Services - Counseling

55. The June 2007 IEP continued to provide Student one-half hour of counseling services from a school psychologist. No other related services were included.

56. As determined in Factual Finding 38, the behavior goals worked towards meeting Student's need to develop motivation to remain focused on school work and to complete school work. The IEP provided that the counseling services with a school psychologist supported the behavior goals. Similar counseling had not proven successful in the past to meet Student's behavior needs, even with the additional support of a behavior contract.

57. Student had needs in the area of social and emotional functioning that he did not have during the prior school year. As determined in Factual Finding 26, Student had needs in the areas of reducing his depression and the occurrence of self-destructive thoughts. As determined in Factual Finding 39, the behavior and social and emotional functioning goals did not address these needs. There is no evidence that the one-half hour of counseling with the school psychologist would address these needs. Mr. Collins was not aware of Student's mental health needs. Throughout the hearing it became clear that Department's educational staff deferred to the clinical mental health staff to address any of Student's mental health needs. However, it also became clear that the clinical mental health staff did not address Student's mental health needs pertaining to his education. The IEP did not require that the counseling be used to address Student's needs to reduce his depression and the occurrence of self-destructive thoughts. There were no other services in the IEP that addressed these needs. Therefore, the IEP failed to meet Student's needs to

reduce his depression and the occurrence of self-destructive thoughts.

#### 2005-2006 School Year: Related Services - Mental Health Therapy

58. Student contends that he required individual, group, and family mental health counseling to meet his needs. Department contends it met Student's mental health needs by the one-half hour of counseling with a school psychologist.

59. As determined in Factual Finding 53, Dr. Solomon opined that Student needed individual counseling, group therapy and family therapy. However, she did not identify the services Student needed to assist him to benefit from his education, rather than those needed to address other issues, such as his commitment offense, and those services needed to compensate him for an alleged denial of FAPE. Student offered no additional evidence supporting his claim, and none is found. Department was not required to provide Student mental health therapy.

#### 2006-2007 School Year: Related Services - Mental Health Therapy

60. As determined in Factual Findings 39 and 57, the January 2007 IEP did not include any special education or related services to Student's needs to reduce his depression and the occurrence of self-destructive thoughts. Department provided both individual and group therapy to Student as part of his juvenile justice program. The therapists who provided these services agreed that it was difficult to establish rapport with Student in individual therapy, and even more so in group therapy. Unless therapy is provided to Student in a manner in which rapport can be established with the therapist, he is unlikely to benefit from it. For these reasons, Student required individual mental health therapy for educational purposes in the January 2007 IEP.

#### 2006-2007 School Year: Related Services - Behavior Support Plan

61. If an IEP team determines that a student's behavior impedes his learning or that of others, it must consider the use of positive behavioral interventions and supports,

and other strategies to address the behavior. A behavior intervention is the systematic implementation of procedures that are calculated to result in lasting positive changes in the student's behavior. It includes the evaluation and modification of the student's instruction or environment to produce significant improvement in the student's behavior through skill acquisition and the reduction of the problematic behavior.

62. Student contends that he required a behavior support plan to meet his unique needs. Department contends it met Student's needs without a behavior support plan.

63. As discussed in Factual Finding 38, the behavior goals and counseling provided in the January 2007 IEP assisted Student in the areas of improving his motivation to remain focused on school work and to complete school work, but they did not meet his needs. Similarly, the one-half hour of counseling with a school psychologist was not adequate to meet Student's behavioral needs. Student's inability to remain focused on and complete his school work had been long-standing concerns. The behavioral contract from the May 2005 IEP was not successful in addressing Student's behavior. This lack of progress shows that Student required an intervention, such as a behavior support plan, that systematically evaluated the behavior and provided strategies to facilitate Student's educational progress. A behavior support plan was required to provide the educational staff with specific methods to address Student's problematic behavior and promote behavior likely to lead to academic progress. For these reasons, Student required a behavior support plan in the January 2007 IEP.

#### DID DEPARTMENT FAIL TO PROVIDE STUDENT THREE HOURS A WEEK OF SERVICES FROM A RESOURCE SPECIALIST DURING THE 2005-2006 AND 2006-2007 SCHOOL YEARS?

64. Student contends Department did not provide the three hours a week of services from a resource specialist required by his May 2005 and July 2007 IEPs.



Department contends that staff provided more than the required number of hours of service to Student. In order to show that a failure to implement an IEP resulted in a denial of a FAPE, the failure must be material.

#### 2005-2006 School Year

65. Ms. Clarkson, Student's resource specialist at Boss from May through September 2005, worked individually with Student both inside the general education classroom, and while working with a small group of students outside the classroom. Student successfully completed assignments with her.

66. Student transferred to Chad in October 2005. John Morgan was Student's resource specialist while at Chad. Mr. Morgan's teaching assistant, Angela Scott, also assisted Student.<sup>13</sup>

67. Mr. Morgan provided special education services to Student in the following manner: He entered and observed the general education classroom to become familiar with the lesson being taught. He then individually approached each student on his case load, and asked what the student was working on and whether he needed help. If the student needed help, he assisted the student. If not, he asked the next student, and continued in this manner until he spoke with each of his students. After assisting all those who asked for help, Mr. Morgan waited in the classroom to see if additional help was needed. On occasion, Mr. Morgan fell asleep for a short time while he waited in the classroom. Mr. Morgan had each student sign a log indicating that he provided services to them.

68. When Mr. Morgan entered a classroom, Student was usually talking with other students, and not working on school assignments. Student usually told Mr. Morgan

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<sup>13</sup> Ms. Scott holds a bachelor's degree and is taking courses to obtain a teaching credential.

that he did not need help.

69. Mr. Morgan generally spent between 25 and 30 minutes in a classroom. He did not keep track of how much time he spent with each individual student. He usually logged his time in one hour increments on his monthly service report regardless of how much time was actually spent with a student. He also included the time he spent talking with teachers, reviewing records, and preparing for IEP team meetings. The time that he reported he spent with a student also included the time his teaching assistant reported she spent with the student. Mr. Morgan gave Ms. Scott the amount of time he spent with Student and she entered the data into the monthly service report.

70. Ms. Scott entered her time in increments of one-half hour. When she first entered a classroom, Ms. Scott tried to get Student to work on class assignments. She said that at most she was able to get him to complete one problem. She spent about 10-15 minutes on school work with Student. Ms. Scott spent most of her time with Student chatting about things unrelated to school or school assignments.

71. The May 2005 IEP required Department to provide Student three hours of resource specialist services beginning June 15, 2005. The 2005-2006 school year was from August 2005 through July 2006.

72. The record includes monthly provider reports showing the hours that the resource specialist reported were provided to Student. There are no reports for October 2005 or April 2006. The reports indicate that Student received 139.5 hours of resource specialist services from August 2005 through July 2006. The IEP required that Student receive 159 hours during this same period.<sup>14</sup>

73. Even if the monthly provider reports are reliable, Department failed to

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<sup>14</sup> Calculated as follows: 3 [hours a week of services] x 53 [weeks from August 1, 2005, to July 31, 2006].

provide Student 19.5 hours of service from a resource provider during the 2005-2006 school year. However, the weight of the evidence shows that the monthly reports are not reliable. The IEP required Student to receive three hours a week of services from a resource specialist. The IEP did not authorize Department to substitute the services of a teaching assistant. A resource specialist is a trained special education teacher; a teaching assistant is not. In addition, time was included in the monthly reports for which no special education services were provided. The time that Mr. Morgan was present in the classroom waiting for Student or others to ask for help, or that Ms. Scott spent chatting with Student about topics unrelated to school work does not constitute time providing resource services to Student. The weight of the evidence shows that Department failed to provide Student a substantial number of hours of services from a resource specialist that were required by the IEP during the 2005-2006 school year. As determined in Factual Findings 35 and 36, Student did not make progress on his academic goals during the 2005-2006 school year. Department's failure to implement Student's IEP was material.

#### 2006-2007 School Year

74. The 2006-2007 school year was from August 2006 through July 2007. The monthly provider reports indicate that from August 2006 through May 2007, Student received 183.25 hours of resource specialist services. No reports were provided for June or July 2007. The IEPs required him to receive 156 hours during that period of time.<sup>15</sup> The records indicate Student received 27.25 hours more than he was required to receive under the IEP.

75. The monthly reports are not reliable. For the reasons set forth in Factual Finding 73, Department failed to provide Student the required hours of services from a

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<sup>15</sup> Calculated as follows: 3 [hours a week of services] x 52 [weeks from August 1, 2006, to July 31, 2007].

resource specialist that were required by his IEPs during the 2006-2007 school year. Because of Student's demonstrated lack of academic progress, this failure was material.

**DID DEPARTMENT DENY STUDENT A FAPE BY FAILING TO HOLD AN ANNUAL IEP TEAM MEETING ON OR BEFORE MAY 31, 2006?**

76. The IEP team must periodically review the IEP, no less frequently than annually, to determine whether the student is achieving the annual goals and progressing in the general curriculum. Department held an IEP team meeting on May 31, 2005, and did not hold another one until January 9, 2007. Department failed to conduct an IEP team meeting at least annually for Student.

77. While Department conceded it did not hold a timely IEP team meeting, it contends that it continued to provide Student services, and his need for services did not change during the time period. However, Student's needs did change. While the IEP team offered the same special education and related services provided since May 2005, the January 2007 IEP team found it necessary to modify his goals in math, writing, and behavior. As determined in Factual Finding 26, the IEP team also found that Student had additional needs in the areas of reducing his depression and the occurrence of self-destructive thoughts. During the period in which Department failed to hold a timely IEP team meeting, it became ever more obvious that Student was not progressing and his program needed to be changed. For these reasons, it is found that Department's failure to hold a timely IEP meeting on or before May 31, 2006, resulted in a loss of educational opportunity to Student.

**DID DEPARTMENT DENY STUDENT A FAPE BY FAILING TO PROVIDE HIM A REFERRAL FOR MENTAL HEALTH SERVICES UNDER GOVERNMENT CODE, CHAPTER 26.5?**

78. Government Code, Chapter 26.5 governs the provision of mental health services that are required by an IEP. As determined in Legal Conclusion 16, these provisions

do not apply to Department. While Department did not provide a referral for Student under Chapter 26.5, it was not required to do so.

#### REQUESTED RELIEF

79. As discussed in Legal Conclusion 18, compensatory education is an equitable remedy. Relief must be reasonably calculated to provide the educational benefit that would have likely accrued from the special education services that should have been provided.

80. Student contends he is entitled to compensatory education in the form of one- to-one education, five hours per day, five days a week, for one year, and individual, group, and family therapy, and medication management services for one year.

81. Dr. Solomon testified that Student required individualized, one-to-one instruction from a qualified special education teacher, five days a week, five hours per day, to remedy his failure to make progress during the 2005-2006 and 2006-2007 school years. She believed that Student may be able to make up to two years' progress during this time. Ms. Clarkson had success motivating Student to complete school work by working with him one-to-one. Dr. Solomon and Ms. Clarkson persuasively showed that Student requires intensive, individualized instruction from a qualified special education teacher to provide him the educational benefit that would have accrued if Department had provided a FAPE.

82. Dr. Solomon also opined that Student required individual mental health therapy once a week, group therapy for two hours twice a week, family therapy, and medication management services. She did not explain why Student specifically needed three different forms of therapy to compensate for Department's failure to provide FAPE, and Student offered no additional evidence to establish this. Dr. Solomon's testimony did not establish that Student required all of these services in order to receive the educational benefit that would have accrued if Department had provided a FAPE. However, the evidence shows that Student requires individual mental health therapy to receive the educational benefit that would have accrued if FAPE had been provided.

83. Student also contends Department staff require training regarding the requirements concerning convening IEP team meetings; the relationship between mental health and educational needs; developing present levels of performance; writing measurable goals; providing teachers and service providers copies of IEPs and goals; calculating the time a student spends in special education; proper supervision of teaching assistants; and the difference between a special day class and resource specialist program services. While additional training of Department's staff may benefit all of its students who are eligible for special education services, the evidence does not show that training is required as a remedy for Department's denial of FAPE to Student.<sup>16</sup>

## LEGAL CONCLUSIONS

1. As the petitioner, Student has the burden of proving that Department did not offer or provide him a FAPE. (*Schaffer v. Weast* (2005) 546 U.S. 49, 62 [126 S.Ct. 528].)

2. A child with a disability has the right to a FAPE under the Individuals with Disabilities in Education Improvement Act (IDEA) and California law. (20 U.S.C. §1412(a)(1)(A); Ed. Code, § 56000.) A FAPE is defined in pertinent part as special education and related services that are provided at public expense and under public supervision and direction, that meet the State's educational standards, and that conform to the student's IEP. (20 U.S.C. § 1401(9); Cal. Code Regs., tit. 5, § 3001, subd. (o).) Special education is defined in pertinent part as specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, and that are needed to assist the child to benefit from instruction. (20 U.S.C. §§ 1401(29); Ed. Code, § 56031.) Special education

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<sup>16</sup> Department educational staff would benefit from training about the legal requirements for developing annual goals to meet a student's needs, holding an IEP team meeting when a student demonstrates a lack of anticipated progress, providing specially designed instruction to meet a student's unique needs, and providing

related services include developmental, corrective, and supportive services, such as psychological and counseling services, as may be required to assist a child with a disability to benefit from special education. (20 U.S.C. §§ 1410(26); Ed. Code, § 56363.)

3. An LEA must provide “a basic floor of opportunity . . . [consisting] of access to specialized instruction and related services which are individually designed to provide educational benefit to the [child with a disability].” (*Bd. of Educ. v. Rowley* (1982) 458 U.S. 176, 200 [102 S.Ct. 3034].) An LEA must offer a program that meets the student’s unique needs and is reasonably calculated to provide more than a trivial or minimal level of progress. (*Amanda J. v. Clark County Sch. Dist.* (9th Cir. 2001) 267 F.3d 877, 890, citing *Hall v. Vance County Bd. of Educ.* (4th Cir. 1985) 774 F.2d 629, 636.) A child’s unique educational needs are to be broadly construed to include the child’s academic, social, health, emotional, communicative, physical and vocational needs. (*Seattle Sch. Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500, citing H R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106.)

4. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) The IEP’s goals and methods are evaluated as of the time they were developed to determine whether they were reasonably calculated to confer an educational benefit to the student. (*Ibid.*)

5. An IEP must include annual goals designed to meet the needs that result from the child’s disability to enable the child to be involved in and make progress in the general curriculum, and that meet the child’s other education needs that result from his or her disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); Ed. Code, § 56345, subd. (a)(2).) An IEP must include services, supplementary aids, modifications, or supports that will allow the student to advance appropriately toward attaining the annual goals, to be involved in and make progress related psychological, social work and counseling services that are required to assist a student to benefit from special education. in the general education curriculum, and

to be educated and participate with other students with disabilities and those who do not have disabilities. (20 U.S.C. § 1414(d)(1)(A)(IV); Ed. Code, § 56345, subd. (a)(4).)

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

7. When a child exhibits a serious behavior problem, such as self-injurious or assaultive behavior, California law imposes specific and extensive requirements for the development of a functional analysis assessment and a behavior intervention plan. (Cal. Code Regs., tit. 5, §§ 3001, subd. (f), 3052.) There are many behaviors that will impede a child's learning or that of others that do not meet the requirements for a serious behavior problem requiring a behavior intervention plan. These less serious behaviors require the IEP team to consider and, if necessary, develop positive behavioral interventions, strategies and supports. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i); Ed. Code, § 56341.1, subd. (b)(1).) In California, a behavior intervention is "the systematic implementation of procedures that result in lasting positive changes in the individual's behavior." (Cal. Code Regs., tit. 5, § 3001, subd. (d).) It includes the design, evaluation, implementation, and modification of the student's individual or group instruction or environment, including behavioral instruction, to produce significant improvement in the student's behavior through skill acquisition and the reduction of problematic behavior. (*Ibid*) Behavioral interventions should be designed to provide the student with access to a variety of settings and to ensure the student's right to placement in the least restrictive educational environment. (*Ibid*) An IEP that does not appropriately address behavior that impedes a child's learning denies a student a FAPE. (*Neosho R VSch. Dist., v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028; *County of San Diego v. California Special Educ. Hearing Office* (9th Cir.



1996) 93 F.3d 1458, 1467-1468.)

DID DEPARTMENT MEET STUDENT'S NEEDS IN THE AREAS OF CORE ACADEMICS, SOCIAL AND EMOTIONAL FUNCTIONING AND BEHAVIOR BEGINNING JULY 6, 2005, IN THE 2005-2006 AND 2006-2007 SCHOOL YEARS?

Failure to Meet Student's Needs During the 2005-2006 School Year

8. As determined in Factual Finding 32, Department did not provide a behavior goal to address Student's need to improve his attendance at school. As determined in Factual Findings 44 and 45, Department did not meet Student's academic needs because it failed to provide appropriate specialized instruction. Student had a history of failing to make academic progress, had been retained in ninth grade since 2002, and had earned few credits toward high school graduation. For these reasons, Department failed to provide Student a FAPE during the 2005-2006 school year.

Failure to Meet Student's Needs During the 2006-2007 School Year

9. As determined in Factual Findings 35 and 36, Department did not provide Student goals in math or writing that met his needs. He failed to make any progress with similar math goals since 2002, yet Department neither modified the goal nor the educational services. Similarly, Student's lack of progress on prior writing goals indicated he did not have the foundational skills necessary to make progress. In addition, as determined in Factual Findings 48 through 50, Department failed to provide Student the adequate level of individualized special education services necessary to meet his academic needs.

10. As determined in Factual Findings 38 and 39, Department provided goals in behavior and social and emotional functioning related to some of his needs in these areas, but they alone did not meet all of his needs. As determined in Factual Findings 57 and 60, Department did not provide Student with necessary counseling and mental health therapy

services. As determined in Factual Finding 63, Department failed to provide a behavior support plan to systematically address Student's long-standing behavioral needs. Department failed to provide Student necessary positive behavioral supports and interventions to address behavior that impeded his learning. For these reasons, Department failed to meet Student's needs in the area of behavior and social and emotional functioning.

DID DEPARTMENT FAIL TO PROVIDE STUDENT THREE HOURS A WEEK OF SERVICES FROM A RESOURCE SPECIALIST BEGINNING JULY 6, 2005, IN THE 2005-2006 AND 2006-2007 SCHOOL YEARS?

11. In order to show that an LEA violated the IDEA regarding its implementation of an IEP, there must be a "material" failure to implement the IEP, which requires more than a minor discrepancy between the services provided and those required by the IEP. (*Van Duyn v. Baker Sch. Dist. 5J* (9th Cir. 2007) 502 F.3d 811, 822.) The materiality standard does not require that the child suffer demonstrable educational harm in order to prevail. (*Ibid*) However, the child's educational progress, or lack of it, may be probative of whether there was more than a minor shortfall in services. (*Ibid*) A shortfall in services and a shortfall in the child's achievement in that area tend to show that the failure to implement the IEP was material. (*Ibid*.) Similarly, if the child performed at or above the anticipated level of achievement, this would tend to show that the shortfall in services was not material. (*Ibid*.)

12. As determined in Factual Finding 73, Department did not provide a substantial number of hours of services from a resource specialist during the 2005-2006 school year that were required by the IEP. As determined in Factual Finding 75, Department did not provide the required hours of resource services during the 2006-2007 school year. Student's failure to make academic progress established that this was a material failure to implement Student's IEP.

DID DEPARTMENT DENY STUDENT A FAPE BY FAILING TO HOLD AN ANNUAL IEP TEAM MEETING ON OR BEFORE MAY 31, 2006?

13. The IEP team must periodically review the IEP, no less frequently than annually, to determine whether the annual goals are being achieved, and revise it as appropriate to address any lack of expected progress toward the annual goals and in the general curriculum; the results of any reassessment; information about the student provided to or by the parents or guardians; the student's anticipated needs; and any other relevant matter. (20 U.S.C. § 1414(d)(4)(A); Ed. Code, § 56341.1, subd. (d).)

14. The Supreme Court recognized the importance of adhering to the procedural requirements of the IDEA. (*Bd. of Educ. v. Rowley*, *supra*, 458 U.S. at pp. 206-207.) To constitute a denial of a FAPE, procedural violations must result in the loss of educational opportunity, a serious infringement of the parents' opportunity to participate in the IEP process, or a deprivation of educational benefits. (*Amanda J. v. Clark County Sch. Dist.*, *supra*, 267 F.3d at p. 892.) This is codified in both federal and state law. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2).)

15. As determined in Factual Finding 76, Department failed to hold an annual IEP team meeting on or before May 31, 2006. The meeting was not held until January 9, 2007. Student's unique needs and the services required to meet those needs changed between the 2005-2006 and 2006-2007 school years. Therefore, Department's failure to hold a timely IEP team meeting resulted in a loss of educational opportunity for Student.

DID DEPARTMENT DENY STUDENT A FAPE BY FAILING TO PROVIDE HIM A REFERRAL FOR MENTAL HEALTH SERVICES UNDER GOVERNMENT CODE, CHAPTER 26.5?

16. Government Code Chapter 26.5 provides for the coordination of services provided by state and local governmental agencies to children who qualify for special education services. (Gov. Code, § 7570.) Mental health services required by a student's IEP are governed by these provisions. (Gov. Code, § 7576.) The implementing regulations

provide that Chapter 26.5 applies to the California Department of Education, school districts, county offices, and special education local plan areas. (Cal. Code Regs., tit. 2, § 60000.) A local education agency is defined as a school district or county office of education which provides special education and related services. (Cal. Code Regs., tit. 2, § 60010, subd. (k).) Neither the Department, nor the California Youth Authority is governed by the provisions of Chapter 26.5.

17. As determined in Factual Finding 78, Department did not provide a referral for Student to obtain community mental health services under Chapter 26.5. However, Department was not required to do so. Department did not deny Student a FAPE for failing to provide him a referral.

#### DETERMINATION OF RELIEF

18. It has long been recognized that equitable considerations may be considered when fashioning relief for violations of the IDEA. (*Parents of Student W. v. Puyallup Sch. Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496, citing *School Comm. of Burlington v. Department of Education* (1985) 471 U.S. 359, 374 [105 S.Ct. 1996].) Compensatory education is an equitable remedy; it is not a contractual remedy. (*Parents of Student W. v. Puyallup Sch. Dist., No. 3, supra*, 31 F.3d at p. 1497.) Relief is appropriate that is designed to ensure that the student is appropriately educated within the meaning of the IDEA. (*Ibid*) The award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the LEA should have supplied. (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.) In addition, an ALJ may order an LEA to comply with the procedural requirements of state and federal special education law. (Ed. Code, § 56505, subd. (f)(4).)

19. As determined in Factual Finding 82, Student requires intensive, individualized instruction from a qualified special education teacher in order to receive the educational benefit he would have received if Department had provided a FAPE. The

evidence supports awarding Student compensatory educational services in the form of one- to-one individualized instruction from a special education teacher for five hours a day, five days a week, for one year.

20. As determined in Factual Finding 82, Student requires consistent, individual mental health therapy from a licensed mental health provider in order to receive the educational benefit he would have received if Department had provided a FAPE. The evidence supports awarding Student compensatory educational services in the form of individual mental health therapy from a licensed mental health provider in the amount of one hour a week to address his needs in the areas of behavior and social and emotional functioning for one year.

## ORDER

1. Department shall, as compensatory educational services, beginning no later than 30 days from the date of this Order, provide Student one-to-one, individualized instruction from a qualified special education teacher for five hours a day, five days a week, for a total of 52 weeks.

2. Department shall, as compensatory educational services, beginning no later than 30 days from the date of this Order, provide Student individual mental health therapy from a licensed mental health provider to address his needs in the areas of behavior and social and emotional functioning in the amount of one hour a week, for one calendar year from the date of this Order.

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

## PREVAILING PARTY

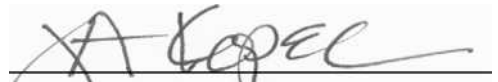
Education Code section 56507, subdivision (d), requires a decision to indicate the extent to which each party prevailed on each issue heard and decided. Student prevailed on Issues 1a, 2, and 4. Department prevailed on Issues 1b and 3. Both parties prevailed

equally on Issues 1c and 1d.

## 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 90 days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

Dated: January 9, 2008

A handwritten signature in black ink, appearing to read "A. Kopec", is written over a horizontal line.

JUDITH A. KOPEC  
Administrative Law Judge  
Office of Administrative Hearings