

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

BREA ORLINDA UNIFIED SCHOOL  
DISTRICT.

OAH CASE NO. 2008050301

DECISION

Administrative Law Judge (ALJ) Darrell L. Lepkowsky, Office of Administrative Hearings (OAH), State of California, heard this matter in Brea, California on June 30 and July 1, 2008.

Student's Mother (Mother) represented Student and herself at hearing each day. Student did not attend the hearing. Attorney Darrin W. Barber represented the Brea Orinda Unified School District (District). Cheri Guerrero, the District's Director of Special Education, was present each day of the hearing. Student opened the hearing to the public and observers were present for each day of the hearing.

Student called his Mother, Dr. John Mitchell, Dr. Mitchell Harris, and Allen Quirk as witnesses. The District called Cheri Guerrero, Susan Grein, and Rachel Didur as witnesses.

Student filed his request for a due process hearing (Complaint) on May 7, 2008. The hearing began as scheduled on June 30, 2008, at which time the ALJ received sworn testimony and documentary evidence. At the conclusion of the hearing, the parties requested time to file written closing argument. Each party timely filed its closing

argument. The ALJ took the matter under submission and closed the record upon receipt of the parties' closing argument on July 11, 2008.

## PROCEDURAL ISSUES

### ISSUES FOR HEARING

During the telephonic prehearing conference held on June 23, 2008, Student raised two issues not included in his Complaint filed on May 7, 2008. Student sought to allege that the District had failed to assess him properly in May 2008 and/or had failed to assess him in all areas of suspected disability. Student also sought to allege that the District's newest offer to him of an individualized education program (IEP), made on or about June 3, 2008, did not constitute a FAPE. The District orally agreed to permit litigation of the FAPE issue but stated that it was not prepared to litigate the issues regarding its assessments of Student. Because the ALJ believed that she could not make a determination regarding FAPE without considering the assessments administered to Student, and because Student had not given the District notice of the issues prior to the prehearing conference, she declined to hear either issue in the instant proceeding.

Student also alleged in his Complaint that the District violated his rights under section 504 of the Rehabilitation Act (section 504), under the Americans with Disabilities Act (ADA), and under No Child Left Behind (NCLB). The ALJ dismissed these issues as beyond her jurisdiction in a due process matter. The jurisdiction of OAH to hear due process claims under the IDEA is limited. OAH only has jurisdiction to consider a proposal or refusal to initiate or change the identification, assessment, or educational placement of a child, or the provision of a FAPE to a child. OAH also has jurisdiction to consider the refusal of a parent or guardian to consent to an assessment of a child, or a disagreement between a parent or guardian and the district as to the availability of a program appropriate for a child. (Ed. Code, § 56501, subd. (a).) This limited jurisdiction

does not include a school district's alleged failure to comply with section 504, the ADA, or NCLB. Therefore, the only issues heard and decided in this Decision are those listed below.

#### STATUTE OF LIMITATIONS

The District orally moved to exclude any allegations of violation of Student's rights that Student alleged occurred prior to May 7, 2006, or more than two years prior to the date Student filed his Complaint. As discussed more fully below, Student alleged that the statute of limitations should be waived under an exception to the statute under California law (Ed. Code, § 56505, subd. (l)(2)), which states that the statute does not apply if a parent was prevented from filing a due process complaint because a district withheld information that it was required to provide to her. Mother stated at the prehearing conference that her testimony at hearing would support her contention in this regard. At hearing, the ALJ informed the parties that she was going to bifurcate the issue of the statute of limitations, and would first receive testimony, through Mother's narrative direct examination of herself and the District's cross-examination of her, on the issue. After completion of this testimony, and after consideration of the facts, the ALJ granted the District's motion to exclude all allegations relating to calendar year 2005 and evidence supporting those allegations, based upon her finding that Mother had failed to prove that an exception to the statute of limitations applied to the facts as presented in Mother's testimony. The ALJ further informed the parties that she would more fully elaborate on the basis for her ruling in this Decision.

## ISSUES<sup>1</sup>

1. Should the applicable statute of limitations be waived for the period of September 2005 through May 2006 because Student's Mother was prevented from requesting a due process hearing due to the District's withholding information that it was required to provide to her?

2. Assuming the statute of limitations is waived, did the District deny Student a free appropriate public education (FAPE) by failing to provide Student's Mother with prior written notice of the reasons for the District's refusal to perform all assessments requested by Mother and the reasons for the District's refusal to provide additional aide services to Student?

3. Assuming the statute of limitations is waived, did the District deny Student a FAPE by failing to provide Student with an appropriate placement in the least restrictive environment (LRE) in September 2005?

4. Assuming the statute of limitations is waived, did the District deny Student a FAPE in September 2005 by impeding his Mother's opportunity to participate in the decision making process and by not considering Student's unique needs?<sup>2</sup>

5. Did the District deny Student a FAPE from March 21, 2008, to April 29, 2008, by failing to make him a 30-day offer of placement immediately upon the request of Student's mother that Student be re-admitted to a District school?

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<sup>1</sup> The ALJ has reorganized the issues for purposes of this Decision

<sup>2</sup> Issue four was re-worded the first day of hearing per Mother's request to reflect her original intent in filing the request for due process.

6. Has the District denied Student a FAPE since March 21, 2008, by failing to give his Mother prior notice of its reasons for refusing her requested placement for Student and by failing to allow her to participate in the IEP process?

7. Did the District deny Student a FAPE on April 29, 2008, by failing to make an appropriate 30-day offer of placement?

8. Did the District deny Student a FAPE on April 29, 2008, by failing to offer Student a grade-appropriate, rather than an age-appropriate placement?

9. Has the District denied Student a FAPE since March 21, 2008, by failing to consider the continuum of placement options available for him and refusing to offer him placement in the least restrictive environment?

## REQUESTED REMEDIES

Student has requested compensatory education as well as an order that his stay-put placement should be based upon the last grade level he completed while enrolled in the private school where his Mother had unilaterally placed him.

## CONTENTIONS OF THE PARTIES

Student contends that the District denied him a FAPE in the spring and fall of 2005 because it did not provide Mother with prior written notice of the reasons why the District refused to perform additional assessments requested by Mother. Student also alleges that the District failed to provide prior written notice that explained the reasons why the District refused to provide additional one-on-one aide services Mother requested for Student during the meetings held to develop Student's IEP for the 2005 – 2006 school year.<sup>3</sup> Student further contends that the October 2005 offer of FAPE

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<sup>3</sup> Final meeting notes of this IEP, which, as discussed below, Mother only partially agreed to, are dated October 26, 2005. It appears that IEP team meetings were held on

violated his rights because it did not place him in the least restrictive environment and was made without permitting his Mother to participate in the IEP process and without considering his unique needs. Student contends that although the allegations pertaining to calendar year 2005 are outside the statute of limitations, the statute should be waived since his Mother was prevented from requesting a due process hearing because the District withheld information that it was required to provide to her.

Student further contends that the District violated his rights beginning on March 31, 2008,<sup>4</sup> when his Mother informed the District that she intended to return Student to a District school after having unilaterally enrolled him in a private school for almost three years. Student contends that the District should not have applied statutes controlling the interim placement of special education students who transfer from one school district to another with a current IEP in effect. Rather, Student maintains that the District should have treated him as a general education student re-entering the District without an IEP. However, Student also asserts that the District's 30-day interim offer was not appropriate because it was not made in a timely manner, was not substantively appropriate because it placed him in eighth grade rather than in sixth grade, which was his present private school placement. Student further contends that the District's 30-day interim offer was defective because the District did not give Mother prior written notice of why it insisted on placing him in sixth grade rather than in eighth grade as requested

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April 29, 2005, May 13, 2005, May 25, 2005, September 2, 2005, October 14, 2005, and October 26, 2005, to develop this IEP. The ALJ shall refer to this, generally, as the October 2005 IEP.

<sup>4</sup> In his closing brief, Student concedes that the proper date should be March 31, 2008.

by Mother and because eighth grade was not the least restrictive environment for Student.

The District responds initially that the Student has failed to prove that there is a basis for waiving the statute of limitations as to the allegations concerning calendar year 2005. The District maintains that Mother was aware of her rights under the Individuals with Disabilities Education Act (IDEA) and state law but chose not to exercise them in 2005. With regard to the allegations concerning calendar year 2008, the District first asserts that it was under no obligation to make a 30-day interim offer to Student because there is no statutory basis for such an offer for a student transferring from a private school to a public school and because of the fact that Mother never actually re-enrolled Student in the District. In the alternative, the District contends that its 30-day interim offer was procedurally and substantively proper.

## FACTUAL FINDINGS

### JURISDICTION AND GENERAL BACKGROUND INFORMATION

1. Student is a 14-year-old boy who is eligible for special education under the category of other health impaired (OHI).<sup>5</sup> Student was determined to be eligible in May 1997, just before he turned three years old. At all times relevant to this proceeding, Student's family lived within the jurisdiction of the District. At the time of the hearing,

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<sup>5</sup> Student's IEP dated April 30, 2004, identifies his eligibility classification as OHI. The initial draft of the October 2005 IEP also identifies Student's eligibility classification as OHI. However, the last draft of the October 2005 IEP identifies Student's primary eligibility classification as specific learning disability (SLD) with a secondary eligibility of OHI. Since the parties have not put Student's eligibility classification at issue in this hearing, it is unnecessary for the ALJ to resolve the issue here.

Mother was home-schooling Student. Student has an older brother who is also receiving special education and related services from the District.

2. In February of 2004, Student's primary care pediatrician, Dr. John Mitchell, referred Student for a test to determine his bone growth because Student was not growing at an expected rate. The test results indicated that Student, who was nine and three-quarters years old at the time, had the bone age equivalent of a child aged five years and six months, give or take one and one-half years.

3. Student received special education and related services through a series of individualized education programs (IEPS) which are not in dispute. The last IEP to which Mother fully agreed is dated April 30, 2004. The ALJ shall refer to this as the April 2004 IEP.

4. To develop the April 2004 IEP, Student's IEP team considered a variety of placements for him on the educational continuum. The team considered fully mainstreaming Student in a general education classroom, but rejected that placement because it would not provide him with enough one-on-one support and did not meet his academic and social needs. The team rejected a special day class (SDC) for Student because it found that completely removing Student from his peers would be too restrictive and would not address his needs. The team also rejected a program that would only provide Student with designated instruction and services (DIS) on a pullout basis as unable to address his needs.

5. Ultimately, the team determined that the appropriate placement for Student at the time was a general education classroom 370 minutes a day, five times a week, with resource specialist program (RSP) support. The team also determined that Student required the support of a one-on-one aide for half of his school day, as well as DIS services of adaptive physical education (APE) two times a week for 30 minutes each session and occupational therapy (OT) two times a week for 45 minutes each session.

Overall, Student's April 2004 IEP indicated that he would spend 90 percent of his school day in a general education setting and 10 percent of his day in a special education setting.

6. The April 2004 IEP also provided Student with small group instruction if needed as well as accommodations such as preferential seating in the classroom and limitations on the amount of homework his teacher would assign to him. The April 2004 IEP covered the remainder of Student's fourth grade year and the majority of his fifth grade year.

#### WAIVER OF THE STATUTE OF LIMITATIONS

7. Mother contends that the two-year statute of limitations for filing a request for due process hearing under applicable California law should be waived because the District did not provide her with prior written notice of its reasons for refusing to assess Student in all areas of suspected disability and for refusing to increase the one-on-one aide services Student was receiving as Mother requested during the development of Student's October 2005 IEP.<sup>6</sup> Mother stated at hearing that although she was aware that she could file for due process hearings, she was not aware in mid- to late-2005 the extent to which the prior written notice needed to contain specific information as to a district's reasons for refusing to change a student's placement and/or services because the District never informed her of those requirements. Mother

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<sup>6</sup> Student's closing brief states that one of the prior written notice issues concerned the alleged failure of the District to integrate Student into a general education class with a one-on-one aide as the LRE for him. However, this issue was not presented as an issue for hearing as discussed by the parties at the prehearing conference and as identified in the ALJ's Order following the prehearing conference.

thus contends that the District's failure amounted to a withholding of information from her that prevented her from filing a due process complaint within the statute of limitations. Mother contends the statute should be waived as to all allegations raised in Student's Complaint regarding calendar year 2005. Under state and federal law, an exception to the statute of limitations exists if a parent can demonstrate that a school district prevented the parent from filing a due process complaint based upon the district's withholding of information that it was required to provide to the parent.

8. Mother is a general education teacher employed by the District. She has earned a bachelor's degree in mechanical engineering as well as a master's degree in education. She also has earned teaching credentials that permit her to teach a general education sixth grade class as well as to teach general education content in another language (Spanish). Mother has taught general education classes for 18 years. As a general education teacher, she has attended IEP meetings as part of an IEP team at least once or twice a year.

9. Mother has also attended IEP team meetings for each of her sons since each was first found eligible to receive special education and related services. Mother has received a copy of her parent's rights and the IDEA procedural safeguards at least 12 times since an IEP was first developed for Student. Her rights were explained to her various times during IEP meetings. Mother has acknowledged receiving her rights and, at times, has waived a verbatim reading of her rights as a parent. For example, on Student's April 30, 2004 IEP, Mother checked off a box, which states "Parent waived verbatim reading of parent rights." Mother also signed the IEP below a paragraph that states, in pertinent part, "This Individualized Education Program was developed and/or reviewed with me in language and terms that I could understand. I was given sufficient opportunity to provide information, suggest modifications, and consider placement options including the option of regular classroom placement with the use of

supplementary aides and services. *I also acknowledge that I received an explanation of my parent rights.* (Emphasis, italics, and underlining in the original.)

10. In addition to receiving copies of her parental rights and procedural safeguards prior to May 2005, Mother reviewed and also requested and received from the California Department of Education, copies of *A Composite of Laws*, a compilation of special education statutes, codes, and regulations. Mother used *A Composite of Laws* to find citations to the Education Code, which she referenced during IEP meetings and in communications with the District.

11. In April 2005, Mother consulted an attorney regarding concerns she had with Student's educational program. Based upon his review of Student's records, the attorney recommended to Mother that Student receive a full auditory processing assessment as well as a psycho-educational assessment. The attorney thereafter wrote to the District requesting that the District assess Student in the areas of vision processing, central auditory processing, speech and language, occupational therapy, and that they administer a psycho-educational assessment to Student. The attorney also requested the District to provide Student with a full time one-on-one aide and additional occupational therapy (OT), and that Student be retained a year in school. The attorney sent Mother a copy of his letter.

12. Mother was not able to afford to continue paying the attorney. Shortly after the attorney wrote to the District, she ceased using his services and proceeded to deal directly with the District. As more fully discussed below, Mother decided to withdraw Student from the District in August 2005 and enroll him in a private school. Neither her attorney nor Mother filed a due process complaint at any time in 2005. In her closing brief, Mother explains that she did not have time to file a due process complaint every time she believed that the District violated the rights of one of her sons.

She also explains that she did not have a clear understanding of her rights, particularly those that applied once she had unilaterally enrolled Student in a private school.

13. The evidence supports the District's position that Mother received copies of her rights and procedural safeguards numerous times prior to May 2005, and that she often waived a verbatim reading of those rights. The evidence also indicates that Mother had a copy of state statutes, codes, and regulations relating to special education law, and knew how to review those laws in order to cite them to the District as a basis for her requests during the IEP process. Mother also consulted with an attorney during April and May 2005, who could have filed a due process complaint on her behalf, but did not. There is no evidence that Mother ever stated to the District that she did not understand her rights or that the District ever failed to explain any right that Mother did not understand. Mother participated in IEPs for at least eight years prior to 2005, both as a parent and as an IEP team member, without giving the District any indication that she was unaware of her rights or that, she did not understand them. Nor is there any evidence that the District withheld information from Mother that prevented her from filing a due process request.

14. The weight of the evidence therefore does not support Student's contention that the ALJ should waive the two-year statute of limitations for the filing of due process claims. Since no exception to the statute applies, Student has failed to prevail on Issue 1. Since Student has not persuasively demonstrated that there is a basis for the ALJ to waive the statute of limitations, all of Student's claims arising in calendar year 2005 (Issues 2, 3, and 4) are barred and will not be addressed by the ALJ in this Decision.

## WHETHER THE DISTRICT'S APRIL 29, 2008 30-DAY INTERIM OFFER OF PLACEMENT DENIED STUDENT A FAPE

### Events Leading Up to the Offer

15. By early 2005, Mother began having concerns that Student was not progressing adequately in his educational program. Prior to Student's annual IEP meeting for 2005, she consulted with an attorney. As stated above, the attorney reviewed Student's records and recommended that Student receive additional assessments to determine if he required additional special education or services.

16. Student's IEP team met on April 29, 2005, to develop his IEP for the remainder of fifth grade and for the majority of sixth grade. Mother attended the meeting as part of the IEP team. As in the prior year, the team considered a continuum of placement options for Student, ultimately determining that a general education classroom with RSP support continued to be the least restrictive environment for him. The team recommended that Student continue to receive two 30-minute sessions of APE per week. Although the IEP draft appears to state that Student would continue to receive two 45-minute sessions of OT per week, the parties apparently believed the District was proposing to decrease OT from two 45-minute sessions a week to two 30-minute sessions a week. Mother was not agreeable to the decrease.

17. At the top of page two of the draft IEP dated April 29, 2005, the team recommended that Student receive three and three-quarters hours per day of one-on-one aide support from an independent facilitator. Three and three-quarters hours are equivalent to 225 minutes a day. However, in the middle of the page, where the IEP document indicates the services offered, the frequency for the independent facilitator is only given as 22 minutes per day. Since the recommendation from the team in the paragraph above was for three and three-quarters hours for services from the independent facilitator, the reference to 22 minutes per day was most likely a

transcription error by the IEP team member who prepared the document. Instead of writing "225" minutes, that team member wrote "22" minutes, and the error carried over through all drafts of what ultimately became the District's October 2005 IEP offer.

18. The District IEP team members also recommended that Student continue to receive the classroom accommodations and supports provided to him in his April 2004 IEP.

19. Mother did not agree with the proposed IEP. She believed that the District was proposing to decrease Student's one-on-one aide support because she read the IEP as decreasing his support from the 225 minutes a day he was receiving to 22 minutes a day as written on the draft IEP. She also believed that the proposal was to decrease OT services from 45 minutes to 30 minutes a session, although the draft document does not indicate the decrease. Mother gave a written list of her concerns to the District IEP team. She requested that the District increase Student's aide services to full time, that Student receive additional assessments, that the IEP team augment Student's goals, and that the IEP document specifically identify modifications and/or accommodations to Student's program.

20. Mother's attorney wrote a letter to the District on May 12, 2005, requesting that the District refer Student to the Los Angeles Diagnostic Center (Center) for additional assessments for Student. The letter also requested additional services for Student, including a full time one-on-one aide. The letter further requested that the District retain Student in fifth grade for the following year. The attorney explained that retention of Student was necessary because of his lack of academic progress, his failure to meet his goals and objectives, and because of Student's physical and emotional immaturity. Mother was in full agreement that Student needed to repeat fifth grade. Retaining Student became her primary concern regarding his placement for the following school year.

21. The IEP team met for a follow up meeting on May 13, 2005. By the time of the meeting, the District had received the May 12, 2005 letter from Student's attorney. In response to Mother's concerns and the requests made by the attorney, the District agreed to develop an assessment plan for Student and to address the other concerns raised in the letter. The team agreed to continue Student's April 2004 IEP in the interim.

22. The IEP team met again on May 25, 2005. The District presented Mother with an assessment plan. The team noted that the District had telephonically contacted the Center, which had declined to administer the proposed assessments to Student. The District agreed to make a formal written referral to the Center for additional assessment. With regard to Student's request for outside assessments and a full time one-on-one aide, as well as his request to maintain his present level of OT services, the District stated that it was reserving its response to those requests until it had administered its assessments to Student and had an opportunity to evaluate the results of the assessments. With regard to retaining Student in fifth grade, the District indicated that the school principal would make recommendations after consulting with the Assistant Superintendent.

23. Because the District's summer vacation would soon start, the District wrote to Mother on June 8, 2005, indicating that it would not complete the assessments for Student until after the next school year started in September. The District informed Mother that it would hold an IEP team meeting for Student to review the assessments no later than September 30, 2005, and that the District would not consider changes in Student's placement, including retention in fifth grade, until the assessments were completed and the District had an opportunity to review the results. Therefore, the District indicated that it would enroll Student in sixth grade for the 2005 – 2006 school year.

24. Mother was extremely unhappy with the District's response. Her primary concern was that Student repeat fifth grade. She felt that he was not emotionally, physically, or cognitively ready for sixth grade, both based upon her knowledge of Student as his parent, and on her many years of teaching general education six grade classes. Mother therefore decided to withdraw Student from the District and unilaterally place him in a private school. Mother informed the District of this on August 19, 2005. Mother also informed the District that she would make Student available to complete the assessments proposed by the District.

25. Mother enrolled Student at the Eastside Christian School (Eastside), in a general education classroom, without any aide support, special education program, or special education DIS services. Eastside informed Mother that its academic program was more advanced than that of the public schools. Therefore, it was Eastside's policy to place students transferring to it from public schools in a grade level one year behind the student's present grade. In Student's case, since Mother informed Eastside that she had felt he needed to be retained for a year had he continued at public school, Eastside determined that Student should begin fourth grade rather than sixth grade when he began school there for the 2005 – 2006 school year. Mother agreed to the placement.

26. On August 22, 2005, Dr. Mitchell Harris, who was Student's psychotherapist from 2002 to 2004, wrote to the District recommending that Student be retained. Dr. Harris based his opinion on his belief that Student's psychological, social and emotional functioning were well below his chronological age. Dr. Harris opined that advancing Student to sixth grade would most likely be harmful to him.

27. The District held a meeting with Mother on September 2, 2005, to discuss her request that the District retain Student in fifth grade. By this time, Student was enrolled at Eastside. The District stated that it had explored the issue of retaining Student, and that it was prepared to agree to the request to retain him in fifth grade,

with a placement at his home school.<sup>7</sup> Mother declined the placement. In a letter to the District dated September 7, 2005, she stated that there was no reason for the District to have waited until September to agree to retain Student. She also stated that she would not consider the proposed placement until the IEP team could meet to review the results of Student's assessments.

28. On September 9, 2005, Student's pediatrician, John Mitchell, wrote to the District recommending that it hold back Student one or even two academic years. Dr. Mitchell stated that he based his recommendation on the 10 years he had been treating Student and the determination that Student's physical growth was almost five years behind his chronological age. Dr. Mitchell stated that Student's emotional growth was also delayed and that advancing Student to sixth grade was not in Student's best interests.

29. The IEP team, including Mother, met again on October 14, 2005. The draft IEP was updated to include an offer of speech and language services two times a week for 30 minutes each session. No one corrected the error identifying the independent facilitator services for only 22 minutes a day. The draft continued to indicate that OT services last for 45 minutes during each of two sessions. The District shared the results of Student's assessments with Mother.

30. The team held a follow up IEP meeting on October 26, 2005, to complete Student's IEP. Mother attended, as did a general education teacher from Eastside. The District had also invited the Fullerton School District to attend the meeting because

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<sup>7</sup> Student had previously attended class other than at his home school.

Eastside is within its jurisdictional boundaries, but no one from that district could attend the meeting.<sup>8</sup>

31. The District reiterated its offer to place Student in a fifth grade general education classroom with supports at his home school, along with the previously identified DIS services. Mother indicated that she still wanted Student to have a full time one-on-one aide. Mother now stated that she wanted Student to receive three 45-minute OT sessions a week, acknowledging that the proposed OT services were for two 45-minute sessions a week. Mother also reiterated her request for additional assessments. Ultimately, Mother signed her agreement to the proposed goals and to the APE and speech and language services. She did not agree to the "service delivery" and indicated that she still wanted Student to receive visual and auditory assessments, which the District had not agreed to administer. Mother did not agree to transfer Student back to the District.

32. Student remained at Eastside, enrolled in fourth grade for the 2005 – 2006 school year, in fifth grade for the 2006 – 2007 school year, and in sixth grade during the 2007 – 2008 school year. Student maintained a B average for fourth and fifth grade. His grades fell during sixth grade.

#### Timeliness of the 30-Day Interim Offer of Placement

33. Mother and the District did not discuss Student for over two years. However, Student's brother continued to attend District schools under an IEP. In mid-

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<sup>8</sup> Under the reauthorized IDEA, the school district where a private school is located is responsible for providing a special education student with proportional related services under that district's child find obligations. (34 C.F.R. § 300.131(a); 34 C.F.R. § 300.132(a), (b).)

February 2008, during a meeting with District program specialist Susan Grein concerning Student's brother, Mother expressed an interest in re-enrolling Student in the District for the 2008 – 2009 school year. Mother told Grein that she was concerned that Eastside would not accept Student into its Junior High the next school year for seventh grade. At a subsequent meeting for Student's brother in early March 2008, Grein informed Mother that the District would probably place Student in the ninth grade (the first year of high school in the District) should Mother re-enroll Student pending re-assessment of him. Grein told Mother this was based on the fact that Student would be 14 years old by the beginning of the 2008 – 2009 school year. Grein also suggested to Mother that she give the District written notification of her intent to transfer Student back to the District.

34. On approximately March 20, 2008, Student's teacher at Eastside informed Mother that Eastside was not going to permit Student to participate in sixth grade Outdoor Science School (OSS)<sup>9</sup> because he could not climb trees. Mother was distressed because Student had been looking forward to attending OSS for many years and she knew he would be devastated when told he could not participate in the program.

35. On March 21, 2008, Mother sent an email to District Director of Special Education Cheri Guerrero, with a copy to Grein, requesting that the District administer a triennial assessment to Student. Mother also informed Guerrero that she wanted Student to re-enter the District that spring, rather than in fall [of 2008] if placement in sixth grade was possible. Mother stated that she thought it was "absurd" to place Student in ninth grade for the following school year, as Grein had informed her, since he was presently in sixth grade and should only be advancing to seventh grade. Mother further stated that she did not believe placement decision regarding Student were

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<sup>9</sup> Outdoor Science School is a weeklong camp program for all sixth grade students. Both Eastside and the District participate in the program.

appropriate until the District had assessed him. Mother suggested as an alternative that the District temporarily place Student in a sixth grade class pending completion of the assessments.

36. Grein briefly responded to Mother by email on March 21 stating that she had informed the school psychologist that Mother had requested an assessment. Grein did not inform Mother in this email that she needed to enroll Student in the District in order for any placement or assessment issues to be discussed or implemented. Mother replied to Grein on March 30, again suggesting a temporary sixth grade placement. Mother did not start enrollment procedures for Student; she did not go to the District offices to enroll him and did not request that the District mail her enrollment paperwork. Nor did she ask anyone at the District whether she needed officially to enroll Student.

37. March 21, 2008, was the Friday before the District entered a week of spring break. On March 31, 2008, after District staff returned to work following the break, Guerrero delegated responsibility for following up on Mother's email to Grein. Grein contacted school psychologist Rachel Didur and requested that Didur prepare an assessment plan for Mother to review and sign. Both Didur and Grein recognized that the facts of this case were unusual in that Student had previously had an IEP, had been unilaterally placed in a private school where he had no IEP and did not receive any special education or services, and now indicated he might return to the District. They were not aware of any statutes or procedures covering this type of fact pattern. Typically, they deal with situations where a special education child transfers to the District from another District in or out of California with a current IEP. Given the unusual situation, Didur and Grein consulted with the District's attorney, who advised that based on Student's records, an eighth grade placement was appropriate until the assessments were completed.

38. On April 3, 2008, at an IEP for Student's brother, Grein gave Mother the District's assessment plan for Student. Mother signed the assessment plan. On April 4, Mother sent another email to Grein stating that she was open to discussing alternatives regarding Student's placement, such as enrolling him as a sixth grader with a special placement.

39. At the same time Mother was corresponding with the District, she was writing to Eastside pleading with them to permit Student to attend OSS. Student became exceedingly upset when he discovered Eastside was not going to permit him to attend OSS; Mother kept him home from school due to his anxiety and emotional condition. During the week of April 5, 2008, Mother attended the OSS program with her own sixth grade class. During that time, Eastside sent her a letter in which it refused to reconsider its decision to prohibit Student from attending OSS. Eastside also informed Mother that it would not accept Student into its Junior High School for the following school year. At that point, Mother decided to home school Student rather than returning him to Eastside to finish sixth grade.

40. The District determined that it would treat Student as if he were a Student transferring to a different school district with a previous IEP, albeit, in this case, with one that was out of date. The District decided to hold a meeting to consult with Student's mother regarding an interim placement for him while the District completed its assessments. The District contemplated placing Student in as close an approximation of the placement he had been in during the 2004 – 2005 school year, which was the last year he had spent with the District before transferring to Eastside, accounting for the almost three years that had elapsed. The District thus determined that it was logical and appropriate to place Student at least temporarily in the eighth grade until it could assess him, review the assessments, and convene an IEP meeting within 30 days in order to determine what his unique needs now were.

41. Based on the schedules of District IEP team members as well as Mother's schedule, the District could not convene a meeting to discuss an interim placement for Student until April 29, 2008. As of that date, Mother still had not re-enrolled Student in the District. In spite of that, the District proceeded with the meeting and with its assessments of Student.

#### Contents of the District's April 29, 2008 30-day Offer of Interim Placement

42. Rachel Didur contacted Eastside to request a copy of Student's records in preparation for the April 29, 2008 meeting. Eastside did not have a copy of any of Student's previous IEPs or any of his other special education records and therefore could not provide them. The District IEP team members could not find all of the District's own copies of Student's previous IEPs. At the meeting on April 29, the District was therefore uncertain of exactly what services Student had been receiving and what portions of the latest IEP Mother had agreed to almost three years previously. Based upon discussion with Mother, the IEP team determined that Student had been receiving two 30-minute sessions of APE per week and two 45-minute sessions of OT per week. The District offered both of these services to Student as part of an interim 30-day placement. While Mother recalled that the District had previously offered, and she had accepted, DIS speech and language services, she could not recall the amount of services. The team agreed to write in the amount on the 30-day placement once Mother provided the District with copies of all Student's prior IEPs.

43. Based upon its understanding of the content of Student's previously implemented and previously agreed-upon IEPs, the District made the following offer of a 30-day interim administrative placement for Student pending completion of his assessments and the holding of a formal IEP team meeting: eighth grade placement at Brea Junior High School; 180 minutes a day of specialized academic instruction in a general education setting; APE for two 30-minute sessions a week; OT for two 45-

minute sessions a week; speech and language services to be determined at a later date based upon review of Student's latest IEP when it was provided. The offer did not include any one-on-one aide support. The District IEP team members did not agree to place Student in sixth grade pending his assessments as Mother requested or to place Student in an independent study program, also as Mother requested. The District informed Mother that it was its position that it had to offer Student the placement and services from his last agreed upon IEP until the assessment process was complete and Student's present needs determined at an IEP meeting. Mother refused the offer of interim placement.

44. The District provided Mother with a copy of the April 29, 2008 interim offer, along with the notes taken during the meeting, which were attached to the form interim offer.

45. The District convened an IEP team meeting on May 27, 2008, within 30 days of holding the April 29, 2008 interim offer meeting. Mother attended the IEP meeting. The team continued the meeting until June 3, 2008, to complete the IEP, at which time the District made an IEP offer for Student. That offer is not at issue in this case.

## CONCLUSIONS OF LAW

### BURDEN OF PROOF

1. Student, as the petitioning party, has the burden of proving the essential elements of his claims. (*Schaeffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 163 L.Ed.2d 387].)

### STATUTE OF LIMITATIONS (ISSUES 1, 2, 3, AND 4)

2. Student contends that Mother was prevented from filing a due process complaint within the statute of limitations because the District withheld information that

it was required to provide to her by statute. In essence, Student contends that the District did not completely explain the scope of what was required in a prior written notice to a parent of a district's refusal to implement a change requested by the parent in her child's educational program and that, therefore, Mother was not properly advised of her rights under the IDEA. Student contends this amounted to a withholding of information from Mother and therefore the District contends that it did not fail to inform Mother of her rights, and thus no exception to the statute applies.

3. Congress intended to obtain timely and appropriate education for special needs children. Congress did not intend to authorize the filing of claims under the IDEA many years after the alleged wrongdoing occurred. (*Student v. Vacaville Unified Sch. District* (2004) S.E.H.O case SN 04-1026, 43 IDELR 210, 105 LRP 2671, quoting *Alexopolous v. San Francisco Unified Sch. District* (9th Cir. 1987) 817 F.2d 551, 555.)

4. Due process complaints filed prior to October 9, 2006, were subject to a three-year statute of limitations, whereas due process complaints filed after October 9, 2006, are subject to a two-year statute of limitations. (20 U.S.C. §§ 1415(b)(6)(B), 1415(f)(3)(C); 34 C.F.R. § 300.507(a)(2); 34 C.F.R. § 300.511(e); Ed. Code, § 56505, subds. (l) & (n).) In California and under federal law, a request for due process hearing is required to be filed within two years from the date the party filing the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C)-(D); 34 C.F.R. § 300.511(f); Ed. Code, § 56505, subd. (l). See also, *Draper v. Atlanta Ind. Sch. System* (11th Cir. 2008) 518 F.3d 1275, 1288.) This statute does not apply to a parent who was prevented from requesting the due process hearing due to the local educational agency withholding information that was required "under this part" to be provided to the parent. (Ed. Code, § 56505, subds. (l)(l) & (2). See also, *J.L. v. Ambridge Area Sch. District* (W.D. Pa. February 22, 2008) 2008 U.S. Dist. LEXIS 13451, \*23-24.) An administrative law judge is required to make determinations, on a case-by-

case basis, of factors affecting whether the parent “knew or should have known” about the action, that is the basis of the complaint. (71 Fed.Reg. 46706 (Aug. 14, 2006).)<sup>10</sup>

5. The “‘knowledge of facts’ requirement does not demand that the [party] know the specific legal theory or even the specific facts of the relevant claim; rather the [party] must have known or reasonably should have known the facts underlying the supposed learning disability and their IDEA rights.” (*Miller, supra*, 318 F.Supp.2d at 861 (citing *Jolly v. Eli Lilly & Co.* (1988) 44Cal.3d 1103, 1111); *Ashlee R. v. Oakland Unified Sch. District Financing Corp.* (N.D. Cal. 2004) 2004 U.S. Dist. LEXIS 17039, p. 16.)

6. Misrepresentation of facts and withholding of information are narrow exceptions that require that the local education agency’s actions be intentional or flagrant rather than merely a repetition of an aspect of determining whether a student received a FAPE. “The statutory requirement that the misrepresentation or withholding prevented (the parent) from requesting the hearing further evidences the stringency, or narrowness, of these exceptional circumstances.” (*School District of Philadelphia* (Pa. State Educational Agency, Appellate Panel, March 5, 2008) 49 IDELR 240, p. 5, 108 LRP 13930.)

7. Here, the weight of the evidence does not support Student’s contention that the District either failed to advise Mother of her rights or withheld information it was required to provide to her. The IEP documents indicate, and Mother admitted at

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<sup>10</sup> The two-year statute of limitations and exceptions were added when the IDEA was revised and signed into law in December 2004, effective July 1, 2005. (20 U.S.C. § 1415(f)(3)(C)-(D).) By its terms, Education Code section 56505, subdivision (l) sets forth the two exceptions in accordance with part 300.507(a)(2) and parts 300.511(e) and (f) of title 34 of the Code of Federal Regulations. Thus, California has in effect adopted the IDEA statute of limitations and its two specific exceptions.

hearing, that the District reviewed parental rights with Mother and that it gave her copies of her rights and the IDEA procedural safeguards numerous times between 1997 and 2005. The evidence also indicates that Mother fully participated in IEP meetings both as a parent and as a District member of IEP teams for her own students. Mother had a copy of and knew how to cite to the California Department of Education's compilation of special education statutes entitled *A Composite of Laws*. Additionally, Mother, who is college-educated, and possesses both a bachelor's degree in engineering and a master's degree in education, along with her certifications as a teacher, consulted an attorney during spring 2005 because of her concerns about Student's educational program. However, neither the attorney nor Mother chose to file due process claims against the District at that time in spite of the disagreements they had with the educational program the District was providing to Student. Student essentially contends that the District did not give Mother specific information about what information was required in a district's prior written notice to a parent of its decision to reject an educational placement or service proposed by a parent. However, Student does not cite to any statute or case law to support his position that a district must provide to a parent what amounts to legal advice. There is no dispute that Mother was literate in English, had been advised of her rights numerous times, had acknowledged her understanding of her rights numerous times, and was not prevented from filing a due process claim. She merely chose not to do so at the time the alleged violations of Student's rights occurred. The District provided Mother with copies of her rights unless she chose to waive receipt of them, and reviewed her rights and procedural safeguards with her. The law requires no more.

8. Therefore, the ALJ finds that Student's Mother was aware of her rights at all times in 2005 when the violations of Student's rights allegedly occurred. No exception to the statute of limitations applies. Since Student has failed to persuade the

ALJ that the statute of limitations should be waived, Student's Issues 2, 3, and 4 are barred since the allegations arise from causes of action that occurred prior to May 7, 2006, which is two years prior to the date Student filed his Complaint. (See *Grant Miller v. San Mateo-Foster City Unified School District* (N.D. Cal 2004) 318 F.Supp.2d 851, 860-862.) (Factual Findings 2 through 9; Conclusions of Law 2 through 8.)

#### WHETHER THE DISTRICT'S APRIL 29, 2008 30-DAY INTERIM OFFER OF PLACEMENT DENIED STUDENT A FAPE (ISSUES 5, 6, 7, 8, AND 9)

##### General Requirements of a FAPE

9. Children with disabilities have the right to a FAPE that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and independent living. (Ed. Code, § 56000.) FAPE consists of special education and related services that are available to the student at no charge to the parent or guardian, meet the state educational standards, include an appropriate school education in the state involved, and conform to the child's IEP. (20 U.S.C. § 1402(9); Ed. Code, § 56031.) In California, related services are referred to as designated instruction and services (DIS). (Ed. Code, § 56363, subd. (a).)

10. There are two parts to the legal analysis in suits brought pursuant to the IDEA- procedural and substantive. First, the court must determine whether the school system has complied with the procedures set forth in the IDEA. (*Bd. Of Ed. Of the Hendrick Hudson Sch. Dist v. Rowley* (1982) 458 U.S. 176, 200 [102 S.Ct. 3034, 73 L. Ed.2d 690] (hereafter *Rowley*.) Second, the court must assess whether the IEP developed through those procedures was designed to meet the child's unique needs, reasonably calculated to enable the child to receive educational benefit, and comported with the child's IEP. (*Id.* pp. 206-207.) Procedural violations constitute a denial of FAPE only if the violations caused a loss of educational opportunity to the student or significantly infringed on the parents' right to participate in the IEP process. (*Rowley, supra*, 458 U.S.

at pp. 206-207; *M.L. v. Federal Way Sch. Dist.* (9th Cir. 2004) 394 F.3d 634, 646; *MM v. Sch. Dist. of Greenville County* (4th Cir. 2002) 303 F.3d 523, 534; *Amanda J. v. Clark County Sch. Dist.* (9th Cir. 2001) 267 F.3d 877, 892.)

#### Timeliness of the 30-day Interim Offer (Issue 5)

11. Student contends that the District did not make a timely offer of interim placement to him because the District had notice of his intent to return to the District as of no later than March 31, 2008, but failed to make an interim offer until April 29, 2008, almost a month later. The District first responds that since there are no statutes that address the facts of this case, where Student was transferring from a private school to a public school without a current IEP, the District had no legal obligation to make an offer a 30-day interim placement to Student.<sup>11</sup> Therefore, there was no legal effect of it

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<sup>11</sup> In his closing brief, Student also argues that since he was transferring from a private school without a current IEP, the District should have treated him as a general education student, ignoring his past eligibility for special education, and potentially, his present need for services. Student's argument is not persuasive. First, if the 30-day interim placement statutes did not apply to Student, then it is irrelevant whether the District procedurally or substantively failed to comply with the state and federal law in making the 30-day offer. All of Student's issues concerning that offer therefore would be subject to dismissal for lack of jurisdiction or because there is no case in controversy. However, the ALJ, as discussed *infra*, rejects the same argument made by the District that it was not obligated to make Student a 30-day offer.

Secondly, the result of accepting Mother's argument would be a *de facto* exiting of Student from special education without following proper legal procedures. To exit a child from special education, a school district must reassess a child to determine

having made an allegedly late offer. The District also contends that since Student never transferred back to the District by re-enrolling in one of its schools, the District was not

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that the child is no longer eligible for special education services, unless the child has graduated from high school with a regular diploma, or has reached the age of 22, at which time the child is no longer eligible for special education services. (Ed. Code, §§ 56381, subds. (h) & (i), 56026, subds. (c)(4)(A), (B) & (C).) Once a student has been receiving special education services, the parent cannot unilaterally withdraw the child from special education. This is so despite the provisions of 34 Code of Federal Regulations, part 300.9(c)(1), and Education Code section 56021.1, which state that a parent can revoke informed consent "at any time." (Office of Special Education Programs, interpretative letter, 18 IDELR 534, September 20, 1991.) If a parent refuses all special education services after having consented to those services in the past, the school district is to file a request for a due process hearing. (Ed. Code, § 56346, subd. (d).) The United States Department of Education recently issued a Notice of Proposed Rulemaking, seeking public comment on a proposal to amend 34 Code of Federal Regulations part 300.9, to permit parents to unilaterally withdraw their children from special education. (73 Fed.Reg. 27690-27692 (May 13, 2008).) At this time, however, the law remains that parents cannot unilaterally remove their children from special education. Accepting Mother's argument would create a loophole in the prohibition against a parent unilaterally withdrawing her child from special education: all the parent would have to do is temporarily withdraw the child from public school and then, at some future date, re-enroll the child. Since the child would no longer have a "current IEP," the parent could then argue that the child was no longer a special education student. Until the IDEA and/or the Code of Federal Regulations are amended, that course of action is contrary to the present letter and spirit of the IDEA.

under any obligation to make a 30-day offer of interim placement to Student, and therefore no timeline for making the offer was triggered. Alternatively, the District asserts that it made its 30-day offer within a reasonable amount of time given the schedules of its IEP team members and Mother.

12. Thirty-day administrative offers are governed by both state and federal law. However, there is no law that addresses the obligation of a district when receiving a transferring student, who is eligible for special education services but who does not have a current IEP in effect.

13. The reauthorized IDEA set forth new requirements for districts to follow when a child with a disability transfers to a new school district within the same academic year. If the child had an IEP that was in effect in the same state, then the local educational agency (in this case, the District) must provide the child with a FAPE, including services comparable to those described in the previously held IEP. The district must consult with the student's parents before making the offer of placement and services to the transfer student. The receiving district must then adopt the previous IEP or develop, adopt, and implement a new IEP consistent with state and federal law. (20 U.S.C. § 1414(d)(2)(C)(i)(1).) The Code of Federal Regulations clarifies that the student must both transfer to a new public agency (i.e. the District) *and* enroll in a new school, for the District's obligation to be triggered (34 C.F.R. § 300.323(e)(1) & (2).)

14. California law requires a district, which receives a child from a district that is not within the same local plan as the district from which the child is transferring, to provide the child with a FAPE, including services comparable to those described in the child's previously approved IEP, in consultation with the child's parents. Under California law, the receiving district is charged with providing the services under the existing IEP for no more than 30 days. After 30 days, the district must adopt the previous IEP, or develop, adopt, and implement a new IEP. (Ed. Code, § 56325(a)(1).) The difference

between the California statute and the federal statute is the requirement in California that the receiving district must decide to either adopt the current IEP or develop a new IEP within 30 days; the federal statutes have no such time requirement.

15. It is also possible for a district to temporarily place a transferring student in an interim program for a specific time (e.g., 30 days) where the student's parents believe a new evaluation is necessary. (*Ms. S. ex rel G. v. Vashon Island School District, supra*, 337 F.3d at p. 1130.) Therefore, although there is no statute which specifically addresses the instant situation where a child, who is eligible for special education services but does not have current IEP, transfers to a new district which is aware, or becomes aware of the child's eligibility, the ALJ finds that the receiving district has the obligation to provide an interim placement reasonably designed to meet the student's unique needs. (See also *Student v. Bonsall Unified School District* (2007) OAH No. N2007040284.) It is clear from reading state and federal law that the intent of Congress and the state legislature was to ensure that a child who had been found eligible for special education services continue to receive them until an IEP team had an opportunity to review the child's present needs and determine whether the child still qualified for the services. To find otherwise would run counter to the intent of the IDEA. Therefore, the ALJ finds that under the facts of this case, where the District was well aware that Student was a child who had previously qualified for special education services, the District had an obligation to make a 30-day interim offer to Student.

16. However, the District also contends that it was not legally obligated to offer an administrative interim placement, irrespective of whether Student had or did not have a current IEP, because Mother never enrolled Student in the District. While this argument certainly is logical based upon the language of the Code of Federal Regulations that a child must enroll in a district in order to receive an interim placement, it ultimately is not persuasive under the facts of the instant case. Here, as stated in

Findings of Fact 33 through 41, both Mother and the District were operating under the premise that the District was going to make a 30-day interim offer to Student. Although Mother never enrolled Student, no one from the District informed her that she needed to do so in order to receive a 30-day offer of placement. As Mother points out in her brief, had the District informed her that she needed to enroll Student before they could consider an interim placement, she would have done so. However, in spite of the fact that Student was not enrolled in the District, the District convened a meeting to consult with Mother about the contents of the 30-day offer, then made an interim offer based upon that discussion, and then convened an IEP meeting within the 30-day period mandated by California law. Mother therefore relied on the words and actions of the District in failing to enroll Student. The fact that Mother did not enroll Student therefore does not relieve the District, under the facts of this case, of its obligation to have made a timely and legally appropriate 30-day interim offer to Student. To hold otherwise would punish Student for reasonably relying on the statements and actions of the District to his detriment.<sup>12</sup>

17. Therefore, the ALJ finds that the District had an obligation to make a 30-day offer in a timely manner. The issue remains, however, whether the offer the District made was, in fact, "timely." Neither federal nor California statutes address when a district must make its administrative offer of interim placement once it is aware that a child eligible for special education is transferring into the district. There is a paucity of case law on the subject, probably because these offers are intended to be temporary

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<sup>12</sup> However, this is no requirement that a parent enroll her child in a district in order for the district to be obligated to assess a child and, if the child is found eligible for special education, offer the child an IEP. (*James v. Upper Arlington City Sch. Dist.* (6th Cir. 2000) 228 F.3d 764, 766-69.)

solutions until the parties can convene a formal IEP meeting. In *Termine by Termine v. William S. Hart Union High Sch. Dist.* (9th Cir. 2007) 48 IDELR 272, 107 LRP 59234, the Ninth Circuit, in an unpublished decision, found that a school district had not made a timely 30-day offer to a transfer student because the offer was made two weeks after the Student transferred to the district. The court based its finding on the language of Education Code section 56325, subdivision (a) in effect in 2001, the year the causes of action arose in the case. At that time, the statute read: "Whenever a pupil transfers into a school district from a school district not operating programs under the same local plan in which he or she was last enrolled in a special education program, the administrator of a local program under this part shall ensure that the pupil is *immediately* provided an interim placement for a period not to exceed 30 days." (emphasis added.) However, the present version of Education Code section 56325, subdivision (a)(1), referenced in paragraph 14 above, omits the language requiring a district to *immediately* provide a 30-day placement. Instead, like the federal statute on which it is based, the present version of the Education Code does not address how much time a district may take before it makes an interim offer. Therefore, the issue is whether the District made its offer within a reasonable amount of time.

18. Based upon the facts of this case, the ALJ finds that the District's offer was timely. First, since the District was unsure of whether any statutes concerning interim offers were applicable to Student's case, it was reasonable for District staff to review the facts of the case and to consult with legal counsel before it met with Mother to discuss an interim offer. Further, since Mother did not ever enroll Student, the District was not under notice of when time would have start running on a "reasonable" amount of time for it to make the offer. Furthermore, the District spent time attempting to obtain Student's records from his private school, but ultimately discovered that the private school did not have any of Student's IEPs or special education records. Additionally,

there were legitimate conflicts in the schedules of District IEP members that prevented them from convening the meeting prior to April 29, 2008. Finally, the failure to make the 30-day offer in a timely manner is a procedural violation. As stated in Conclusions of Law 10, a procedural violation of the IDEA only results in a violation of FAPE if the violation caused a loss of educational opportunity to the student or significantly infringed on the parent's right to participate in the IEP process. Here, the District's delay did not affect Mother's right to participate in the 30-day interim offer process. Further, Student did not lose any educational opportunity because Mother ultimately rejected the offer. All evidence in this case indicates that Mother had no intention of accepting any offer other than one which including placing Student in a sixth grade classroom. The delay therefore did not affect Student's education since Mother did not intend to accept the offer. Therefore, any delay was harmless error, which did not amount to a denial of FAPE.

19. The ALJ thus finds Student has failed persuasively to prove that the District failed to make a 30-day interim offer to him in a timely manner. (Factual Findings 15 through 41; Conclusions of Law 9 through 18.)

#### Prior Written Notice (Issue 6)

20. Mother contends that the District failed to give her prior written notice of the basis for its refusal to offer Student placement in a sixth grade class when it made its 30-day interim offer to him. Mother contends that the District never explained its reasoning, other than what was contained in the notes to the April 29, 2008 interim offer. The District maintains that it provided Mother with adequate prior written notice of what it was offering in the 30-day interim placement and what its reasoning was based upon, in the document comprising the 30-day offer.

21. A school district must provide written notice to the parents of a child before it proposes to initiate or change, or refuses to initiate or change, the

identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(3); 34 C.F.R. § 300.503(a); Ed. Code, § 56500.4.) The notice shall include, among other things, a description of the action the school district proposes or refuses; an explanation of why the school district proposes or refuses to take the action; and a description of other options considered by the IEP team and the reason those options were rejected. (20 U.S.C. § 1415(c)(1); 34 C.F.R. § 300.503(b); Ed. Code, § 56500.4.) The comments to the federal regulation indicate that prior written notice shall be provided at a reasonable time before the school district implements the proposal or refusal that is the subject of the notice. (71 Fed.Reg. 46691 (Aug. 14, 2006).) The comments assume that a school district will convene an IEP team meeting after it formulates its proposed action or refusal, and then provide prior written notice of its decision to implement the proposed action or refusal. (*Ibid.*)

22. The ALJ first notes that the District persuasively argues that the 30-day interim offer document itself gave Mother adequate prior written notice of what the offer was and why the District was making it. The document specifically states that the District was rejecting Mother's request to place Student in sixth grade for a number of reasons. The District felt that placing him in eighth grade at Brea Junior High would allow the assessment team full access to Student during the assessment process since the team was from Brea. The assessment team would also be able to observe Student in his classroom setting if he attended school where the team members were located. Finally, the District staff informed Mother, as it indicated on the 30-day offer document, that it felt that placement in an eighth grade class best approximated the placement and services of Student's last agreed-upon IEP. The document therefore gave Mother sufficient prior written notice of the basis for the District's offer. (See *Student v. Alhambra Unified School District* (2006) OAH No. N2006020312; *Student v. Pomona Unified School District* (2006) OAH No. N2005070523.) Therefore, the District did not

violate Student's rights to prior written notice by its failure to write Mother a separate letter detailing the reasons it rejected her request for a sixth grade placement for Student. (Factual Findings 42 through 44; Conclusions of Law 21 and 22.)

#### Participation in the IEP Process

23. Mother contends that the District violated her rights because the District did not permit her to participate in the IEP process when formulating its 30-day interim offer of placement. The District maintains that it did not violate any of Mother's rights.

24. Parents are required and vital members of the IEP team. (§ 1414(d)(1)(B)(i); 35 C.F.R. § 300.344(a)(1); Ed. Code, § 56341, subd. (b)(1).) The IEP team must consider the concerns of the parents for enhancing their child's education throughout the IEP process. (§ 1414(c)(1)(B) [during assessments], (d)(3)(A)(i) [during development of the IEP], (d)(4)(A)(ii)(III) [during revision of an IEP]; 34 C.F.R. §§ 300.305(a)(i), 300.324(a)(1)(ii), (b)(1)(ii)(C); Ed. Code, § 56341.1, subds. (a)(1) [during development of an IEP], (d)(3) [during revision of an IEP], & (e) [right to participate in an IEP].) The requirement that parents participate in the IEP process ensures that the best interests of the child will be protected, and acknowledges that parents have a unique perspective on their child's needs, since they generally observe their child in a variety of situations. (*Amanda J., supra*, 267 F.3d at p. 891.) Procedural violations that interfere with parental participation in the development of the IEP "undermine the very essence of the IDEA." (*Ibid.* at p. 892.) In order to fulfill the goal of parental participation in the IEP process, the school district is required to conduct a meaningful IEP meeting. (*Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2004) 293 F.3d 840, 857, citing *W.G. v. Bd. Of Trustees of Target Range Sch. Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1485.)

25. A parent has meaningfully participated in the development of an IEP when the district informs her of her child's problems, attends the IEP meeting, expresses her disagreement regarding the IEP team's conclusions, and requests revisions in the IEP.

*(N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1036 [parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].)

26. The weakness in Student's argument is that a 30-day interim offer is not an IEP. It is an administrative method of ensuring that a child who was previously found eligible for special education continues to receive services after transferring to a new district until his IEP team, including his parent, has an opportunity to develop a new IEP if necessary. The 30-day offer process does not contemplate the full panoply of procedural requirements that underlie the IEP process. There is no requirement for assessment or observation of a child before a district makes a 30-day interim offer and no requirement that specific individuals attend any meeting a district convenes to discuss the offer. The only requirement is that a district "consults" with a student's parents before formulating the offer.

27. Here, the District met its obligations to consult with Mother. Indeed, the evidence demonstrates that the District went beyond what the law requires it to do in formulating its offer. The District first consulted with Mother through emails, and responded to her written concerns. It then held a meeting, attended by special education staff as well as a school psychologist so that Mother could discuss her concerns and be part of the process to develop the offer. The 30-day offer remained open, based upon Mother's representation that there were more services to be added to the offer, in the expectation that the offer would be augmented after the District received the information from Mother. As stated by both Didur and Grein, it was unusual for the District to meet formally with a parent before it made an administrative 30-day offer. The evidence amply supports the District's position that it consulted with Mother, considered her input, and discussed the reasons why it disagreed with her.

Student has failed to prove that the District prevented Mother from participating in the process to develop the 30-day interim offer. (Factual Findings 33 through 45; Conclusions of Law 12 through 14, 24 through 27.)

Whether the District's 30-Day Offer of Interim Placement Substantively Denied Student a FAPE (Issues 7, 8, and 9)

28. Student contends that the District's 30-day interim offer was inappropriate because it failed to place him in a sixth grade class, which was his last equivalent educational placement. Student also contends that his unique needs dictated that the District place him in a sixth grade class rather than in an age-appropriate classroom. Student further contends that an eighth grade class was not the LRE for him. Finally, Student contends that the District's offer failed to comport with his last agreed upon IEP(S). The District responds that, given the totality of the circumstances and the information available to it at the time, the 30-day offer it made was a reasonable and prudent approach to an unprecedented situation.

29. Both federal and state law requires school districts to provide a program in the LRE to each special education student. (See 34 C.F.R. §§ 300.114, et seq.) A special education student must be educated with nondisabled peers "[t]o the maximum extent appropriate," and may be removed from the regular education environment 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 "cannot be achieved satisfactorily." (Ed. Code, §§ 56001, subd. (g), 56345, subd. (a)(5); 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(i), (ii).) When determining whether a placement is in the least restrictive environment (LRE), four factors must be evaluated and balanced: (1) the academic benefits of placement in a mainstream setting, with any supplementary paraprofessionals and services that might be appropriate; (2) the non-academic benefits of mainstream placement, such as language and behavior models provided by non-

disabled students; (3) the negative effects the student's presence may have on the teacher and other students; and (4) the cost of educating the student in a mainstream environment. (*Sacramento City Unified School District v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (hereafter, *Rachel H.*))

30. Both Dr. Mitchell and Dr. Harris testified that it was their expert opinion that Student's present physical, emotional, and social development warranted placement of him in a class with students two years younger than he is. However, a student's actual or present needs are not relevant when determining the adequacy of a 30-day offer. Therefore, the law applying to the development of an IEP and the adequacy of a FAPE offer is of little help in analyzing whether a 30-day interim offer met legal requirements. As stated in Conclusions of Law 26, the 30-day interim offer process is an administrative procedure for temporarily placing a child in an educational program based upon an existing IEP. There are no requirements that a child be assessed or that his *present* unique needs be the basis for the offer. The only requirements are that a district consults with the child's parents and that the 30-day offer be predicated upon the child's last agreed upon IEP. Therefore, it is immaterial that the district's 30-day interim offer may not have been the LRE for Student. Likewise, the District was not required to review the continuum of placement options for Student. Since the District was only required to implement Student's last agreed upon IEP, other placements that might have been appropriate for Student were irrelevant to the formulation of the 30-day offer. Student therefore has failed to meet his burden of proof as to Issue 9 that the District was required to consider a continuum of placements for him or to place him in the LRE when making its 30-day offer of interim placement. (Factual Findings 33 through 44; Conclusions of Law 12 through 14; 26, 29, and 30.)

31. Finally, Student alleges that the 30-day interim offer was not substantively proper because it did not place him in sixth grade, which was his last educational

placement, and did not comport with his last agreed upon IEP. Student's argument has merit and he has met his burden of proof as to these contentions, as raised in Issues 7 and 8.

32. The District's 30-day offer provides placement of Student in an eighth grade class with specialized academic instruction for 180 minutes a day, five days a week in a general education setting. It also provides two APE sessions a week for 30 minutes each session and two OT sessions a week for 45 minutes each session. The District left open the extent of speech and language services pending review of Student's latest IEP. The offer did not include any one-on-one aide support.

33. Student's last agreed upon IEP was the IEP dated April 30, 2004, as augmented by the terms to which Mother agreed in the October 2005 IEP. (Factual Findings 5, 6, 29, and 31.) Pursuant to those two IEP documents, Student's last agreed-upon placement and services consisted of placement in a general education classroom, with RSP support, for 370 minutes a day, five times a week, with a one-on-one aide (or individual facilitator) for half his day. His DIS services were APE for two sessions a week, 30 minutes each session, OT for two sessions a week, 45 minutes each session, and speech and language for two sessions a week, 30 minutes each session. Since the District's 30-day interim offer failed to include the speech and language sessions and failed to include one-on-one aide services for half of Student's school day, the ALJ will order the District to amend its 30-day interim offer to include those provisions. (Conclusions of Law 12 through 15 and 31 through 33.)

34. The issue remains as to what constituted the appropriate classroom grade level for Student in the 30-day offer: sixth grade, the highest grade he had attended at Eastside, or eighth grade, the grade a child of his age would normally be in and the grade Student would have been in had he advanced from grade to grade at a District school. As stated above, the issue is not what Student's unique needs were at the time

the District made the 30-day offer, but what his last educational placement was, based upon his IEPs.

35. The District argues that it was faced with the unprecedented situation of a private school child who had not been serviced under an IEP for almost three years and who had been held back two years by his private school. The District cites to cases which support its position that a child's stay-put does not mean that the child does not advance from grade to grade; rather, stay put must take into consideration the fact that a child normally advances from grade to grade. Therefore, even if a district and a child's parents cannot agree upon a new IEP, and the current IEP must be followed while their dispute is resolved, it does not mean, for example, that a kindergarten student will not advance to first grade simply because the current IEP only addresses kindergarten. For example, in *Van Scoy v. San Luis Coastal Unif. Sch. Dist.*, (C.D. Cal. 2005) 353 F.Supp.2d 1083, 1086, the court, discussing stay put in the context of changing grade levels, recognized that because of changing circumstances the status quo cannot always be exactly replicated for the purposes of stay put. "The stay-put provision entitles the student to receive a placement that, as closely as possible, replicates the placement that existed at the time the dispute arose, taking into account the changed circumstances." (*Ibid.*) Therefore, the court found that the child needed to advance to his or her next grade as part of stay put.

36. At first blush, the District's argument here is appealing. Student was almost 14-years-old at the time the District made its 30-day offer, he had been held back by his private school two grade levels, and normally a child would have advanced from grade to grade each year. The District was faced with a difficult, unprecedented situation and tried its best to analyze the facts, Student's record, and meet its obligations to Student. However, ultimately, the District's position is not persuasive. The purpose of the state and federal statutes and regulations concerning the transfer of

students with special education needs is to preserve the status quo until an IEP can determine the student's present unique needs and develop an IEP accordingly. The district is charged with offering a 30-day interim placement, which, to the extent possible and practicable, mirrors the student's last placement. It may very well be that Student's present unique needs do not support placement in a classroom with students two years younger than he is. However, it is without question that Student was in sixth grade at Eastside when he indicated that he wanted to transfer back to the District. Student had matriculated from fourth to fifth to sixth grade at Eastside and had never matriculated in seventh or eighth grade. He therefore had never completed course work for those grades. His present educational placement was sixth grade. There are a many reasons and circumstances why a student might not be in an age-appropriate grade level when transferring from another school district. The student might come from a district, a state, or a country where children start school earlier or later than they do in California. Therefore, the child's age would not, and should not, determine where the receiving district places the child. Rather, it should be the child's present educational level. Likewise, a child might have been skipped many grades by his prior school district due to the child's intelligence. For example, a 10-year-old child may be so intellectually advanced that he is matriculating in high school rather than elementary school. It would not be logical for a receiving school district to insist on placing that child in fifth grade based solely on his age, rather than ninth grade, when the child had already completed course work in the lower grades. Here, the reverse is true. Student had never matriculated in seventh or eighth grade. He was in sixth grade. Therefore, at least for purposes of the District's 30-day offer of interim placement, the District should have placed Student in a sixth grade class in order to maintain Student's status quo. The ALJ therefore will order that the District's 30-day interim offer be amended to reflect

placement in a sixth grade class.<sup>13</sup> (Factual Findings 25 and 32; Conclusions of Law 12 through 15, 30, 32, and 36.)

37. Finally, the ALJ addresses the results of her order. Since the 30-day interim offer will be amended to reflect a sixth grade placement, with services as indicated in paragraph 34 above, that is Student's stay put placement, with the exception that Student, as discussed in the *Van Scoy* case, logically must advance from grade to grade. For the 2008 – 2009 school year, Student should be in seventh grade since he was in sixth grade at the end of the previous school year. Should Mother enroll Student in a District school at any time during the 2008 – 2009 school year, Student's placement should be seventh grade, with the services delineated in paragraph 34, *until and unless* the parties develop a new IEP for Student *or* an Administrative Law Judge in a due process proceeding validates a new IEP. This Decision does not address the merits of any subsequent IEP offer made by the District, including the June 3, 2008 IEP offer, and does not address whether Student's present unique needs do or do not require an age-appropriate placement.

#### COMPENSATORY EDUCATION

38. 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 Committee of*

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<sup>13</sup> The ALJ also notes that the District, in its October 2005 IEP offer, retained Student in fifth grade as Mother had initially requested. Therefore, it would have been just as logical for the District to argue that Student's proper placement should have been seventh grade, the grade in which he would have been had Student remained at the District.

*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.)

39. An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (*Ibid.*)

40. In this case, the ALJ informed Student and Mother at the prehearing conference and in the Order Following Prehearing Conference, that it was Student's burden to prove the amount and extent of compensatory education. As Student concedes in his closing brief, Mother did not put on any evidence of compensatory damages. Since there is no evidence that Student suffered any damages and no evidence of what type of compensatory education Student might need based on the District's failure to provide an appropriate 30-day interim offer, Student has failed to meet his burden that he is entitled to compensatory relief.

## ORDER

The District's April 29, 2008 30-day offer of interim placement is amended to include the following:

1. Placement in a sixth grade classroom at a District school.
2. Speech and language services two times a week for 30 minutes each session.
3. Provision of a one-on-one aide or independent facilitator for one-half of Student's school day.
4. All other requests for relief by Student are denied.

## PREVAILING PARTY

Pursuant to 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. In accordance with that section, the following finding is made: Student prevailed on Issues 7 and 8. The District prevailed on all remaining issues.

## 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 in accordance with Education Code section 56505, subdivision (k).

Dated: July 21, 2008



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DARRELL L. LEPKOWSKY

Administrative Law Judge

Office of Administrative Hearings