

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

In the Matter of:

STUDENT,

Petitioner,

v.

BONSALL UNIFIED SCHOOL DISTRICT,

Respondent.

OAH CASE No. 2007040284

DECISION

Administrative Law Judge Robert F. Helfand, Office of Administrative Hearings, Special Education Division (OAH), State of California, heard this matter in Bonsall, California on June 1, 4, 5, and 6, 2007.

Student was represented by attorney Eric B. Freedus. Student's mother (Mother) and father (Father) were also present. Student did not attend the hearing.

Bonsall Unified School District (District) was represented by attorney Lauri LaFoe of Lozano Smith. Cathy Myhers, Special Education Director for the District, was also present during the hearing.

Student filed his request for due process hearing on April 9, 2007. At the conclusion of the hearing, the record remained open to permit the parties to submit post-hearing briefs. Both parties submitted post-hearing briefs timely. The matter was submitted on June 14, 2007. The parties have stipulated that the decision by OAH is due on July 16, 2007.

## ISSUES<sup>1</sup>

Did the District deny Student a free, appropriate public education (FAPE) for the 2006-2007 school year by:

- a. Failing to hold an individualized education plan (IEP) team meeting prior to making an offer of FAPE to Student, on or about September 11, 2006,
- b. Predetermining Student's placement and services at the October 18, 2006 IEP meeting,
- c. Failing to invite Student's private school teacher to the October 18, 2006 IEP team meeting,
- d. Failing to develop appropriate goals to address Student's unique needs,
- e. Failing to offer a properly trained aide,
- f. Failing to offer a behavior support plan,
- g. Failing to offer a plan for Student's transition from private school to a regular public school classroom.

## CONTENTIONS OF THE PARTIES

Student asserts that the District failed to provide him FAPE for the 2006-2007 school year by committing procedural violations of the Individuals with Disabilities Act (IDEA) and substantively by failing to provide an appropriate offer of FAPE.

Student asserts that the District's adoption of a previously unaccepted IEP from another district as its placement offer of September 11, 2006, and IEP proposed at the October 18, 2006 IEP meeting, failed to meet Student's unique needs because it did not provide a one-to-one aide for Student, a plan for transition of Student from his private school to a general education public school class, a Behavior Support Plan, and contained insufficient goals for Student. Student also contends that his parents' right to

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<sup>1</sup> The issues have been re-framed for the purposes of this decision.

meaningfully participate in the IEP process was infringed when the District unilaterally offered to implement an IEP from a transferring district without holding an IEP meeting on September 11, 2006, excluding his private school teacher, and predetermining its IEP offer at the October 18, 2006 IEP meeting. The sole remedy sought is reimbursement for the costs of private school tuition, occupational therapy, speech language therapy, and a one-to-one aide.

The District contends that it did not procedurally violate the IDEA in that Student was not denied an educational opportunity nor were his parents prevented from meaningfully participating in the IEP process since Mother was given an opportunity to participate in the IEP process at the October 18, 2006 IEP meeting, and that it acted reasonably when adopting the unaccepted IEP from the transferring district as an interim placement on September 11, 2006. The District also contends that that there was no need for providing a one-to-one aide in order to provide Student with a FAPE. The District also avers that there was no need for the private school teacher to attend the IEP team meeting since she had participated in four such meetings from April through June 2006 with the Oceanside Unified School District. The District also contends that Student is not entitled to reimbursement for private school tuition and costs of a one-to-one aide and other services because Student's parent acted unreasonably for failing to notify the District of their concerns regarding the proffered placement and services.

## FACTUAL FINDINGS

### JURISDICTIONAL FACTS

1. Student was born on April 14, 2000. At the time of the hearing, Student was seven years old and was attending the Old Mission Montessori School (Old Mission), a Catholic parochial school in Oceanside, California. The District does not dispute that Student and his family reside within the boundaries of the District, and that Student is eligible for special education services under the category of autism. Both parties also do

not dispute that Student requires occupational therapy (OT) and speech language therapy to meet his unique needs.

#### BACKGROUND INFORMATION

2. During the 2005-2006 school year, Student and his family resided within the boundaries of the Oceanside Unified School District (OUSD). The District and OUSD are part of the same special education local plan area, the North Coastal Consortium for Special Education. Student attended Old Mission and was in the kindergarten-first grade combined class of Anita Lindsay. Old Mission does not provide any services to a special needs child nor are any of the Old Mission teachers certified or trained in special education. Student moved within the District boundaries in July 2006.

3. In February 2005, the North County Child Study Center evaluated Student and diagnosed him with Asperger's Disorder and Attention Deficit/Hyperactivity Disorder, Combined Type. Two months later, Children's Hospital of San Diego found that Student did not meet the criteria for Asperger's since he possessed higher non-verbal skills than verbal skills, and had great difficulty in sensory processing and integration. In September 2005, Student began receiving occupational therapy (OT) services for difficulties in fine motor, sensory processing and self-regulation; attending a social skills group class; and receiving speech language therapy to address auditory processing and sound/letter awareness from Innovative Therapy 4 Kids (ITK).

4. On December 12, 2005, Dr. Dawn Holman<sup>2</sup> of Autism Spectrum Consultants (ASC) reported the results of an assessment conducted on November 28, 2005. Dr.

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<sup>2</sup> Dr. Holman received a B.A. in Psychology from U.C.L.A., a master's in Clinical Psychology and a doctorate in Educational Psychology from U.S.C. Dr. Holman worked with Dr. Ivar Lovaas for the Young Autism Project and is a licensed Marriage and Family Therapist. She is the Clinical Director for the San Diego office of ASC.

Holman diagnosed Student with high functioning autism. She recommended that Student continue in a mainstreamed school setting and may need a one-to-one aide trained in Applied Behavior Analysis (ABA) depending on Student's academic learning and social skills, and receive ABA training at home for 15 hours per week. Dr. Holman referred Mother to OUSD and the San Diego Regional Center for assistance in obtaining services.

5. During the 2005-2006 school year, Student attended Old Mission and was in the combined kindergarten-first grade class of Anita Lindsay, a certified Montessori teacher. Student lacked social skills to interact with peers, rarely made eye contact with others, and was often alone. Student's behavior interfered with his ability to learn. He was easily distracted, would often wander around the classroom, go off to sit by himself in an isolated area, and sit in front of a mirror and converse with himself. Student often refused to do his work and never finished his work if left unattended. He did not follow more than two-step or multi-step instructions. He often became frustrated and went to the classroom door and opened it so as to be alone. When the teacher was not present, he often left the classroom and wandered down the hall. If he was corrected, he often punched himself in the head. Student required constant prompting to stay on task. Academically, Student's strong point was math, but he made little progress in language. Because Student made only minimal academic progress, was well below grade level in language, and unable to read, he was not promoted to the next level.

6. On February 9, 2006, Mother requested by letter that OUSD assess Student for special education eligibility and services in the areas of academic achievement, speech language, and cognitive functioning. OUSD forwarded to Mother an Evaluation Plan setting forth the following areas to be assessed: academic, psycho-motor development, speech language, cognitive functioning, social/emotional and health. On February 25, 2006, Mother consented to the evaluation plan.

## THE OUSD ASSESSMENT

7. The psycho-motor development assessment, conducted by the OUSD occupational therapist, found that Student is unable to regulate his behavior and level of attention for tasks in the school environment, and he has difficulty in fine motor skills requiring precision and accuracy. The speech language assessor found that Student requires speech language therapy in areas of receptive comprehension of directions and expressive communication skills.

8. Student took the Woodcock Johnson: Tests of Academic Achievement, Third Edition (WJ-III), and he scored average in Broad Math, low average in Broad Written Language and low in Broad Reading. Student correctly identified the names of five lowercase letters and the sounds of two. He could not identify any kindergarten sight words. He was able to count to 30 without prompting, and he was able to write numbers one to 10 with the numbers two, seven and nine reversed. Throughout testing, Student needed to be redirected to task frequently, was up and down in his chair, and showed signs of frustration when tasks became too difficult.

9. Andrew Melia, a credentialed school psychologist with OUSD, conducted a psychoeducational assessment. Mr. Melia concluded that Student was eligible for special education services under the category of autistic-like behaviors and that he was in the average range for cognitive ability. As part of his psychoeducational evaluation, Mr. Melia observed Student in his class at Old Mission on two occasions for one and a half hours each time. Student was very resistant to doing academic work. His interactions with peers were very brief and infrequent, and Student was content to play alone. Student walked around the classroom until prompted multiple times to return to work. When Student did work, he did so in an area where he was separated from the rest of the class. Student needed prompting at the rate of approximately once per minute to stay on task and to do assigned work. Mr. Melia noted that frequently the prompts were not successful in keeping Student on task. Ms. Lindsay informed Mr. Melia that Student's behavior during

the observations was typical of his everyday behavior.

#### THE OUSD IEP MEETINGS

10. The OUSD IEP team met on April 18, May 30, June 13 and June 21, 2006. Student's teacher at Old Mission, Ms. Lindsay, his advocate, Danielle Sanchez, and Mother attended all four meetings. Maryann Le, a Clinical Supervisor at ASC and Student's case manager, attended the June 13 and 21 meetings on behalf of Student. The team reviewed assessment results and made a determination that Student was eligible for special education services under the category of autistic-like behaviors during the April 18 meeting. During the May 30 meeting, the team reviewed additional assessment results, the December 12, 2005 ASC report, and commenced drafting goals. At the June 13 meeting, the team completed drafting goals, discussed implementation of the goals, and discussed educational progress Student had made in Ms. Lindsay's class and his level of performance.

11. At the June 21 meeting, the team completed drafting goals and discussing Student's academic level and functioning in a classroom setting. Ms. Lindsay noted that Student requires a one-to-one aide to complete his school work and to progress academically and socially. Ms. Le opined that Student requires an aide to receive educational benefit from a regular education classroom as well as to assist in transitioning from his present school to the public school in order to prevent regression. Mother expressed concerns that an aide is required in case Student has a "meltdown" in class or elopes as occurred previously at Old Mission. OUSD refused to consider an aide because the offered levels of services were "adequate" to meet Student's needs. Mother's request for a Functional Behavior Analysis in order to develop a Behavior Support Plan (BSP) was also rejected by OUSD on the basis that there was enough information to develop a BSP. OUSD then presented its offer of FAPE at the June 21 meeting to place Student in a regular education first grade classroom at the San Luis Rey Elementary School with Resource Specialist Program (RSP) support four times per week for 75

minutes, speech language therapy twice per week for 30 minutes per session, occupational therapy once per week for 30 minutes, the development of a BSP, and counseling by the school psychologist once per week for 30 minutes. There was also a discussion of what services may be available if Student elects to remain at Old Mission.

12. Mother never consented to the OUSD proposed IEP.

#### FAILURE TO HOLD AN IEP TEAM MEETING

13. During the academic year, when a student transfers from one school district to another within the same SELPA, the receiving district is required to provide an educational placement that comports with the placement provided by the sending district.

14. Procedural violations of the IDEA only constitute a denial of FAPE if the procedural inadequacies result in the loss of the child's educational opportunity, loss of a child's right to a FAPE, or significantly impedes the parents' right to participate in the IEP process.

15. Student contends that the District was obligated to hold an IEP meeting within 30 days of her August 9, 2006 written request and that the District was required to hold an IEP meeting prior to making its September 11, 2006 offer of placement. Student contends that these procedural violations denied Parents the opportunity to participate in the IEP process.

16. On July 27, 2006, Mother forwarded a letter to OUSD requesting copies of all of Student's records and tapes of the IEP meetings. On August 7, 2006, Mother picked up the records (except for test protocols, emails and the IEP meeting tapes) from the OUSD and informed an OUSD official that the family had moved outside of the OUSD to the District. On August 8, 2006, an OUSD official emailed Cathy Myhers, the District's special education director, that Student had moved to the District and would be attending school there.

17. On August 9, 2006, Mother hand delivered to the District a copy of the



OUSD IEP document and a letter informing the District that her six year old, autistic son has "moved to the district and needs a placement for this coming school year." Mother requested that an IEP meeting be held as soon as possible.

18. The letter was forwarded to Ms. Myhers who received it on August 10, 2006. She then forwarded it to Cathy Andressen, the resource specialist at the Bonsall Elementary School, the neighborhood school for Student, to commence the IEP process, receive the OUSD records, and schedule an IEP meeting within 30 days. Ms. Myhers concluded that Student was eligible for special education services based on the OUSD IEP document. On August 20, 2006, Ms. Andressen's husband passed away and she left on bereavement leave. The matter was not reassigned, and the District failed to contact Mother about her request.<sup>3</sup>

19. On September 5, 2006, Mother delivered a letter notifying the District that she intended to place Student in private school within 10 business days at public expense because the District failed to hold an IEP meeting "so that the IEP from Oceanside could be implemented at the beginning of school" which resulted in a "failure to provide FAPE."

20. On September 11, 2006, Ms. Myhers sent Mother a letter acknowledging that there was no indication that the OUSD IEP offer had been accepted, and offered to implement the OUSD offer as a 30 day "administrative placement" followed by an IEP meeting within 30 days<sup>4</sup> with Student being placed in a regular education first grade class at Bonsall Elementary School. Student would receive RSP services 75 minutes four

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<sup>3</sup> The District did contact Mother on August 28, 2006, the first day of school, to request proof of residency. The next day, Mother delivered a copy of utility bills to the District office.

<sup>4</sup> Ms. Myhers intended the offer to be an "interim offer" because the OUSD IEP was never adopted.

times a week within the RSP room, speech and language services for 30 minutes 60 times per year, OT services for 30 minutes 30 times per year, and counseling for 30 minutes 30 times per year. Enclosed with the letter were District enrollment forms and a consent form to permit the District to obtain records from OUSD. Mother signed the authorization for record release on September 13, 2006, and completed Student's registration form. Mother returned both to the District which received them on September 18, 2006. The District then faxed to OUSD the authorization and requested a copy of Student's records that same day. Mother rejected the District's interim offer by letter on September 14, 2006 and notified the District of her intent to enroll Student in private school at public expense. Student began attending class at Old Mission on September 18, 2006, and was placed in Ms. Lindsay's kindergarten-first grade class.

21. Because the District was aware that OUSD had assessed the Student and held four IEP meetings over a two and a half month time period and that Mother, in her September 5, 2006 letter referred to the District's failure to implement the OUSD IEP, the District could reasonably believe that its 30 day interim offer contained in its September 11, 2006 letter would reasonably meet Student's needs. Moreover, nothing in the law requires the District to hold an IEP team meeting when a student transfers districts with an IEP. Additionally, the District's September 11, 2006 offer comported with the law in that it provided substantially similar services to those offered by the previous school district.

#### PREDETERMINATION OF PLACEMENT OFFER

22. Student contends that the District procedurally violated the IDEA by interfering with his parents' right to meaningfully participate in the IEP process by predetermining its FAPE offer.

23. A school district may not predetermine a child's placement and services prior to an IEP team meeting. All relevant members of the IEP team must be present when determining a student's placement and services.

24. On September 25, 2007, Ms. Myhers sent a letter and a Notice of Meeting to Mother indicating that the District had received the OUSD records and scheduling an IEP meeting for October 11, 2006.<sup>5</sup> The District later re-scheduled the meeting at Mother's request. Mother did not request that the District invite, nor did the District invite, Ms. Lindsay to the meeting.<sup>6</sup> On October 18, 2006, the District held the IEP meeting to formalize the District's IEP offer contained in the September 11, 2006 letter and to discuss how the offer would be implemented.

25. Mother and her advocate, Ms. Sanchez, attended on behalf of Student. District personnel attending were Ms. Myhers; Kathleen Wilson, a first grade teacher from Bonsall Elementary School; Ms. Andressen, a resource specialist; Krista Lamphere, a District speech language pathologist; Ashley Hammer, a school psychologist; and Annette Rodriguez, an occupational therapist. Ms. Sanchez stated that Student's present levels of performance were accurately documented in the OUSD IEP document.<sup>7</sup> Ms. Myhers reiterated the District's prior offer and explained that the District was offering to implement the OUSD offer as the IEP. After 30 days, the IEP team would conduct a review to determine Student's present levels of performance, whether further assessments were warranted, whether or not Student required additional services, whether the annual goals needed revising, and whether any other changes should be made to the IEP. When asked

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<sup>5</sup> At the hearing, Student contended that the District failed to review Student's records from OUSD prior to the October 18, 2006 meeting. The evidence does not support this contention.

<sup>6</sup> Ms. Myhers felt that Ms. Lindsay's observations and opinions were contained in the note section of the OUSD IEP document.

<sup>7</sup> The District relied on this statement to determine that the levels of performance documented in the OUSD IEP were accurate.

about any concerns regarding the District's offer, neither Mother nor Ms. Sanchez indicated that there were any. Mother never offered that Student required an aide. The participants discussed the services available at a charter school affiliated with the District. Mother requested an opportunity to observe the first grade classes and campus at Bonsall Elementary. District participants were aware that Mother had requested a one-to-one aide at the OUSD IEP meetings, but there was neither a discussion as to the need for an aide nor any inquiry as to why the OUSD IEP offer or the District's September 11, 2006 offer had not been accepted by Student's parents.

26. Because the IEP meeting was solely to formalize how the OUSD IEP would be implemented, the District predetermined Student's placement and services and did not come to the meeting with an open mind, ready to discuss several options or consider the Parents' recommendations. By failing to consider the concerns of parents and offering a placement that was determined prior to the IEP meeting, the District denied Parents the opportunity to participate in the IEP process and therefore denied Student a FAPE.

#### FAILURE TO INVITE THE PRIVATE SCHOOL TEACHER

27. Student contends that the District is required to have invited his private school teacher to the October IEP Team Meeting.

28. The child's current regular education teacher is not required to be a member of the IEP team. The IEP team should include at least one regular education teacher to serve as a member of the team who is, or may be, responsible for implementing a portion of the IEP.

29. The District included on Student's IEP team a regular education first grade teacher, Ms. Wilson. Thus, the District met its obligation in having a regular education teacher, who may be responsible for implementing Student's IEP present.

## DISTRICT'S OFFER OF FAPE

30. In order to provide a child a FAPE, a district is required to develop an IEP designed to address the child's unique educational needs with a program reasonably calculated to provide him with some educational benefit.

### Unique Needs

31. Student's unique needs are that he has (a) difficulty with fine motor skills requiring precision and accuracy including paper/pencil activities; (b) low communication skills in both receptive comprehension and expressive language; (c) an inability to initiate tasks, stay on task and to complete tasks without constant prompting; and (d) an inability to regulate his behavior.

### Goals

32. Student contends that goals and present levels of performance adopted by the District are inappropriate.

33. An IEP is required to include a statement of the child's present levels of performance, a statement of measurable academic and functional goals designed to meet the child's needs and enable him to progress.

34. The District's IEP contains 11 goals<sup>8</sup>, each with its own baseline,<sup>9</sup> numbered two through 11.<sup>10</sup> The goals are annual goals and are to be completed as of April 2007,

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<sup>8</sup> The IEP goals identified in the IEP are directly adopted from the OUSD IEP, including completed dates and present levels of performance.

<sup>9</sup> Baselines are the present levels of performance which are specific to each goal. This provides a basis of measuring a child's progress towards his goals.

<sup>10</sup> During the IEP process, the original first goal was later merged with the ninth so that the IEP does not contain a goal number one.

the date of the next annual IEP meeting. The goals are as follows:

- (a) Goal 2 involves reading. The baseline is that Student can identify two sight words, and he is unable to demonstrate sound/symbol relationships in order to blend words. Student's goal is to be to read targeted one syllable and priority sight words at 75 percent accuracy within three of four trials to be measured by teacher-charted observations. This was a measurable annual goal containing a statement how Student's progress could be measured.
- (b) Goal 3 involves written language. The baseline is that Student can correctly form 50 percent of uppercase letters and has difficulty with letter/number formation and spacing. The goal is for Student to demonstrate an ability to write letters and the numbers one to 10 with 75 percent accuracy in three of four trials as measured by teacher selected work samples. This was a measurable annual goal containing a statement how Student's progress could be measured.
- (c) OT is the subject of Goal 4. This goal sets a baseline that Student requires frequent verbal cues to maintain attention; he is overwhelmed by loud noises, and avoids paper/pencil tasks. The goal is for Student to demonstrate ability to attend to and complete tasks and structural educational activities, and that he can request a break if he feels overwhelmed and then return to task with no more than three to four verbal reminders in a 15 minute period as measured in three out of four trials by his teacher. This was a measurable annual goal containing a statement how Student's progress could be measured.
- (d) Goal 5 relates to behavior. Student's goal is to participate in 10 minutes of direct instruction with only five to seven verbal prompts on three of four trials based on school psychologist observations. This goal had no benchmarks which are to be established after Student is at the school. This area requires the baseline to be established after Student enters his new school as his

behaviors in this new situation would be unknown. The goal itself is measurable and contains a statement how his progress could be measured.

- (e) Social play is the topic of Goal 6. The goal is for Student to engage in facilitated age appropriate play activities using turn taking and observing social norms for five minutes on four out of five days with no more than five prompts. This goal will be measured based on observations by the school psychologist. This goal requires the baseline to be established after Student enters his new school as his behaviors in this new situation would be unknown. The goal itself is measurable and contains a statement how his progress could be measured.
- (f) Goal 7 involves complaint behavior and is to be measured based on sampling observations by the school psychologist. The baseline is that Student requires six prompts within 10 minute periods. The goal is to reduce Student's classroom anxiety, have him follow teacher instructions and transition appropriately between activities with four to five prompts in a 15 minute period, 80 percent of the time. This was a measurable annual goal containing a statement how Student's progress could be measured.
- (g) Goal 8 relates to receptive and expressive language. Student's baseline is that he is in the ninth percentile in concepts and following directions.<sup>11</sup> Student's goal is to be able to follow directions, involving a variety of basic concepts with concrete objects, receptive pointing, verbal label, and paper/pencil, and demonstrate knowledge of the implied meaning of non- verbal utterances by providing a verbal definition, with 80 percent accuracy as measured by student

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<sup>11</sup> This baseline refers to the score Student received in the concepts and directions subtest of the Clinical Evaluation of Language Fundamentals IV (CELF-4), a standardized test, which was administered to him as part of the OUSD speech language assessment.

and therapy records. This was a measurable annual goal containing a statement how Student's progress could be measured.

- (h) Pragmatic communication is the topic of Goal 9. The baseline is that Student "may lack appropriate and emotional reaction to people and events." The goal is for Student to be able to verbally label facial expressions depicting descriptive questions about people, infer feelings and actions, and identify feelings in given situations in two of three trials measured by therapy recorded data and observations. Although the baseline is somewhat vague, the goal itself is specific and contains a statement how Student's progress can be measured.
- (i) Goal 10 deals with expressive/pragmatic language skills. Student's baseline is that he does not ask "wh" questions (e.g, why, what, when and where), initiate comments or conversations, and maintains minimal eye contact with others. The goal is for Student to ask "wh" questions, provide two comments on a topic using two reciprocal exchanges, initiate conversation in a small peer group utilizing eye contact and appropriate voice volume in two of three trials measured by therapy records and observation. This was a measurable annual goal containing a statement how Student's progress could be measured.
- (j) Goals 11 and 12 deal with the social-emotion area. Since these goals involve new skills, there were no baselines established. Goal 11 requires Student to be able to state how he knows a certain piece of information and how others know it using no more than four prompts in four out of five times. Goal 12 requires that Student in four out of five times be able to make a simple choice when given two options in the classroom setting with no more than four prompts. Both goals are to be measured by observations and records. Because Student's present level of performance has not been previously measured as these are new skills, the goals themselves are specific and they contain a



statement how Student's progress can be measured.

35. The OUSD IEP team wrote goals based on the results of the assessments conducted and input from Mother and the child's private school teacher. The baselines established for the goals were based on Student's reported levels of performance with two exceptions. These two areas required observations of Student's behaviors in the regular education public school classroom. The goals drafted by the OUSD team were sufficient as they were designed to address Student's unique needs in the areas of fine motor, communication, distractibility and behavior regulation.

#### PROVISION OF A PROPERLY TRAINED AIDE

36. A school district is required to provide a student with special needs a program, including support services, designed to address the child's unique educational needs. Student contends that his unique needs require the services of a properly trained one to one aide.

37. Ms. Le, an Autism specialist and Student's case supervisor at ASC, observed that Student will require a one-to-one aide in any regular education class in order to benefit educationally so as to keep him on task, to allow him to complete tasks, and to regulate his behavior. Ms. Le opined that the failure to provide the services of a one-to-one aide would deprive Student of the opportunity to benefit from the educational instruction he will be given as it is impossible for him to stay on task and complete work without constant prompting.

38. On October 24, 2006, Mother and Ms. Le visited Bonsall Elementary School and observed six first grade classes and the lunch/playground area. Ms. Le concluded that Student could function well in two of the classes provided he was given proper tools and support, including a one-to-one aide. Neither Mother nor Ms. Le informed Ms. Myhers that the District's offer may be acceptable if the District provided Student a one-to-one aide. Mother failed to inform the District she had safety concerns because of Student's past history of elopement at Old Mission, and that the District's offer may be

acceptable if it included a one-to-one aide.

39. Student requires constant prompting in a classroom environment at a rate of almost once per minute to keep on task, complete his work, and to prevent him from disturbing the class because of his behaviors, Student requires a one-to-one aide in order to obtain educational benefit from attending a general education class. Thus, the failure to provide the services of an aide deprives Student of adequate services so he can benefit from the educational instruction. Thus, the OUSD IEP fails to offer a FAPE to Student.

#### BEHAVIOR SUPPORT PLAN

40. Federal and state law require that an IEP team consider strategies, including positive behavioral interventions and supports in a BSP when a child's behavior impedes the child's learning and that of others. Because the District adopted the OUSD IEP which included a BSP, Student can not establish that the District's October 18, 2006 IEP denied Student a FAPE on grounds that it did not provide him with a BSP.

#### TRANSITION PLAN

41. Student asserts that the OUSD was required to include a transition plan pursuant to Education Code, section 56345, subdivision (b)(4). Here, Student is transitioning from a regular education class at a sectarian private Montessori school to a more structured general education setting within a public school. Pursuant to Legal Conclusion 11, section 56345, subdivision (b)(4) does not apply.

#### REIMBURSEMENT OF INCURRED COSTS

42. A school district may be required to reimburse a parent for the costs of private school and related services when the district fails to provide a FAPE and the private placement or services are appropriate under the IDEA and replaced services the district failed to provide. A parent is required to provide 10 days notice when seeking

private services because of a denial of FAPE. A child's parents are eligible for reimbursement for costs incurred when a proposed IEP fails to provide a child with FAPE, and the private placement is appropriate to meet the child's unique needs. Parents must establish that the placement provides educational instruction specifically designed to meet the child's unique needs, supported by such services as are necessary to permit the child to benefit from the instruction.

43. Student claims that because he was denied a FAPE, he is entitled to reimbursement for his private school tuition and costs for support services including the one- to-one aide. The District contends that in the event there was a denial of FAPE, Student is not entitled to reimbursement because Mother's actions were unreasonable in communicating her concerns about the FAPE offer and OUSD IEP nor that the placement proposed by the District may be acceptable if an aide was provided.

44. In a November 6, 2006 letter, Mother informed Ms. Myhers that the District's offer was rejected because the IEP and the offered placement are not appropriate for Student. Mother's letter concluded: "Therefore, after ten business days after the date of this letter, we intend to obtain private placement and services and seek reimbursement from the district."

45. Student's parents incurred costs for speech and language therapy and occupational therapy through ITK in the amount of \$5, 415 from September 6, 2006 through April 26, 2007, because such services were unavailable from Old Mission. Student's tuition and costs at Old Mission totaled \$4,675 for the 2006-2007 school year plus \$2,405.60 in mileage to and from the school. Student also incurred \$16, 990 in charges for the services of an ABA trained one-to-one aide from December 1, 2006, through the end of the 2006-2007 school year.

46. The District's IEP offer of October 18, 2006, failed to make a FAPE available to Student for the 2006-2007 school year because the District procedurally violated the IDEA when it interfered with Student's parents' participation in the IEP process by

predetermining his IEP prior to the IEP meeting, and it substantively violated the IDEA when it failed to provide a one-to-one aide, which was required for Student to obtain educational benefit from his instruction.

47. Mother gave the District appropriate notice of her rejection of the District's proposed placement and services, and that she intended to enroll her son in a private school at public expense.

48. Student did not establish that Old Mission is an appropriate placement since it does not provide special education instruction and services designed to meet Student's unique needs.

49. Student has established that the costs for the one-to-one aide were required to meet his unique needs, to progress academically and to obtain educational benefit. Student was once again in Ms. Lindsay's kindergarten-first grade combined class for the 2006-2007 school year. Student made little, if any, academic and social progress. On November 27, 2006, Adam Ebert, a behavioral therapist,<sup>12</sup> began working as Student's one-to-one aide four times per week for four and a half hours daily. From the time that Mr. Ebert started, Student has shown great improvement academically including more effective communication skills, beginning to read, improved behavior in class, completing work assignments, and no longer being socially isolated. Ms. Le, a Board certified Behavior Analyst who has her M.A. in Human Development from National University, is Student's case supervisor at ASC. Based on her observations, interviews and data collection from the ITK providers<sup>13</sup> and the aide, it is her professional opinion that Student has made progress in areas of non-compliant behavior and task completion, and

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<sup>12</sup> Mr. Ebert received his B.S. in Psychology and French from Pepperdine University. He is employed at ASC and has been a behavior therapist since 2002.

<sup>13</sup> ITK was providing both speech language therapy and OT on a weekly basis to Student.

reducing aggressive behavior. She believes that the aide is necessary in a regular education class to permit Student to initiate tasks, complete tasks and maintain attention so that he can benefit from his education.

50. Parents may forfeit their right to reimbursement if they act unreasonably during the IEP process. Mother acted unreasonably in failing to give the District an opportunity to provide an appropriate IEP when she (1) failed to communicate that the IEP offer was unacceptable and then insisting in her September 5, 2006 letter that the OUSE IEP should be implemented; (2) failing to inform the District of her safety concerns at the place of placement; (3) being silent at the IEP meeting when asked about her concerns with the District's offer; and (4) failing to inform the District there were classes at Bonsall Elementary that would be an appropriate placement if Student was provided a one-to-one aide. Mother's actions prevented the District from offering a program which would have included the services of an aide and OT and speech language therapy. Thus, the award in full of the cost of these services is not warranted and Student's parents should be reimbursed for 50 percent of the cost of the one-to-one aide, the speech language therapy, and the OT (\$11, 203).

## LEGAL CONCLUSIONS

### APPLICABLE LAW

### BURDEN OF PROOF

1. The petitioner in a special education administrative hearing has the burden to prove his or her contentions at a due process hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 163 L.Ed.2d 387].) Accordingly, Student has the burden of proof as to all issues.

### REQUIREMENTS OF FAPE

2. A child with a disability has the right to a free appropriate public education

(FAPE) under the Individuals with Disabilities Education Act (IDEA) and California law. (20 U.S.C. § 1412(a)(1)(A); Ed. Code, § 56000.) FAPE means special education and related services that are available to the student at no charge to the parents, that meet the state educational standards, and that conform to the student's IEP. (20 U.S.C. § 1401(9).)

3. 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. (20 U.S.C. § 1401(29); Ed. Code, § 56363.) California's definition of special education includes both specially designed instruction to meet the unique needs of the student with exceptional needs and related services to enable a student to benefit from such specially designed instruction. (Ed. Code, § 56031.) "Related services" include developmental, corrective, and other support services, such as speech-language pathology, designed to enable a student with exceptional needs to receive a FAPE. (Ed. Code, § 56363, subd. (a).)

4. The IEP is the "centerpiece of the [IDEA's] education delivery system for disabled children" and consists of a detailed written statement that must be developed, reviewed, and revised for each child with a disability. (*Honig v. Doe* (1988) 484 U.S. 305, 311 [108 S.Ct. 592, 98 L.Ed.2d 686]; 20 U.S.C. §§ 1401 (14) and 1414 (d)(1)(A); Ed. Code, §§ 56032, 56345.)

5. There are two parts to the legal analysis of a school district's compliance with the IDEA. First, the tribunal must determine whether the district has complied with the procedures set forth in the IDEA. (*Board of Ed. of Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 206-07 [102 S.Ct. 3034, 73 L.Ed.2d 690].) Second, the tribunal must decide whether the IEP developed through those procedures was reasonably calculated to enable the child to receive special education benefit. (*Ibid.*)

6. To determine whether a district offered a student a FAPE, the analysis must focus on the adequacy of the district's proposed program. (*Gregory K. v. Longview Sch. Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314) If the district's program was designed to

address the student's unique educational needs, was reasonably calculated to provide him some educational benefit, and comported with his IEP, then that district provided a FAPE, even if the student's parents preferred another program. A denial of FAPE can be found where the district fails to provide adequate support services so the child can benefit from the educational instruction being given. (*Katherine G. v. Kentfield School Dist.* (N.D. Cal. 2003) 261 F.Supp.2d 1159, 1171.)

7. In *Rowley, supra*, 458 U.S. at p. 200, the United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the requirements of the IDEA. The Court determined that a student's IEP must be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services to maximize a student's abilities. (*Id.* at pp. 198-200.) The Court stated that school districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instructional and related services which are individually designed to provide educational benefit to the student. (*Id.* at p. 201.)

8. The Ninth Circuit Court of Appeals has endorsed the "snapshot" rule, explaining that the actions of the District cannot be "judged exclusively in hindsight...an IEP must take into account what was, and what was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted." (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrmann v. East Hanover Bd. Of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1041.).

9. Parents of children with disabilities are also provided procedural protections under the IDEA. (20 U.S.C. § 1400, et seq.) The Supreme Court in *Rowley* also recognized the importance of adherence to the procedural requirements of the IDEA. However, procedural flaws in the IEP process do not automatically require a finding of a denial of a FAPE. Procedural violations may constitute a denial of FAPE only if the

procedural inadequacies result in the loss of the child's right to a FAPE, caused a deprivation of educational benefits, or significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of FAPE. (20 U.S.C. § 1415 (f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2); see *W.G. v. Board of Trustees of Target Range School District No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.) Mere technical violations will not render an IEP invalid. (*Amanda J. v. Clark County School District* (9th Cir. 2001) 267 F.3d 877, 892.)

#### REQUIREMENTS OF AN IEP

10. An IEP team shall meet within 30 calendar days whenever the parent requests a meeting to develop, review, or revise an IEP from the date of the parent's written request, not counting days of school vacation in excess of five school days. (Ed. Code, §§ 56403 (l), 56343(c), 56343.5.)

11. Where appropriate, an IEP shall include provision for transition into the regular classroom program if the pupil is to be transferred from a special day class or nonpublic, nonsectarian school into a regular class in a public school for any part of the school day. (Ed. Code, § 56345(b)(4).)

12. An IEP must include in pertinent part, a statement of the (1) the student's present levels of educational and functional performance, (2) a statement of measurable academic and functional goals designed to meet the child's educational needs and enable the child to make progress, (3) a description of how the goals will be measured, (4) a statement of the special education and related services to be provided to the child, (5) the beginning date along with the anticipated frequency, location and duration of the special education and related services, and (6) an explanation of the extent to which the child will not participate with nondisabled children in a regular class or other activity. (20 U.S.C. § 1414(d)(1)(A)(i); 34 C.F.R. § 300.320(a); Ed. Code, §56345(a).) While the required elements of the IEP further important policies, "rigid 'adherence to the laundry list of items [required in the IEP]' is not paramount." (*W.G., supra*, 960 F.2d at p. 1484, citing



*Doe v. Defendant I* (6th Cir. 1990) 898 F.2d 1186, 1190- 1191.)

13. In developing the IEP, the IEP team shall consider the strengths of the child, the concerns of the parents for enhancing the education of their child, the results of the initial evaluation or most recent evaluation of the child and the academic, functional and developmental needs of the child. (20 U.S.C. § 1414(d)(3)(A).) Nevertheless, an IEP need not conform to a parent's wishes in order to be sufficient or appropriate. (*Shaw v. District of Columbia* (2002 D.D.C.) 238 F.Supp.2d 127, 139 [IDEA does not provide for an "education...designed according to the parent's desires."], citing *Rowley*, supra, 458 U.S. at p. 207.)

14. An IEP should include a BSP when a child's behavior impedes the child's learning or that of others. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.346(a)(2)(i), (b); Ed. Code, § 56341.19b)(1).)

#### PARENTAL PARTICIPATION IN IEP PROCESS/PREDETERMINATION OF PLACEMENT

15. Parents are required and vital members of the IEP team. (20 U.S.C. § 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 child's education. (20 U.S.C. § 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]; 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 interest 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, not just an IEP meeting, but a meaningful IEP meeting. (*Deal v. Hamilton County*

*Bd. of Educ.* (6th Cir. 2004) 392 F.3d 840, 857, citing *W.G., supra*, 960 F.2d at p.1485.)

16. Each school district is required to initiate and conduct meetings for the purpose of developing, reviewing, and revising the IEP of each individual with exceptional needs. (34 C.F.R. § 300.343, Ed. Code, § 56340.) "A school district violates IDEA procedures if it independently develops an IEP, without meaningful parental participation, and then simply presents the IEP to the parent for ratification." (*Ms. S. ex rel G. v. Vashon Island School District* (9th Cir. 2003) 337 F.3d 1115, 1131.) The test is whether the school district comes to the IEP meeting with an open mind and several options, and discusses and considers the parents' placement recommendations and/or concerns before the IEP team makes a final recommendation. (*Doyle v. Arlington County School Board* (E.D. Va. 1992) 806 F.Supp. 1253, 1262; *Deal, supra*, 392 F.3d at p. 857.)

#### DISTRICT'S DUTY TO PROVIDE SERVICES TO TRANSFERRING STUDENT

17. There is no specific state or federal law regarding the obligation of a district when receiving a transferring student, who is eligible for special education services and does not have in effect an IEP consented to by the student's parents. Federal law requires a receiving district to provide the student, who is transferring between districts within the same SELPA and in the same academic year, services comparable to that which the other district had provided. (20 U.S.C. § 1414 (d)(2)(2)(C)(i)(I).) California law requires the district, which receives a child from a district within the same SELPA in the same school year, to provide services comparable to those described in the existing IEP, unless the district and parents agree to develop, adopt and implement a new IEP. (Ed. Code, §§ 56403(m)(2), 56325(a)(2).) 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.) Thus, a district receiving a new student, who is eligible for special education services but does not have an IEP which was consented to by his parents, has the obligation to provide an interim placement reasonably designed

to meet the student's unique needs.

#### PARTICIPATION OF STUDENT'S PRIVATE SCHOOL TEACHER AT THE IEP MEETING

18. Not less than one regular education teacher of a student, if the student is in a regular education class, is required to be part of the IEP team. (Ed. Code, § 56341(b)(2).) The Ninth Circuit recently decided that a school district is not obligated to have a child's current regular education teacher as a required IEP team member. The district is required to have a regular education teacher, who may be responsible for the implementation of a child's IEP, be an IEP member. (*R.B. v. Napa Valley Unified School District* 9th Cir. July 16, 2007, No. 05-16404) \_\_\_\_\_ F.3d \_\_\_\_\_.)

#### REIMBURSEMENT

19. Parents may be entitled to reimbursement for the costs of placement or services they have procured for their child when the school district has failed to provide a FAPE, and the private placement or services were appropriate under the IDEA and replaced services that the school district failed to provide. (20 U.S.C. § 1412(a)(10)(C); *School Committee of Burlington v. Department of Education* (1985) 471 U.S. 359, 369-371 [105 S.Ct. 1996, 85 L.Ed.2d 385].) Parents may receive reimbursement for their unilateral placement if the placement met the child's needs and provided the child with educational benefit. However, the parents' unilateral placement is not required to meet all requirements of the IDEA. (*Florence County School District Four v. Carter* (1993) 510 U.S. 7, 16 [114 S.Ct. 361, 126 L.Ed.2d 284].)

20. The Supreme Court has established a two part test: (1) was the IEP proposed by the district inappropriate; and (2) was the private placement appropriate to meet the child's needs. (*Gagliardo v. Arlington Central School District* (2d Cir.2007) \_\_\_\_\_ F.3d \_\_\_\_\_, 2007 U.S. App. LEXI S 12451, at p. 17, citing *School Committee of the Town of Burlington, supra*, 471 U.S. at p. 370.) In assessing the propriety of a unilateral placement, the totality of the circumstances must be considered in determining whether

the placement reasonably serves a child's individual needs. (*Gagliardo, supra.*) Parents may receive reimbursement for the unilateral placement if the placement met the child's unique needs and provided him with educational benefit. (*Florence County School District Four, supra*, 510 U.S. at pp. 13- 14.) The parents "need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction." (*Frank G. v. Board of Education* (2d Cir. 2006) 459 F.3d 356, 364-365.)

21. Reimbursement for the costs of a private school may be reduced or denied in any of the following circumstances: (1) at the most recent IEP meeting the parents attended before the student was removed from public school, the parents did not provide notice rejecting the proposed placement, stating their concerns, and expressing their intent to enroll the student in a private school at public expense; (2) the parents did not give written notice to the school district 10 business days before removing their child from the public school rejecting the proposed placement, stating their concerns, and expressing their intent to enroll the student in a private school at public expense; (3) before the parents removed their child from the public school, the district gave the parents prior written notice of its intent to evaluate the student, but the parents did not make the student available for evaluation; or (4) the parents acted unreasonably. (20 U.S.C. § 1412(a)(10)(C)(iii); 34 C.F.R. § 300.148(d); Ed. Code, § 56176.)

## DETERMINATION OF ISSUES

A. DID THE DISTRICT DENY STUDENT A FAPE FOR THE 2006-2007 SCHOOL YEAR BY FAILING TO HOLD AN IEP TEAM MEETING PRIOR TO MAKING ITS SEPTEMBER 11, 2006 OFFER?

22. Pursuant to Factual Findings 13 through 21 and Legal Conclusions 1, 2, 3, 5, 9, 10, and 17, the District did not deny Student, a transferring student, a FAPE, because it acted reasonably in offering a reasonable interim placement.

**B. DID THE DISTRICT DENY STUDENT A FAPE FOR THE 2006-2007 SCHOOL YEAR BY PREDETERMINING THE IEP TO BE OFFERED TO STUDENT?**

23. Pursuant to Factual Findings 22 through 26 and Legal Conclusions 1, 2, 3, 4, 9, 15, and 16, the District committed a violation of the IDEA by predetermining the IEP prior to the October 18, 2006 IEP meeting. By failing to come to the IEP meeting with an open mind and several options, the District deprived Student's parents of meaningfully participating in the IEP process.

**C. DID THE DISTRICT DENY STUDENT A FAPE FOR THE 2006-2007 SCHOOL YEAR BY FAILING TO INVITE STUDENT'S PRIVATE SCHOOL TEACHER TO THE OCTOBER 18, 2006 IEP MEETING?**

24. Pursuant to Factual Findings 25 27, 28 and 29 and Legal Conclusions 1, 2, 3, 4, 5, 9, 15, 16, and 18, the District did not commit a procedural violation of the IDEA by not inviting Student's private school teacher at the October 18, 2006 IEP team meeting.

**D. DID THE DISTRICT DENY STUDENT A FAPE FOR THE 2006-2007 SCHOOL YEAR BY FAILING TO DEVELOP GOALS TO ADDRESS STUDENT'S UNIQUE NEEDS?**

25. Pursuant to Factual Findings 11 and 30 through 35 and Legal Conclusions 1, 2, 3, 4, 8, 12 and 13, the Student did not establish that the District denied him a FAPE on this basis.

**E. DID THE DISTRICT FAIL TO OFFER STUDENT A FAPE BECAUSE IT DID NOT PROVIDE FOR A ONE-TO-ONE AIDE?**

26. Pursuant to Factual Findings 4, 5, 7, 8, 9, 11, 30, 31, 34, 36, 37, 38, and 39 and Legal Conclusions 1, 2, 3, 4, 5, 6, 7, 8, and 13, the District's September 11, 2006 offer of FAPE, as modified at the October 18, 2006 IEP meeting, failed to offer Student a FAPE because it failed to provide a one-to-one aide.

F. DID THE DISTRICT FAIL TO OFFER STUDENT A FAPE BECAUSE IT DID NOT INCLUDE A BEHAVIOR SUPPORT PLAN?

27. Pursuant to Factual Findings 11, 25, and 40 and Legal Conclusions 1, 2, 3, 4, 5, 6, 7, 8, 12, 13, and 14, the District did not deny Student a FAPE as a BSP was included in the District's IEP offer, which adopted the OUSD IEP.

G. DID THE DISTRICT FAIL TO OFFER STUDENT A FAPE BECAUSE IT DID NOT INCLUDE A TRANSITION PLAN?

28. Pursuant to Factual Findings 1 and 41 and Legal Conclusion 11, the District did not fail to offer Student a FAPE, because the District was not legally obligated to include a transition plan in Student's IEP since Student would be transferring from a regular education class in a private, sectarian school to a regular education class in a public school.

REMEDY

29. Pursuant to Factual Findings 36 through 44 and Legal Conclusions 19 through 21, Student's parents are eligible for reimbursement for costs and expenses in the amount of \$8, 495.

ORDER

Within 60 days of the date of this decision, The District shall pay to Student's parents the cost of obtaining the services of a one-to-one aide, occupational therapy and speech language therapy in the amount of \$11, 203.

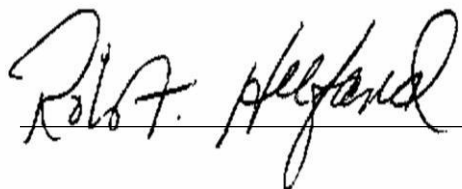
PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. Pursuant to this mandate, it is determined that the Student prevailed issues b and e; the District prevailed on issues a, c, d, f, and g.

## RIGHT TO APPEAL THIS DECISION

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

Dated: July 16, 2007

A handwritten signature in black ink, reading "Robt. F. Helfand", written over a horizontal line.

ROBERT F. HELFAND

Administrative Law Judge

Office of Administrative Hearings

Special Education Division