

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

In the Matter of:

STUDENT,

Petitioner,

v.

FREMONT UNIFIED SCHOOL DISTRICT and  
ALAMEDA COUNTY BEHAVIORAL HEALTH  
CARE SERVICES,

Respondents.

OAH CASE NO. N 2007090800

DECISION

John A. Thawley, Administrative Law Judge (ALJ), Office of Administrative Hearings, Special Education Division (OAH), State of California, heard this matter on November 26, 27, 29, 30, and December 3 through 7, 2007, in Fremont, California.

Roberta Savage, Attorney at Law, represented Student. Student's Father and Mother attended the hearing.

Damara Moore, Attorney at Law, represented Respondent Fremont Unified School District (District). Jack Bannon and Charlene Okamoto, District's Director and Assistant Director of Special Services, each attended portions of the hearing.

Mark Goodman, Attorney at Law, represented Respondent Alameda County Behavioral Health Care Services (ACBHCS).

Student's due process hearing request was filed on September 28, 2007. At the hearing, oral and documentary evidence were received. The record was held open for the

submission of closing briefs, which were timely filed on December 26, 2007. The record closed and the matter was submitted on December 26, 2007<sup>1</sup>. At the close of the hearing, the parties agreed to extend the 45-day deadline for the issuance of this decision to January 11, 2008.

## ISSUES

1. During the 2006-2007 School Year (SY) and Extended SY (ESY), did the District fail to timely assess Student in all areas related to his disability?
2. During the 2006-2007 SY and ESY, did the District and ACBHCS fail to provide Student with a free, appropriate public education (FAPE) by:
  - a. Failing to develop, implement, and monitor appropriate goals and objectives?
  - b. Failing to develop and provide an appropriate program and services as offered in the individualized education program (IEP) team meetings on November 3, 2006, December 7, 2006, January 12, 2007, January 19, 2007, and April 19, 2007?
  - c. Failing to ensure that Student's goals and objectives were implemented during the ESY?
  - d. Failing to provide prior written notice (PWN) regarding the denial of Parents' request for a one-to-one aide, the failure to conduct an occupational therapy (OT) assessment, and the basis for concluding that the offer of the mild-moderate special day class (SDC) at Mattos Elementary School (Mattos) was appropriate, and that the offer of 20 minutes of counseling per week was

---

<sup>1</sup> On February 19, 2008, Student submitted a request to augment the record, entitled "Notice of Additional Evidence." As noted above, the matter was submitted on December 26, 2007. Student's request is untimely. Accordingly, Student's request is denied.

appropriate?

3. During the 2007-2008 SY, did the District and ACBHCS fail to provide Student with a FAPE by:
  - a. Failing to have the appropriate IEP team members at the IEP team meeting on September 5, 2007?
  - b. Making a pre-determined offer at the IEP team meeting on September 5, 2007?
  - c. Failing to develop, implement, and monitor appropriate goals and objectives?
  - d. Failing to develop and provide an appropriate program and services as offered in the IEP team meeting on September 5, 2007?
  - e. Failing to implement the placement agreed upon at the IEP team meeting on June 12, 2007?
  - f. Failing to provide PWN regarding its refusal to implement the placement agreed upon at the June 2007 IEP team meeting, and regarding its decision to offer a change in placement at the Eastfield Ming Quong (EMQ) program at Harvey Green Elementary School (Green)?

## FACTUAL FINDINGS

### BACKGROUND FACTS

1. Student was born on November 11, 1997, and lives with his Parents within the District's boundaries. Student attended a private school from kindergarten through second grade, and then began attending a District school for the 2006-2007 SY, his third grade year. The parties do not dispute that Student's emotional disturbance qualifies him for special education and related services.

## THE 2006-2007 SCHOOL YEAR

### Timeliness of Assessment

2. A school district has an obligation to initiate a special education assessment referral of a pupil within 15 days of receiving a written request for such an assessment, not counting school vacations in excess of five days, in which case the school district has 15 days from the start of school. A school district must assess the pupil and hold an IEP team meeting within 60 days of receiving a parent's consent for assessment. A violation of the timelines may be a procedural violation of the IDEA. A procedural violation is a denial of FAPE if it impeded the pupil's right to a FAPE, significantly impeded the ability of the pupil's parents to participate in the decision-making process regarding the provision of a FAPE to the pupil, or caused a deprivation of educational benefits to the pupil.

3. Student contends that, on August 9 and 17, 2006, Parents requested a special education assessment, and informed the District that Student had a diagnosis of Bipolar Disorder. But the District did not provide an assessment plan to Parents until September 12, 2006. Student contends that the District did not refer him to the ACBHCS until November 3, 2006.

4. The District does not dispute that it received Parents' letters of August 9 and 17, 2006, which noted Student's diagnoses and requested a special education assessment. However, the District notes that it received the letters during the summer break, and that it had 15 days from the start of the school year to provide an assessment plan to Parents.

5. On or about August 30, 2006, school started. On September 11, 2006, the District developed an assessment plan. The next day, Mother signed her consent to the plan.

6. District developed an assessment plan 13 days after school started, following the summer break. Therefore, the District's assessment plan was timely.

7. After receiving Mother's consent, the District conducted an assessment and

held an IEP team meeting in 52 days, less than the 60 days allowed by the applicable law. Therefore, District's initial assessments and the initial IEP team meeting were timely.

8. For the second portion of Student's claim of failure to assess, we must consider subsequent events, at the IEP team meeting on April 19, 2007. Student contends that Parents requested an occupational therapy (OT) assessment, and the District agreed to make the OT referral. Student contends that the District never provided an assessment plan, and the OT assessment never occurred.

9. At the IEP team meeting on April 19, 2007, Parents requested an OT assessment, based on their concerns about Student's handwriting and his sensitivity to touch, setting, and noise/sound. Student's teacher also had concerns about Student's writing, but had not noticed sensory issues with Student. The IEP states, "An OT referral will be made by the teacher to the [D]istrict. If an assessment cannot be made, the [P]arents would be formally notified." Parents signed their consent to the IEP, but also wrote a statement identifying some additional concerns.

10. On April 24 and 25, 2007, Marcia Uriarte, Student's teacher, completed an OT checklist and gave it to Mary Ann Frates, a District program specialist. Ms. Uriarte indicated that frequently Student was easily distracted by visual or auditory stimuli, and occasionally lost his place while reading or had difficulty copying from the chalkboard.

11. Sometime in May or June 2007, Shanti Malladi, a District occupational therapist, reviewed the checklist, which indicated that Student did not have any sensory issues, nor any issues in the areas of fine and gross motor skills. Ms. Malladi talked with Ms. Uriarte for about 30 to 45 minutes in Ms. Uriarte's classroom, while Student was there. During the visit, Ms. Malladi also reviewed work samples, and looked at the legibility, orientation, spacing, and formation of Student's handwriting. Student's handwriting was "very legible," particularly on work samples that indicated that Student had been re-directed to rewrite the work sample. In late May or early June 2007, Ms. Malladi told Ms.

Frates that Student did not require an OT assessment. Ms. Malladi was not asked to conduct an OT assessment of Student, or to attend the next IEP team meeting, nor was she asked to write a report or to contact Parents. OT was not mentioned at the June 2007 IEP team meeting.

12. As noted above, after Parents request for an OT assessment, the District was required to develop and present an OT assessment plan within 15 days. It failed to do so.

#### Assessment in All Areas Related to Suspected Disability

13. A school district must assess a pupil in all areas related to his or her suspected disability. Areas of suspected disability include, if appropriate, general intelligence, academic performance, and social and emotional status. There are two methods whereby a school district may refer a pupil for a mental health assessment. Both methods require the school district to assess the pupil in all areas of suspected disability, and in all areas related to the disability. One method requires the school district to provide services to the pupil prior to a mental health referral, while the other method allows a mental health referral based on the preliminary assessment results.

14. Student's only challenge to the appropriateness of the District's assessment is the lack of a concurrent referral for a mental health assessment.

15. In late September and into October, District personnel exchanged emails about Student's assessment, and a possible concurrent mental health assessment. One of those emails indicated that Mother had agreed to wait for the District's psychoeducational assessment before referring Student to ACBHCS. Mother testified that she never agreed to delay the ACBHCS assessment. There was no written agreement to delay the ACBHCS assessment.

16. Mother signed her consent to the ACBHCS referral on November 3, 2006. A referral to ACBHCS was completed, and the District's special education director approved the referral on November 16, 2006.

17. On December 6, 2006, the ACBHCS developed a mental health assessment plan. On December 8, 2006, Mother signed the ACBHCS assessment plan.

18. The District was required to assess Student before it could refer Student for a mental health assessment. District chose to refer Student based on the results of the initial assessment, and without waiting to provide services to determine which, if any, services would be effective. Accordingly, the District appropriately referred Student for a mental health assessment.

#### November 2006 Offer of FAPE

19. A school district provided a FAPE to a disabled pupil if its program or placement was designed to address the pupil's unique educational needs, was reasonably calculated to provide some educational benefit in the least restrictive environment, and if the services provided comported with the IEP.

#### UNIQUE NEEDS

20. On August 15, 2006, Dr. Elena Labrada, Student's psychiatrist, wrote a letter diagnosing Student with Bipolar Disorder Not Otherwise Specified, and probable Attention Deficit Hyperactivity Disorder (ADHD).

21. Maria Heath, the RSP teacher at Student's school, conducted an academic assessment of Student using the Woodcock Johnson Revised test (WJ-R).<sup>2</sup> Student's WJ-R scores were in the average range, except for Student's low-average scores in the Written Language cluster skills, reading comprehension, and reading fluency. During the assessment, Ms. Heath noticed that Student did not use punctuation and wrote in

---

<sup>2</sup> Ms. Heath earned a master's degree in special education from the University of Arizona in 1995, became a California Professional Level 2 teaching specialist in 2006, and has 11 years of teaching experience.

incomplete sentences. Ms. Heath established that Student's academic strengths were in reading decoding and math, while his weaknesses were in writing and written expression, including reading fluency and comprehension.

22. Poh Ngau, a District school psychologist, assessed Student.<sup>3</sup> Ms. Ngau's assessment included a review of Student's cumulative file, and interviews of Student, Parents, and Student's private school teacher. Parents told Ms. Ngau that Student had difficulty with organization, task completion, reading comprehension and writing, and that Student had started taking medication in early August. Ms. Ngau's observations of Student revealed that Student had mood swings and, on bad days – during transitions or when he had to do academic work – he engaged in significant shut-down behaviors, such as non-compliance, putting his head down, crying, or going under a table. However, on good days, Student participated in class, transitioned well, and, although he was easily distractible, responded well to the accommodations of his teacher. Ms. Ngau noted that Student's behavior had changed due to medication, but then had relapsed.

23. Ms. Ngau administered the Wechsler Intelligence Scale for Children, Fourth Edition. Student's subtest scores were all in the average range except for coding and symbol search. Student's processing speed score was significantly delayed, and demonstrated a significant discrepancy between his next highest score. On the Test of Visual Perceptual Scales Revised, most of Student's scores were in the average range, except that Student scored in the first percentile in visual sequential memory, and in the second percentile in visual memory. Due to Student's difficulties in the areas of visual

---

<sup>3</sup> Ms. Ngau earned a master's degree in child development and education from the University of California, Davis, in 1991. She earned her Personnel and Pupil Services credential in 1992. She has two years of experience as a classroom teacher, and is now in her sixteenth year as a school psychologist.



processing and processing speed, Ms. Ngau established that Student would need support in the area of written expression. Ms. Ngau used the Developmental Test of Visual Motor Integration to assess Student's fine motor skills. Student scored in the average range.

24. Ms. Ngau also used the Behavior Assessment System for Children (BASC), as well as her observations, to assess Student's behavioral abilities and needs. The BASC questionnaire scores of Mother and Sherri Swinney, Student's teacher, were consistent as to depression and the internalizing problems composite (both rated as clinically significant) and as to withdrawal (both rated as at risk). The scores of Ms. Swinney and Mother indicated concerns in the areas of hyperactivity, somatization, attention problems, and the behavioral symptoms index, albeit with differing scores. Dr. Hall told Ms. Ngau that Student displayed significant social-emotional issues during therapy sessions, and that Student may revert to "infantile" coping skills to try to relieve anxiety. Ms. Ngau established in her report and testimony that Student displayed significant anxiety, and that Student's most severe area of behavioral need was externalizing problems, which included anxiety and depression.

25. Testimony and reports from Ms. Heath and Ms. Ngau established that Student had unique needs in the areas of writing, written expression, reading fluency and comprehension, behavior, anxiety, and depression.

#### GOALS

26. An IEP must include, among other things, the pupil's present levels of educational performance, measurable annual goals, the special education, related services, and supplementary aids and services to be provided, as well as a statement of how the pupil's progress toward the annual goals will be measured. IEP goals must be measurable, must be designed to meet the pupil's unique needs, which result from the pupil's disability, to enable the pupil to be involved in and make progress in the general curriculum, and must be designed to meet each of the pupil's other educational needs that

result from the pupil's disability.

27. Student claims that the District failed to provide present levels of performance that were sufficiently measurable or related to the goals to determine whether progress had been made.

28. However, as noted above, the applicable statutes and regulations require only the IEP goals to be measurable, not the present levels of performance. The present levels of performance are only required to provide information about the pupil's current level of functioning.<sup>4</sup>

29. Ms. Ngau wrote the present level of performance in the social-emotional (behavioral) goal, which states, "[Student] feels easily overwhelmed, frustrated and anxious during transitions and during academic work. He will then shut down, crawl under the table, lay in a fetal position, cry or refused [sic] to talk." Ms. Heath used the academic assessment results to write the present level of performance for the two written language goals, which states that Student is "performing in the low average range in Written Language skills." Ms. Heath also noted a 1.8 grade equivalent, which she got from a computer calculation and the WJ-R protocol. Ms. Heath also used the academic assessment results to write the present level of performance for the two reading

---

<sup>4</sup> (See *Nack v. Orange City Sch. Dist.* (6th Cir. 2006) 454 F.3d 604, 612 [parents challenged the proposed IEP for a failure to provide a baseline to measure future progress, but the court held that the technical failure to provide sufficient baseline information did not result in a substantive violation because objective test results demonstrated the pupil's progress and demonstrated that the pupil had not been harmed thereby]; *Derek B., by and through Lester B. and Lisa B. v. Donegal Sch. Dist.* (E.D.Pa. 2007) 2007 U.S. Dist. LEXIS 2983, pp. 31-37, 47 IDELR 34, 107 LRP 2742 [similar ruling on challenge to baseline information in IEPs].)

comprehension goals, which states that Student is “performing in the low average range in Reading Comprehension.” Ms. Heath noted a 2.2 grade equivalent. As reflected in the November 2006 IEP team meeting notes, Ms. Swinney reported that Student was still engaging in infantile behaviors, and that his behavior was appropriate about 10 percent of the time. This information reflected Student’s level of performance at that time, and provides information from which progress could be measured. Accordingly, the November 2006 IEP provided sufficient information regarding Student’s present level of performance in behavior, writing and written expression, including reading comprehension.

30. Student also claims that the District failed to draft goals to address all of his unique needs, including areas of need noted by Ms. Swinney, such as fluency problems, struggling with vocabulary, and off-topic responses, as well as behavior. However, the assessments of Student did not demonstrate that Student had unique needs in areas beyond those discussed above.

31. Two written language goals were written. The first goal called for Student to be able to expand kernel sentences by adding adjectives and to edit the sentences to ensure that all the requirements had been met. Student’s second written language goal called for him to be able to compose five examples of four different types of sentences, related to a picture prompt, and to edit the sentences to ensure that all the requirements had been met. These two goals addressed Student’s unique needs in writing and written expression.

32. Two reading comprehension goals were written. The first goal called for Student, when given an appropriate text, to restate five details. Student’s second reading comprehension goal called for Student, when given a selected third grade expository passage, to distinguish the main idea. These two goals addressed Student’s unique needs in reading comprehension.

33. The social-emotional (behavioral) goal called for Student, when feeling

frustrated and anxious at school, to increase his ability to use appropriate coping skills to deal with his frustration and anxiety. This goal addressed Student's unique needs in the areas of behavior and anxiety.

34. District did not draft any goals to address Student's unique needs in the area of reading fluency or depression. The District's failure to address Student's unique needs in these areas constituted a denial of FAPE. As a result, the District will be ordered to provide compensatory education.

#### DISTRICT'S PLACEMENT OFFER

35. A school district is required to make a formal, specific written offer which clearly identifies the proposed placement and services. One reason for this requirement is to provide parents with an opportunity to decide whether the placement offer is appropriate, and whether to accept the placement offer.

36. Student asserts that the District's offer at the November 2006 IEP team meeting was inappropriate because it meant that Student would be in a GE class with RSP support "as needed" until November 27, 2006. Student asserts that it was clear that he could not function in a GE class, due to his behavior issues and difficulties with homework and task completion, organization, reading comprehension and written expression.

37. The District offered, among other things, a mild-moderate SDC, mainstreaming in the GE setting for about three percent of Student's day, and the as-needed use of the RSP classroom for a "safe spot" for Student.

38. The IEP team meeting was held on Friday, November 3, 2006. Only two school weeks occurred after the IEP team meeting before the Thanksgiving break. The IEP called for Student to start the SDC on the Monday after Thanksgiving, November 27, 2006. The two-school-week delay in placing Student in an SDC allowed time for Parents to observe the SDC, and for Student to be transitioned to the SDC. The latter was particularly important, given Parents' concerns about Student's difficulties with transitions. During

those two weeks, Student had the support of the RSP room as a quiet spot. For all these reasons, the District appropriately offered the GE classroom for a brief period of time before Student moved to the SDC. The brief delay provided for in the IEP, during which time Student was to remain in the GE classroom, does not constitute a denial of FAPE.

39. Student also asserts that the District's offer of an SDC does not meet the District's obligation to provide a clear, written offer because the IEP does not identify the location of the SDC being offered by the District, or otherwise notify Parents of which SDC was being offered. Contrary to Student's assertion, the District's offer was communicated to Parents in writing, and was sufficiently specific for the parties to know what was being offered by the District. The lack of a specific SDC location does not render the District's offer impermissibly vague, because locations may change, so that the setting itself, the SDC, is the piece of information necessary for a clear written offer.

40. Furthermore, nine days after Mother signed the IEP, Ms. Teodosio accompanied Parents for an observation of the Mattos SDC. At least by that time, if not before the observation, the District had informed Parents of the specific SDC being offered. Even if the failure to identify a specific SDC location at the IEP team meeting constituted a procedural violation, there is no indication that the brief delay between the IEP team meeting and the identification of the specific SDC caused any prejudice to Student. After the observation, Parents rejected the SDC. There is no indication that the brief delay interfered with Parents' participation in the decision-making process, particularly in light of Parents' concerns that Student could not handle the transitions from the GE classroom to the SDC, and then potentially to a new placement based on the AB3632 assessment results. Therefore, any procedural violation did not amount to a denial of FAPE because it did not impede Student's right to a FAPE, did not significantly impede Parent's ability to participate in the decision-making process regarding the provision of a FAPE to Student, and did not cause a deprivation of educational benefits to Student.

41. Student asserts that the “as needed” offer of RSP support is vague and unclear, and does not meet comply with the District’s obligation to provide a clear, written offer. The “as needed” language in the IEP referred to the use of the RSP room as a “safe spot” for Student. However, the “Offered” box on the IEP is not checked for the RSP room. District committed a de minimis error by failing to check the “Offered” box for the RSP room. Ms. Swinney and Ms. Heath established that the RSP room was offered, that that portion of the offer was clearly conveyed to Parents, and that Student used the RSP room as a safe spot when he was feeling overwhelmed in the GE setting. The District could not predict when or for how long Student would need the RSP room. As a result, the District was not required to include additional specific information about the availability of the RSP room to Student.

42. Student also asserts that the District’s offer of 20 minutes per week of counseling with a school psychologist was insufficient to meet his unique needs, and that the District failed to implement the counseling. The IEP indicates that the team discussed 20 minutes per week of counseling for Student, but the District did not offer the counseling, as evidenced by the fact that the “Offered” box is not checked. Therefore, Student’s claim appears to be based on a misunderstanding of the District’s offer.

43. Student asserts that the District failed to honor Parents’ request for a one-to-one aide during the time that Student was undergoing additional assessment by ACBHCS. However, there is no evidence that Parents requested a one-to-one aide prior to the December 2006 IEP team meeting.<sup>5</sup>

#### IMPLEMENTATION

44. Student asserts that the District failed to implement and monitor the IEP

---

<sup>5</sup> The analysis of the claim is included below, as part of the claims relating to the December 2006 IEP.

goals, because they were not implemented until Student was placed at EBAC in January 2007. However, Ms. Swinney worked on Student's social-emotional (behavioral) goal, and Student made some progress in that area. Ms. Swinney also worked on the first written language goal, and the first reading comprehension goal. But Student did not make any progress on those goals. Ms. Swinney did not work on Student's second goals in written language and reading comprehension because those goals would have been worked on later in the school year. For all of these reasons, District appropriately implemented and monitored Student's goals from the November 2006 IEP.

45. Student also asserts that the District failed to implement the BSP. However, Ms. Heath implemented a portion of the BSP because Student used her room as a quiet spot when he was feeling extremely overwhelmed and anxious, including the use of a bean-bag chair that Ms. Heath put in the back of the RSP room for Student, and because Ms. Heath verbally praised and reinforced Student's use of "quiet time." Ms. Swinney implemented a portion of the BSP by using an incentive chart as a reinforcement to Student establishing, maintaining, and generalizing replacement behaviors, by modifying assignments for Student, often by shortening the assignments to lessen his anxiety and feelings of being overwhelmed, and by communicating with Parents, because Ms. Swinney spoke with Mother, almost daily, when Mother brought Student to school and picked him up. The BSP was effective, in that Student eventually stopped using the RSP room, and his infantile behaviors (crying or going under the desk) decreased. Hence, the District implemented the BSP.

#### December 2006 Offer of FAPE

46. On December 7, 2006, the IEP team convened for an IEP addendum meeting. The IEP notes reflect Ms. Swinney's report that Student was functioning only about 10 percent of the time, he was getting down on the floor or under the table at least three times per week, he was using the RSP room about three to four times per day, for about

five minutes at a time, and he did not always return to class when he left the RSP room, and sometimes refused to return to class. The District continued to offer the Mattos SDC, as well as 20 minutes of counseling per week.

47. Student contends that the District's amended offer at the December 2006 IEP team meeting was inappropriate because the Mattos SDC was not designed for emotionally disturbed pupils such as Student. At the IEP team meeting, Parents and their advocate, Renee Lamborn, pointed out that they believed Student required a therapeutic setting that the Mattos SDC did not provide.

48. However, Parents had already indicated their rejection of the therapeutic component of the District's offer – 20 minutes per week of counseling. As noted above, the November 2006 IEP team discussed counseling, but it was not offered. Ms. Teodosio and Ms. Ngau established that Parents explained to the November 2006 IEP team that they did not want Student to start a new counseling program at school because he was already receiving counseling from a private psychologist, because he had a private psychiatrist, and because they did not want an intern to provide counseling to Student.

49. Moreover, as to the appropriateness of the Mattos SDC, Ms. Swinney established, and Parents agree, that Student was overwhelmed in a GE class of 20 pupils, and that Student needed a smaller classroom environment. Ms. Swinney did not have an aide to assist her in the classroom. In contrast, the Mattos SDC only had about 10 pupils, with a teacher experienced in dealing with behaviors who was assisted by an aide. Ms. Teodosio had had success placing other pupils with Bipolar Disorder in the Mattos SDC. Also, the Mattos SDC utilized modified curriculum. The goals set forth in the IEP for Student could have been implemented at the Mattos SDC. Even assuming that Student would have been at the Mattos SDC for a fairly short time before the ACBHCS assessment was complete, the Mattos SDC was a much more appropriate placement for Student than Ms. Swinney's GE classroom. For all these reasons, the District's December 2006 offer to



place Student in the Mattos SDC was appropriate.

50. Student also contends that the District's December 2006 amended offer was inappropriate because it was only an interim placement, pending the AB3632 assessment results. At the IEP team meeting, Parents explained that they and Dr. Labrada believed that Student was in "crisis mode" and could not handle an additional transition (from the GE classroom to the SDC to whatever placement was recommended by the AB3632 process), and that Student was scheduled to begin taking Lithium the day of the IEP team meeting.

51. Contrary to Student's contentions, the Mattos SDC was an appropriate interim placement for all of the reasons set forth above. The concerns of Parents and Dr. Labrada about Student's ability to make multiple transitions were misplaced, in light of the fact that Student had uneventful transitions to EBAC in January 2007, and to a new teacher during the 2007 ESY. Moreover, the Mattos SDC, a smaller class with a more structured setting, was a good transition classroom from Ms. Swinney's GE classroom to the EBAC program, or to whatever program the AB3632 assessment would recommend. By mid-December 2006, the EBAC program had been discussed, Parents and Ms. Lamborn had observed it, Parents were hoping Student would be placed there, and Ms. Lamborn was advocating placement there. Hence, the District appropriately offered the Mattos SDC as an interim placement.

52. Student contends that he needed a one-to-one aide to assist with the implementation of the BSP pending the ACBHCS assessment. The IEP team discussed Parents' request for a one-to-one aide. The other members of the IEP team did not agree to Parents' request because, as established by Ms. Ngau and Ms. Teodosio, Student would not respond to a stranger, a one-to-one aide would not be appropriate in the Mattos SDC because of the low ratio of pupils to adults there, and one-to-one aides encourage dependence on an adult and decrease a pupil's learning of coping skills. Since school was not in session during the two-week winter break, and because the AB3632 referral was

ongoing, any assistance from a one-to-one aide would have lasted only a short period of time. As Mother established with her testimony, “[i]t takes a long time for [Student] to warm up to someone and to actually engage.” Hence, Student did not require a one-to-one aide during the brief time between the December 2006 IEP team meeting and the review of the ACHBCS assessment results, or during his proposed interim placement at the Mattos SDC.

53. Student also contends that he received no special education services from the District in between the December 2006 IEP team meeting and the IEP team meeting on January 12, 2007. Contrary to Student’s contention, as noted above, two of Student’s academic goals were being implemented, the behavior goal and BSP were being implemented, and Student was using the RSP room as a quiet spot. In addition, the District placement at the Mattos SDC, as well as 20 minutes of counseling per week, remained available. However, Parents elected not to accept those elements of the District’s offer.

#### The IEP of January 12, 2007

54. On December 20, 2006, Parents and Ms. Lamborn observed the EBAC program. That same day, Ms. Lamborn wrote a letter to Mr. Bannon, requesting special education supports as described in her letter of December 8, 2006,<sup>6</sup> and also requesting emergency placement of Student at EBAC to start on January 15, 2007, pending completion of the ACBHCS assessment.

55. On January 5, 2007, Mother wrote a letter to the District superintendent asking for assistance. Mother noted that the District was working with Parents for an emergency placement of Student in the EBAC program beginning on January 16, 2007,<sup>7</sup>

---

<sup>6</sup> In both letters, Ms. Lamborn requested a one-to-one aide, use of the RSP teacher and room, counseling, and ongoing support and consultation with Ms. Swinney.

<sup>7</sup> Monday, January 15, 2007, was the holiday in honor of Dr. Martin Luther King,

which was being recommended and supported by ACBHCS. Mother also submitted a request that Student be placed on home hospital instruction for a week.

56. On January 12, 2007, the District held an IEP team meeting and granted Mother's request that Student be placed on home hospital instruction for a week. The District continued to offer a SDC for the time period before and after the week of home hospital instruction, as well as 20 minutes of counseling per week. The IEP team was awaiting the ACBHCS referral for a day treatment program. On January 12, 2007, Mother signed her consent to the IEP.

57. Student asserts that, during the week that he was on home hospital instruction, he did not receive the special education instruction that he required for his unique needs. As noted above, the District's offer of SDC placement remained available, but Parents elected not to place Student there. However, there is no evidence that Student received 20 minutes of counseling for the week that he was on home hospital instruction. This constituted a failure to provide a program that comported with Student's IEP, and denied Student a FAPE.

58. As noted in the IEP, Student received 10 hours of home hospital instruction, which equates to 2 hours of instruction per day. Mr. Bannon established that this was double the normal amount of home hospital instruction, which he authorized to try to assure Parents that Student was receiving adequate services. Mother acknowledged that a teacher came to the house and worked with Student at the kitchen table.

The IEP of January 19, 2007

UNIQUE NEEDS

59. As determined above, District's assessment indicated that Student had unique needs in the areas of writing, written expression, reading fluency and

---

Junior.

comprehension, behavior, anxiety, and depression. There is no evidence that Student's unique needs changed from those determined in November 2006.

60. The ACBHCS assessment report noted the severity of Student's behavioral issues, his high level of emotional volatility, and his family history of Bipolar Disorder, anxiety, and depression. The report concluded that Student was AB3632 eligible because his emotional and behavioral problems interfered with his ability to benefit from special education. ACBHCS recommended a day treatment program that included a "sheltered academic environment with a full complement of mental-health staff on site."

61. Student's unique needs were corroborated by a private assessment done by the Pratt Center in January and February 2007.<sup>8</sup> The Pratt Center used a number of instruments to assess Student, including the WJ-III and the BASC. In general, the results were similar to those of the District's assessments. The Pratt Center found that Student had unique needs in the areas of attention, processing speed, organization, and behavior/social-emotional.

#### GOALS

62. Student continues to claim that the District's goals were inappropriate, for the reasons set forth above. However, Student's claims regarding the District's goals have already been resolved, as determined above. ACBHCS and EBAC developed goals, which will be discussed below.

63. Student claims that the EBAC and ACBHCS goals failed to provide sufficient baselines or present levels of performance.

---

<sup>8</sup> The Pratt Center letterhead indicates that it provides educational, psychological, and neuropsychological services. The assessment was based on a referral from Dr. Labrada, with Ms. Lamborn's knowledge. However, the District and ACBHCS did not know about the assessment until the hearing.

64. As noted above, the applicable statutes and regulations require only that the IEP goals be measurable, not the present levels of performance. The present levels of performance are only required to provide information about the pupil's current level of functioning.

65. On January 18, 2007, ACBHCS completed its assessment report. The report was sent to Parents. The ACBHCS goals of January 18, 2007, do not include baselines or present levels of performance. Instead, the ACBHCS document only includes goals and objectives. The failure to include present levels of performance is a procedural violation.

66. This procedural violation constitutes a denial of FAPE. The lack of baselines/present levels of performance significantly impeded Parents' participation in the decision-making process, because Parents were not sufficiently informed about Student's present levels of functioning in the three areas the ACBHCS goals were designed to address – mood stabilization, academic functioning, and aggressive behavior. Therefore, the procedural failure of ACBHCS to include baselines or present levels of performance in its goals constituted a denial of FAPE.

67. However, the EBAC goals in the March 2007 treatment plan, developed by Christopher Fenaroli, Student's EBAC therapist, included information about Student's current level of functioning in the "Problem" statement that precedes each goal. For example, the first problem area notes that Student "has difficulty accepting adult authority and direction and attempts to argue, or practice avoidance by not listening and refusing to do school work. He sometimes crawls underneath the desk." Each of the other three problem areas provides an even more detailed statement of Student's present level of performance in those areas. Therefore, the EBAC goals provided a sufficient explanation of Student's present levels of performance.

68. Student claims that ACBHCS failed to develop appropriate goals. The ACBHCS assessment report contained three goals, all of which were to be implemented in

a day treatment program. The first goal was to stabilize Student's mood, with the objective that Student would take psychotropic medication as prescribed. The second goal was for Student to increase his academic functioning, with an objective that he would increase his ability to remain on task for 25 percent of class time over the next six months, and with another objective that Student would attempt, with adult assistance, tasks that he normally refused or became frustrated by on two out of four times. The third goal was for Student to decrease his aggressive behavior, with an objective to avoid situations that result in physical or verbal aggression two out of three times, and with another objective that Student would use appropriate de-escalation techniques, such as time-outs and verbalization in place of aggressive behavior for two out of four times.

69. The ACBHCS goals were measurable. In addition, the ACBHCS goals were designed to allow Student to benefit from special education, because the goals were focused on the improvement of Student's behavioral and emotional functioning, including anxiety (as to academic tasks that caused frustration), depression (as to medication and academic tasks that caused frustration), and aggressive behavior (which would improve Student's behavior and functioning both at school and at home). Thus, the ACBHCS goals were appropriate.

70. Student claims that the EBAC goals were insufficient to meet his unique educational needs, either in isolation, or when combined with the November 2006 goals, because they did not address all of the areas of need identified by the ACBHCS assessment. As determined above, District's November 2006 goals appropriately addressed Student's unique needs except as to reading fluency, and Student's unique needs had not changed. The EBAC treatment plan added four areas of need, each of which included a goal.

71. The first area of need noted by EBAC was daily activities, because Student had difficulty accepting adult authority and direction, and attempted to argue or practice

avoidance. The goal stated, "Increase adherence to structure, rules, and staff directions." The objective was for Student to increase his ability to follow directions with one prompt without arguing or practicing avoidance, for three out of ten times as reported by milieu staff by August 2007. The plan set forth numerous interventions, including early preparation of Student for transitions, ignoring behaviors and re-directing Student, giving timeouts when Student was unable to follow directions after the first prompt, and praising on-task peers.

72. The second area of need noted by EBAC was symptom management, because Student's poor frustration tolerance was evidenced by his limited self-soothing and coping skills. The goal stated, "Increase frustration tolerance." The objective was for Student to increase his ability to tolerate frustration as evidenced by his ability to ask for and accept help from staff rather than becoming defiant or discouraged, for four out of ten times as reported by milieu staff by August 2007. The plan set forth a lengthy paragraph of interventions, including offering one-to-one assistance to help Student get started on assignments, prompting Student by reminders of privileges for good behavior, offering bonus dollars for completion of assignments, using a feelings chart as a visual clue if helpful, breaking tasks into small pieces, and modeling and teaching appropriate coping skills.

73. The third area of need noted by EBAC was also related to Student's symptom management, based on Student's poor awareness of his feelings and sense of self, as evidenced by becoming easily provoked, quickly agitated, and very hyperactive. The goal states, "Improve the ability to interact respectfully with others." The objective was for Student to increase his ability to sustain positive social interactions with good physical boundaries without being provoked, both with peers and staff, for two out of ten times as reported by milieu staff by August 2007. The plan listed a number of interventions, including quick staff intervention with modeling and teaching appropriate coping skills if

Student became agitated, prompts to remind Student of privileges, naming and reflecting feelings – using a feelings chart as a visual cue if helpful, and the encouragement of personal breaks when frustrated.

74. The fourth area of need noted by EBAC was Student’s home environment, due to Student’s Parent-reported home behavior, including rages that may last for two or more hours when Student was confronted with limits, disruption of family routines, and the creation of a stressful environment. The goal stated, “Improve behavior at home and minimize destructive emotional outbursts.” The objective was for Parents to increase their communication skills with Student to enable them to avoid his triggers and to provide more structure at home. The intervention was family therapy three times per week to learn communication skills and to make changes that would minimize Student’s emotional home outbursts.

75. As noted above, Student had unique needs at home, and in the areas of behavior/social-emotional, anxiety, and depression. The EBAC goals were measurable, and were designed to meet Student’s unique needs to allow him to benefit from special education. For all these reasons, the EBAC goals were appropriate.

#### DISTRICT/ACBHCS OFFER OF FAPE

76. Local educational agencies must provide special education and those related services, sometimes referred to as designated instruction and services (DIS), necessary for the pupil to benefit educationally from his or her instruction program.

77. Student claims that the EBAC day treatment program placement, offered by the District and ACBHCS at the IEP team meeting on January 19, 2007, was inappropriate because it failed to provide sufficient home support, a plan for home-school communication that would have helped in the reinforcement and generalization of behaviors, a behavioral component, collaboration with Student’s private mental health providers, and therapists with sufficient qualifications and knowledge of Bipolar Disorder.



78. At the IEP team meeting on January 19, 2007, District and ACBHCS offered placement at the EBAC program, including individual and family counseling once each per week for 40 minutes each, group counseling twice per week for 30 minutes each, and crisis counseling on an as needed basis. Mother signed her consent. Student began his placement in the program on about January 22, 2007.

79. The Pratt Center report corroborated that Student was appropriately placed in a day treatment program. The report made four pages of recommendations, including some that were already in place, as discussed below, such as the emphasis of positive rewards for good behavior, modification of assignments (shortened assignments, more time for tests, etc.), frequent communication between Student's caregivers and teachers, and continued individual and family therapy. The report's recommendations provided Parents with a wealth of information on everything from resources that would help them understand Bipolar Disorder to practical suggestions for daily methods of avoiding the triggers of Student's problem behaviors.

#### Home Support and Home-School Communication

80. As noted above, the EBAC treatment plan identified Student's need for home environment support. The evidence established that EBAC and ACBHCS staff appropriately addressed Student's needs for home support and home-school communication.

81. Christine Mukai, Student's AB3632 case manager, spoke to Mother in February 2007. Mother "want[ed] something to be done [because] she could no longer handle [Student's] behaviors at home." Ms. Mukai discussed several things with Mother, including a home behavior plan that could be linked to school, interventions that Mother could try, and a psychiatric medication evaluation.

82. Mr. Fenaroli attended the daily EBAC staff meetings where each pupil was discussed, spent about 10 to 15 percent of the day in Student's classroom, and talked with Marcia Uriarte, Student's teacher, about how Student was doing. Mr. Fenaroli relayed

information to Parents, via phone calls and in person, and attempted to clear up any issues that Parents had about Student in the classroom.

83. In about March or April 2007, Mr. Fenaroli worked with Parents to develop a form for home-school communication. Mr. Fenaroli asked Student how he was doing and feeling, and noted that information on the form by using “smiley” faces and a scale of one to ten. At the end of each school day, Mr. Fenaroli wrote a narrative that included information from the staff members who had interacted with Student. Mr. Fenaroli put together a booklet of the daily forms, which were given to Parents when they came to school. Then Mr. Fenaroli would start a new booklet of the forms. Subsequently, Mr. Fenaroli worked with Parents to develop a form that could be exchanged on a daily basis. Mr. Fenaroli completed the form and faxed it to Parents. This form was being used at least by May 7, 2007. Mr. Fenaroli created a weekly note from the daily notes written by the EBAC mental health resource specialists (MHRS), who provided behavioral interventions in the EBAC classrooms. He used both of the notes, as well as his observations and the staff discussions, to provide progress reports to Parents. Throughout Student’s time in the EBAC program, Mr. Fenaroli provided progress reports outside the IEP process, including by phone.

84. In addition, Mr. Fenaroli met with Parents to talk about the types of behaviors they were seeing from Student, and the time of day when those behaviors would occur. Mr. Fenaroli thought that it would be best to address Student’s home behavioral problems piecemeal – one or two behaviors at a time. Mr. Fenaroli developed a home behavioral plan with Parents. Then Mr. Fenaroli went to Student’s home to talk with Parents about the home behavioral plan and the IEP. They talked about the home environment, what it was like for Parents in the home, and any additional assistance that Mr. Fenaroli could provide, such as posting cues in the home, particularly related to the most problematic times for Student, which included the trip home from school, evening

activities (dinner, homework, and bedtime), and in the morning. Over the ensuing weeks, Mr. Fenaroli talked with Parents about the home behavioral plan. Parents were going to give the plan to Dr. Hall for comments or amendments. However, Parents never returned the plan to Mr. Fenaroli.

85. Parents did not inform Dr. Labrada about Mr. Fenaroli's efforts. Dr. Labrada was unaware that there was communication between home and school, and of the home behavioral plan developed by Mr. Fenaroli. Also, Mr. Fenaroli spent a substantial amount of the family therapy time addressing Parents' concerns about the EBAC program, rather than addressing Student's home behavior issues. During family therapy, Mr. Fenaroli mentioned a list of triggers for Student's home behaviors, which would have helped his worked with Student, but Parents never provided such a list.

#### Behavioral Component

86. A substantial portion of the EBAC program addressed Student's behavior, including Mr. Fenaroli's therapy with Student and Student's family, the home behavioral plan created by Mr. Fenaroli and Parents, and the EBAC "level" system. In the level system, each pupil could earn up to two points per task or criteria, such as follow staff directions, during each of the ten daily class periods.<sup>9</sup> At the end of each day, the points were tallied on a daily point sheet to determine what level the pupil had earned for the following day. The level of reward increased with the point total, and pupils could earn bonus "dollars" to spend at the school store, or for additional rewards such as a movie on Fridays. The EBAC MHRS used the daily point sheets to create a daily narrative about how the pupil did

---

<sup>9</sup> Ms. Lamborn's notes of the April 2007 IEP team meeting provide additional clarification. Student had five goals, which were evaluated every 45 minutes. The goals were for Student to express himself appropriately, to focus on himself, to pay attention, to follow directions, and to stay on task.

behaviorally in school and in the environment, including the pupil's level.

87. Student responded well to the level system, and to the structure of the EBAC program. Out of 33 daily home-school communication forms between May 7, 2007, and the end of the 2007 ESY, Student earned Level 4 on sixteen days, and Level 3 on ten days. In addition, for three of the days when Student earned Level 2, it is noted that he arrived late or left early.

88. Also, the EBAC treatment plan created by Mr. Fenaroli included goals in four areas, all of which directly or indirectly addressed Student's behavior, as discussed above.

89. It is especially noteworthy that the Pratt Center report states, after noting Student's placement in the EBAC program, "Per parent report, [Student] is responding well to his new environment and appears motivated to improve his behavior in order to maintain privileges." This corroborates witness testimony and other documents that indicate that Student's behavior improved at EBAC fairly quickly after he was enrolled there, that Student was on Level 4 for most of the time, and that Student was motivated by the ability to earn privileges.

#### Collaboration with Student's Private Psychiatrist and Psychologist

90. Student also claims that the EBAC placement failed to provide collaboration with Student's private mental health providers. However, Dr. Labrada, Student's private psychiatrist, established that she spoke with Mr. Fenaroli on a number of occasions between January and April 2007. For example, Dr. Labrada told Mr. Fenaroli what she was working on with Student, and what she was seeing in Student, as well as the areas of concern that EBAC needed to address, including learning better coping strategies and mood regulation, managing anger in a less destructive way, and significant support for Parents to manage Student's behaviors at home. Mr. Fenaroli told Dr. Labrada that those were the things he was working on, and that he had previously worked with pupils who had Bipolar Disorder. Dr. Labrada suggested some books on that topic for Mr. Fenaroli. In

addition, Mr. Fenaroli followed up with Dr. Labrada by leaving her voicemail updates during the spring of 2007.

91. Dr. Labrada indicated that she did not receive all of the information that she sought from Mr. Fenaroli. However, as noted above, Parents did not inform Dr. Labrada about at least some of Mr. Fenaroli's efforts.

#### Therapist Qualifications

92. Mr. Fenaroli had been working with children in a variety of positions since approximately 1993, including five years of teaching after he received a California Multiple Subject Teaching Credential in 1998. While Mr. Fenaroli was studying for a master's degree in counseling psychology, he worked as a resource counselor, which involved visiting homes to try to preserve the placements of foster children. Since Mr. Fenaroli received his master's degree in 2004, he has worked as a mental health therapist in day treatment programs.

#### The IEP of April 19, 2007

##### UNIQUE NEEDS

93. As determined above, District's assessment indicated that Student had unique needs in the areas of writing, written expression, reading fluency and comprehension, behavior, anxiety, and depression. The ACBHCS assessment confirmed Student's emotional and behavioral unique needs. The Pratt Center report corroborated these assessments. There is no evidence that Student's unique needs changed from those determined in November 2006 and January 2007.

##### DISTRICT/ACBHCS OFFER OF FAPE

94. Student claims that the April 2007 IEP did not provide a FAPE because the District and ACBHCS did not follow through on the things agreed upon at the meeting,

including the collection of baseline data, the identification of replacement behaviors, the revision of home-based goals, and the development of intervention goals.

95. However, IEP team meeting discussions do not automatically become agreements that bind a school district and constitute FAPE for the pupil. The April 2007 IEP does not reflect that the IEP team agreed to collect baseline data or to provide additional information about replacement behaviors to Parents, and does not mention the revision of home-based goals or the development of intervention goals. Therefore, Student's claims are based on a misunderstanding or a misinterpretation of the April 2007 IEP.

96. Student claims that the failure to develop a home level system denied him a FAPE. However, as noted above, Mr. Fenaroli consulted with Parents in order to develop a home behavior plan. Mr. Fenaroli developed the plan, and then visited Student's home to talk about the plan, and the IEP, with Parents. However, Parents did not follow through on the plan by getting feedback from Dr. Hall, Student's private psychologist.

97. Student claims that the District and ACBHCS failed to provide Parents with information on replacement behaviors for Student. The April 2007 IEP indicates that Parents would like to know replacement behaviors that Student could use. Mother testified that she did not know what replacement behaviors were being worked on with Student at school, and that those replacement behaviors were not discussed. However, as noted above, the initial BSP, which was part of the November 2006 IEP, contained numerous replacement behaviors, including use of the "quiet spot," asking for help, and negotiating for lesser or less demanding work. The initial EBAC treatment goals and objectives also contained replacement behaviors, including increasing Student's ability to ask for and accept help, encouraging Student to take breaks when he was frustrated, and teaching Student to check in with how he was feeling and to ignore a peer's negative behavior. Student told Dr. Labrada that he had learned how to disengage before he exploded, which involved taking time-outs and figuring out that that was helpful to him, using movement

to deal with anxiety, which included basketball and dance, and learning how not to be violent. These coping skills and replacement behaviors were included in the BSP and the EBAC treatment goals.

98. Student also claims that, in spite of Parent requests, Parents were not provided with progress updates, and the District failed to explain the March 2007 progress update. However, as noted above, Mr. Fenaroli provided Parents with booklets of completed forms regarding Student when they came to school. Subsequently, Mr. Fenaroli worked with Parents to develop a daily home-school communication form that he faxed to Parents. Student's current academic progress and behavioral functioning were discussed at almost every one of the five IEP team meetings between November 2006 and June 2007. Accordingly, District and ACBHCS provided sufficient progress updates to Parents.

99. Student claims that his EBAC placement failed to provide a FAPE because the EBAC program negatively impacted his instability, which resulted in his hospitalization for nine days in May 2007. However, Student was making academic and behavior/social-emotional progress in the EBAC program. In addition, Mother and Dr. Labrada established that the instability which resulted in Student's hospitalization occurred at home. Specifically, Student was raging, could not be controlled, talked about being better off dead, became more aggressive with his younger sister, and broke items in the home, to such an extent that Parents did not feel that Student was safe at home. Mother called Dr. Labrada, who recommended hospitalization.

100. It is important to note that medications, and/or their side effects, played a significant role in Student's symptoms and his hospitalization. Dr. Labrada admitted that Student was "exquisitely sensitive" to medication side effects, that she and Parents had been trying to find the right medications for Student for "a very long time," and that she had not yet been able to find the "best fit" of medications for Student. Mother conceded that, at the time of the hospitalization, they needed to start Student on a new medication,

but it was unsafe to do that at home because there had been so many negative medication effects in the past. Also, at the time of the hospitalization, Dr. Labrada was weaning Student from Geodon because he was sleeping too much. Lamictal could cause sleepiness, Depakote could cause sedation, depression, and emotional instability, Tenex could cause sleepiness and, to a lesser degree, confusion and depression, and Geodon caused such serious side effects – such as sedation/drowsiness, agitation, and irritability (as well depression as reported by some patients with Bipolar Disorder) – that it is only prescribed after other medications have failed. These medication side effects are identical to a number of the problems that Student experienced at home and school.

101. It is also important to note that the District and ACBHCS had no control over Student’s medications because, as Dr. Labrada admitted, adjusting Student’s medications was her responsibility.

#### IMPLEMENTATION

102. Student also claims that ACBHCS failed to implement and monitor goals. Ms. Mukai monitored EBAC’s implementation of the ACBHCS and EBAC goals by observing Student in March 2007. Student was “happy and able to socialize with some peers.” Ms. Mukai also spoke with Mother at least twice on the phone to try to provide assistance to Mother, including suggestions of interventions to try at home. Also, as noted above, Mr. Fenaroli implemented and monitored Student’s goals by drafting two forms for home-school communication and a home behavior plan, all with Parents’ assistance, by providing individual, group, and family therapy, by providing home support to Parents, by working with EBAC staff, and by participating in the daily meetings with other EBAC staff.

103. In addition, Ms. Uriarte implemented and monitored Student’s November 2006 goals at EBAC, and updated Student’s progress on the IEP. As of March 14, 2007, Student had made 20 percent progress on his social-emotional goal, 30 percent progress on his written language goals, and 40 percent progress on his reading comprehension



goals. The goal updates were noted as a "3," which meant that Student had made sufficient progress and was expected to meet the goal by the time of his November 2007 annual review.

#### 2007 ESY

104. A school district must provide services, beyond the regular academic year, to a disabled pupil, whose disability is prolonged or may continue indefinitely, when the interruption of the pupil's academic program may cause regression, coupled with the pupil's limited recoupment abilities, would render it unlikely or impossible for the pupil to attain the level of self-sufficiency or independence that would otherwise be expected in view of his or her handicapping condition.

105. A school district must ensure that personnel working with a disabled pupil are aware of the requirements of the pupil's IEP.

106. Student contends that his 2007 ESY teacher did not have access to his IEP, which prevented the teacher from knowing the services to which Student was entitled, and the goals and objectives that were to be implemented.

107. Mark Taubman Walker, Student's 2007 ESY teacher, talked to Ms. Uriarte before the ESY 2007 started. However, Mr. Taubman Walker never received Student's special education records during his time as Student's teacher. Mr. Taubman Walker's 2007 ESY progress report for Student noted that the "Summary of Progress Toward IEP Goals" was made "[i]n the absence of official IEP records."

108. District was responsible for ensuring that Mr. Taubman Walker was aware of the requirements of Student's IEP. District's failure to do so is a procedural violation of Student's right to a FAPE.

109. However, this procedural violation did not amount to a denial of FAPE, because the violation did not impede Student's right to a FAPE, did not significantly impede Parents' ability to participate in the decision-making process regarding the

provision of a FAPE to Student, and did not cause a deprivation of educational benefits to Student. Ms. Mukai observed Student twice during the 2007 ESY, and both times Student was doing well and on the highest level in the class. Also, Mr. Taubman Walker's energetic and compelling testimony established that he addressed Student's goals during the 2007 ESY. First, Student had progressed beyond the behavior noted in his social-emotional goal. Also, Mr. Taubman Walker limited the amount of time each subject was taught, and built transition activities into his instruction. Second, Mr. Taubman Walker addressed Student's first written language goals by having the pupils write in journals, using a variety of prompts such as stories and free writing time. Mr. Taubman Walker had each of the pupils write a letter to the President of the United States about what was on their mind, including what they saw as potentially wrong or right in the world. Mr. Taubman Walker proof-read the letters, and Student's letter was not one of the letters that needed to be re-written. Mr. Taubman Walker wrote a cover letter, mailed the letters to the White House, and later received a response which he forwarded to each of the pupils. Student's writing improved during the 2007 ESY, because he used more adjectives and was able to compose more exciting narratives. Third, Mr. Taubman Walker addressed Student's second written language goal by having the pupils do a considerable amount of expository, exclamatory, and "telling" writing, including having the pupils respond to something that was read to them, and having them learn how to self-edit their written work to ensure it was syntactically correct. Fourth, Mr. Taubman Walker partially addressed Student's reading comprehension goals with mandatory silent reading for about 20 minutes per day, and by working with the pupils for about 40 minutes per day on reciprocal teaching – the pupils would predict what a book was about, clarify anything that they did not understand about the story, create questions about the story that were both on and below the surface of the story, and summarize the story at the end.

110. As a result, the fact that Mr. Taubman Walker did not have Student's IEP did

not impede Student's right to a FAPE during the 2007 ESY, did not significantly impede Parents' ability to participate in the decision-making process as to the provision of a FAPE to Student during the 2007 ESY, and did not cause a deprivation of educational benefits to Student in the 2007 ESY. Mr. Taubman Walker addressed Student's goals during the 2007 ESY, and Student made progress in Mr. Taubman Walker's class.

#### Prior Written Notice (PWN)

111. A school district must provide prior written notice whenever the school district proposes or refuses to initiate or change the identification, evaluation, or educational placement of a pupil, or the provision of a FAPE to a pupil. The notice must contain: (1) a description of the action refused by the agency, (2) an explanation for the refusal, along with a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the refusal, (3) a statement that the parents of a disabled child are entitled to procedural safeguards, with the means by which the parents can obtain a copy of those procedural safeguards, (4) sources of assistance for parents to contact, (5) a description of other options that the IEP team considered, with the reasons those options were rejected, and (6) a description of the factors relevant to the agency's refusal.

112. Student contends that the District failed to provide PWN regarding Parents' request for a one-to-one aide, made at the December 2006 IEP team meeting. The purpose of PWN is to provide parents with information regarding the school district's refusal to initiate or change a pupil's placement, of the provision of FAPE to a pupil, including what other options were considered and sources of assistance for the parents. Any school district offer is a product of the discussion of the IEP team at the meeting, which generally provides the information and explanation required by PWN to parents who attend the meeting.

113. As noted above, the December 2006 IEP team discussed and declined to

grant Parents' request for a one-to-one aide. As a result, by the end of the IEP team meeting Parents were aware of the reasons for the District's declination of their request. Therefore, the District met its obligation to notify Parents about the rejection of their request for a one-to-one aide, and was not required to provide additional notice to Parents regarding the basis for its determination that a one-to-one aide was not appropriate.

114. Student also contends that the District failed to provide PWN regarding its failure to conduct an OT assessment. The District never informed Parents of the OT consultation and observation, or the conclusions of the occupational therapist. As a result, Parents were unaware that the District had undertaken any action on their request for an OT assessment. The District should have provided PWN regarding its refusal to conduct an OT assessment, so that Parents would have been informed of the District's actions, and possible alternatives. The District's failure to provide PWN regarding its refusal to conduct an OT assessment, and its decision to instead conduct an informal OT observation and consultation, deprived Parents of the ability to participate in the decision-making process regarding the provision of a FAPE to Student in the area of OT. Therefore, the District's failure to provide PWN was a procedural violation which amounted to a denial of FAPE.

115. Student also contends that the District failed to provide PWN regarding the basis for its determination that the Mattos SDC was appropriate. As established by Ms. Swinney, the IEP team at the November 2006 meeting discussed possible placements for Student, and the IEP document formally offered a SDC placement. Ms. Teodosio took Parents to observe the Mattos mild-moderate SDC on about November 16, 2006. The December 2006 IEP notes reflect that the District continued to offer the Mattos SDC. As a result, Parents were aware of the basis for the District's recommendation and offer of a mild-moderate SDC, and specifically the Mattos SDC. Therefore, the District met its obligation to notify Parents about the SDC offer, and was not required to provide

additional notice to Parents regarding the basis for its determination that the Mattos SDC was appropriate.

116. Student contends that the District failed to provide PWN regarding the basis for its determination that the November 2006 offer of 20 minutes of counseling per week was appropriate. As noted above, counseling was discussed at the November 2006 IEP team meeting. As a result, Parents were aware of the underlying basis for District counseling, but indicated that they did not want Student to start a new counseling program when he already had a private psychologist and psychiatrist. In any event, the District did not offer counseling at the November 2006 IEP team meeting. The notes of the December 2006 IEP team meeting indicate that the District continued to recommend 20 minutes of counseling per week. Based on the discussion at the November 2006 IEP team meeting, Parents were aware of the basis of the recommendation. The District met its obligation to notify Parents about the counseling offer, and was not required to provide additional notice regarding the appropriateness of 20 minutes of counseling per week in November or December 2006.

#### June 2007 IEP Team Meeting

##### UNIQUE NEEDS

117. As noted above, there is no evidence that Student's unique needs changed from those determined by the assessments in November 2006 and January 2007.

##### GOALS

118. Student claims that, at the June 2007 IEP team meeting, the District and ACBHCS failed to update or correct the still-inappropriate goals. However, Student's claims regarding the District and ACBHCS goals have already been determined, above.

## IMPLEMENTATION

119. Student also claims that ACBHCS failed to implement and monitor goals. However, Ms. Mukai monitored EBAC's implementation of the ACBHCS and EBAC goals by observing Student in May 2007. Student was on the highest level, was working independently, and was asking questions when he needed help. Ms. Mukai also spoke with Mother at least twice on the phone to try to provide assistance to Mother, including suggestions of interventions to try at home. Also, as noted above, Mr. Fenaroli implemented and monitored Student's goals by drafting two forms for home-school communication and a home behavior plan, all with Parents assistance, by providing individual, group, and family therapy, by providing home support to Parents, by working with EBAC staff, and by participating in the daily meetings with other EBAC staff.

120. In addition, Ms. Uriarte implemented and monitored Student's November 2006 goals at EBAC, and updated Student's progress on the IEP. As of June 2007, Student had made 60 percent progress on his social-emotional (behavioral) goal, 60 percent progress on his written language goals, 60 percent progress on his first reading comprehension goal, and 70 percent progress on his second reading comprehension goal. The goal updates were noted as a "3," which meant that Student had made sufficient progress and was expected to meet the goal by the time of his November 2007 annual review. Student's behavioral/social-emotional progress was such that, by June 2007, Student was only exhibiting problem behaviors at the very beginning of the school day. In the area of reading comprehension, Student's dependence on the classroom aide decreased, and by June 2007 Student only needed occasional help determining the main idea of a passage. In the area of written language, Student had two writing sessions per day, as well as other writing assignments, and by June 2007 Student was able to write with 60 percent accuracy, but he still needed help with sentence types.

## THE 2007-2008 SCHOOL YEAR

### IEP Team Meeting Attendance

121. The required members of the IEP team are the parents of the disabled pupil, at least one of the pupil's GE teachers (if the pupil is or may be participating in the GE environment), at least one special education teacher or provider who provides special education to the pupil, a school district representative, an individual who can interpret the instructional implications of the assessments, other individuals who have knowledge or special expertise regarding the pupil (depending on the discretion of the parents or school district), and, whenever appropriate, the disabled pupil.

122. Student alleges that the District failed to have a GE teacher present at the IEP team meeting on September 5, 2007. The September 2007 IEP signature block, and the transcript of the recording of the meeting, reflect that Nanci Pass, the principal at the Green school campus, attended the IEP as the GE representative. At the time, Ms. Pass was beginning her third year as the Green principal. As the principal, Ms. Pass was responsible for "all aspects of the school," including weekly observations of every classroom. She met and observed Student while he was in the EBAC program. The District's offer called for Student to be mainstreamed for physical education, science, and computer classes. Ms. Pass was knowledgeable about the GE opportunities at Green, and could share that information with the other members of the IEP team. Ms. Pass effectively fulfilled the role of GE teacher at the meeting.

123. Student also alleges that ACBHCS failed to have a mental health staff member present at the September 2007 IEP team meeting. Student is correct that no ACBHCS staff member was present at the meeting. However, Lisa Davis, the EMQ Clinical Director, attended the meeting to tell the team about the EMQ program. In addition, on page 28 of the IEP team meeting transcript, Ms. Davis noted that Ms. Mukai, Student's ACBHCS case manager, had provided "all of the information" regarding ACBHCS crisis

support. Hence, an ACBHCS staff member was not required to attend the September 2007 IEP team meeting.

124. Student alleges that, during the September 2007 IEP team meeting, Ms. Uriarte was present but provided no input on the placement offered. Ms. Uriarte's attendance met the District's obligation to ensure that a special education teacher, who had provided special education to Student, attended the meeting. The focus of the meeting was the discussion of the Clark and EMQ programs, which were not Ms. Uriarte's areas of expertise. Ms. Uriarte supported the District's offer of the EMQ program because it was the LRE, and because she believed Student could make progress in the EMQ program. The District and ACBHCS complied with the requirement that a special education teacher of Student be present at the IEP team meeting.

125. Student alleges that the September 2007 IEP team members were not knowledgeable about his unique needs. The September 2007 IEP consisted of ten members: Charlene Okamoto, District assistant director of special services, Ms. Pass, Ms. Uriarte, Program Specialist Raymond Santos, Ms. Davis, Mother, Father, and Ms. Lamborn, as well as two telephonic participants, Mr. Harris and Dr. Labrada. As Mother acknowledged during her testimony, six of the team members had direct knowledge of Student: Mother, Father, Dr. Labrada, Ms. Uriarte, Ms. Lamborn, and Ms. Pass. These six team members were knowledgeable about Student and his unique needs. The District met its obligation to ensure that the IEP team included members who were knowledgeable about Student's unique needs.

#### Pre-determination of the District's September 2007 Offer

126. A school district is required to initiate and conduct meetings for the purpose of developing, reviewing, and revising the IEP of each pupil with exceptional needs. A school district must come to such meetings with an open mind and several options, and must discuss and consider parents' placement recommendations and/or concerns before



the IEP team makes a final recommendation. School districts are not permitted to independently develop an IEP, without meaningful parental participation, and then simply present the IEP to the parent for ratification.

127. A parent has meaningfully participated in the development of an IEP when he is informed of his child's problems, attends the IEP meeting, expresses his disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. While the IEP team should work toward reaching a consensus, the local education agency has the ultimate responsibility to determine the offer of FAPE.

128. Student contends that, at the September 2007 IEP team meeting, the District ignored the June 2007 IEP team's agreement of a NPS placement, and instead a District administrator made the offer of placement without any meaningful discussion or Parent input.

129. As discussed below in detail, the June 2007 IEP team meeting resulted in an agreement to place Student at a NPS, and the NPS options discussed were Clark, Seneca, and the Children's Learning Center. On August 22, 2007, Christopher Harris, the Clark Director, sent Parents a letter inviting them to enroll Student in Clark, beginning on August 28, 2007. Mr. Harris sent a copy of the letter to Ms. Uriarte.

130. However, on August 27, 2007, the District prepared a notice for Parents regarding an IEP team meeting two days later. On August 31, 2007, the District prepared a new IEP team meeting notice, inviting more attendees, and scheduling the meeting for September 5, 2007, the first day of the 2007-2008 SY.

131. At the September 2007 IEP team meeting, there was a lengthy discussion of the Clark and EMQ programs, including a presentation by Mr. Harris and Lisa Davis, the EMQ Clinical Director. After considerable discussion, Ms. Okamoto stated, "I think we just need to make the offer." The District offered placement in the EMQ program.

132. The District predetermined its September 2007 offer. First, the June 2007 IEP

team had already agreed to a NPS placement, and Student was accepted at Clark, a NPS discussed at that team meeting. Second, the initial notice of the September 2007 IEP team meeting was drafted the day before Parents could have enrolled Student in Clark. Third, only one of the two options considered by the September 2007 IEP team was an NPS – yet that was not the option offered by the District. Fourth, during the IEP team meeting, Ms. Okamoto said that the District “just need[ed] to make the offer,” which indicates that the District already knew that a new placement, different than the June 2007 placement offer, would be offered to Student. This pre-determination was a procedural violation that significantly interfered with Parents’ participation in the IEP decision-making process, and thus constituted a procedural denial of FAPE.

#### District/ACBHCS September 2007 Offer of FAPE

#### UNIQUE NEEDS

133. As noted above, the evidence established that Student made some progress, but continued to have unique needs in the areas determined by the assessments in November 2006 and January 2007.

#### GOALS

134. Student claims that the District and ACBHCS denied him a FAPE because, at the September 2007 IEP team meeting, they did not amend or update the goals and objectives from the November 2006 and April 2007 IEPs. Student claims that, as a result, the goals and objectives remain inappropriate, for the reasons set forth above. However, as determined above, Student’s claims regarding the goals have been resolved. In addition, as determined above, Student had not yet met his goals. Moreover, Student’s annual review was not due until November 2007.

## DISTRICT/ACBHCS PLACEMENT OFFER

135. A school district must, to the maximum extent appropriate, educate a disabled pupil with typically developing peers. In addition, a school district is not required to place a pupil in a more restrictive educational environment in order for the pupil to receive the mental health services specified in his or her individualized education program if the mental health services can be appropriately provided in a less restrictive setting.

136. During the September 2007 IEP team meeting, Mr. Harris made a presentation about the Clark program, and Ms. Davis made a presentation about the EMQ program.

137. Clark is a school for pupils with emotional disturbances, over half of whom also have related learning disabilities. The Clark program has four stages: acclimation, immersion, pre-transition, and partial transition. The program is designed to return pupils to a less restrictive environment in 18 to 36 months by teaching them how to effectively use therapeutic services and to regulate and manage their behaviors. Each class of no more than 12 pupils is staffed by an interdisciplinary team that consists of a therapist, a credentialed special education teacher, a teaching assistant, and a behavior specialist. The team is in the classroom every day. The therapists, most of whom are licensed clinical social workers, are the only team member who has an office outside the classroom, yet the therapist spends up to 50 percent of the day in the classroom. The behavior specialists complete a two-day training session called "Handle with Care," which includes training on the use of restraints, as well as the identification of antecedents to escalative behavior and how to intervene before physical restraint is necessary. Then the behavior specialist coordinator supervises each of the behavior specialists to ensure each pupil is working on their IEP goals, to become more autonomous as they work their way through the Clark program. The positive behavior training is a criterion-referenced level system.

138. The Clark interdisciplinary team is supported by crisis counselors, the clinical

manager, the behavior specialist manager, the academic director, and the school director. Clark also has a psychiatrist on staff who monitors each pupil's medications, and who can use an observation booth to make quick adjustments. Clark frequently communicates with parents, including daily correspondence transported by each pupil, and family therapy is required. However, the family therapy is focused on how to support the pupil in the school setting, and any issues that may be sabotaging that effort.

139. Clark does not offer "wrap-around" services, so Clark therapists do not go into pupils' homes to assist parents. Instead, Clark has coordinated such services with the local county mental health agency. Clark has an ESY program, but has only psychiatric services available during any school breaks, including the winter break and the time between the end of the ESY and the start of the academic year.

140. The EMQ program classroom included no more than eight pupils during the 2007-2008 SY, with a teacher, an aide, a clinician, and a family specialist, as well as a psychiatrist. The clinician works as a therapist, and the program includes individual, group, and family therapy. The position requires a master's degree, experience working with special needs pupils, and supervised clinical work working with children. The family specialist is in the classroom to work on behaviors and emotional outbursts. That position requires a high school diploma or General Education Diploma and a year of working with emotionally disturbed children, and the EMQ program provided a three-day training in therapeutic crisis intervention, as well as training in positive behavioral interventions and supports, including how to perform a functional behavioral assessment and how to build a behavior support plan. The EMQ behavioral program was similar to that of Clark, including positive behavioral interventions and supports to identify the antecedents of behaviors, and to teach pupils how to address their needs without resorting to the problem behavior, as well as a level system of incentives, a token economy, and a home-school communication form regarding the pupil's performance in the areas of responsibility,

accountability, safety, and respect. EMQ's clinical director was also going to be the clinical program manager until that position was filled. At the time of the IEP team meeting, the EMQ program had made an offer of employment to a person who would fill that position.

141. At the September 2007 IEP team meeting, the District offered the EMQ program, including individual counseling once a week, group counseling once a day, family therapy recommended once a week, behavior intervention and crisis intervention as needed, and case management by ACBHCS. Student was to be mainstreamed for physical education, science, and computers for one period five times per week. Parents refused to consent to the offer. Student has not attended school since the 2007 ESY.

142. Student alleges that the DIS services offered by the District and ACBHCS at the September 2007 IEP team meeting were not individualized, but were instead on an "as needed" basis. The only "as needed" services offered in the September 2007 IEP were behavior and crisis intervention. This was appropriate, given the unpredictable nature of those interventions.

143. Student also alleges that the IEP team meeting discussion noted that the EMQ placement included the same DIS services as were offered to every other pupil in the EMQ program. However, the EMQ program constituted a FAPE for Student for several reasons. First, the EMQ program provided behavioral services comparable to the Clark program, including positive interventions and a rewards/incentives program. Second, the EMQ classroom had fewer pupils than did the Clark classroom. Third, the EMQ program provided three critical things that the Clark program did not have: services for more of the year, a home component, and the LRE, because Student had the opportunity to mainstream there but not at Clark.

144. Student alleges that, at the September 2007 IEP team meeting, the District and ACBHCS offered the same placement that was available in June 2007, when the IEP team agreed to place Student in a NPS. Even if it was assumed that this allegation was an

alleged FAPE denial, the allegation is incorrect. The District was unable to tell Parents about EMQ at the June 2007 IEP team meeting because the contract with EMQ had not yet been signed. Instead, the District sent Parents a letter, dated June 5, 2007, to inform them that EBAC would no longer be the District's mental health service provider. In August 2007, the District signed a memorandum of understanding with EMQ regarding the provision of mental health services. On August 20, 2007, Parents received a letter informing them that EMQ was the new District mental health service provider.

#### Implementation of the IEP dated June 12, 2007

145. Public agencies must have an IEP in effect at the beginning of each school year for each pupil with unique needs within their jurisdiction. One component of a FAPE is that a pupil's educational program must comport with the pupil's IEP. Also, if a parent consents in writing to the receipt of special education and related services for the child, but does not consent to all of the components of the IEP, those components of the program to which the parent has consented shall be implemented so as not to delay providing instruction and services to the child.

146. Student asserts that, at the June 2007 IEP team meeting, the team agreed to place Student in a NPS; that the three NPSs that the team discussed were Clark, Seneca, and the Children's Learning Center; that he was accepted at Clark on August 22, 2007; and that the District was informed of his acceptance. However, the District did not place Student at Clark. Instead, Student asserts that the District held the September 2007 IEP team meeting on the first day of the 2007-2008 SY, and offered a District/ACBHCS placement. Parents did not consent to the offer. Student asserts that the District and ACBHCS have failed to implement the last agreed-upon IEP, which is dated June 12, 2007.

147. At the IEP team meeting on June 12, 2007, Parents requested a NPS placement, and explained their personal feelings, as well as the reasons for the Student's hospitalization in May 2007. Parents indicated that the EBAC therapeutic setting was not

enough. Ms. Lamborn expressed her belief that Student was not at or near grade level, and needed more coping skills and replacement behaviors.

148. Ms. Uriarte reported that Student was working more slowly than he had before the hospitalization, but he was doing accurate, grade-level work, was getting along well with his peers, and was interacting well with others. Mr. Fenaroli noted that Student had been more engaged since returning from the hospital, that he was communicating with Mr. Fenaroli, that he was taking part in group therapy with other pupils, that he was still having difficulty, but had improved, in talking about his anger and feelings, and that he was playing with other pupils and showing normal restraints. The EBAC Director indicated that Student's treatment plan had been adjusted, and that the EBAC program was not seeing the behaviors that Parents were seeing at home. Mr. Fenaroli also indicated that he was not permitted to contact the hospital staff, that he felt that Parents had not been completely forthcoming with questions and information, and that there was a disconnect. The team discussed Student's goals. Ms. Mukai reported that Student's initial behaviors – crying, sleeping, and going under a desk – were no longer present, that he had not shown aggressive behaviors, and that he had improved in class. But Student was not talking that much to others or to her, and it was difficult to judge his mood.

149. Dr. Labrada noted that she had been trying to stabilize Student for a year, but he was sensitive to medications and their side effects. Student was "still challenging at home," had been put on a new mood stabilizer, and was "angry and not happy" about the medication changes. However, Student had become more articulate in expressing his feelings to Dr. Labrada over the last two months.

150. The June 2007 IEP team was concerned that management of Student's medications was a factor in Student's overall success. The team was not unanimous in its recommendation. However, the IEP states, "Parents and team agree to a NPS placement."

151. The recording and transcript of the June 2007 IEP team meeting confirm an

agreement for NPS placement. When the IEP team began to talk about the NPS referral process, three schools were mentioned: Clark, Seneca, and "CLC" (the Children's Learning Center). Ms. Lamborn asked what would happen if two schools accepted Student. The District program specialist said, "If we make the referral to the school, then that is saying we are in agreement with that school. So if two or three of the schools come back we ask you to go see them, to go meet with them, but then really it is kind of your choice at that point."

152. Parents signed their consent to the June 2007 IEP. District sent referrals to Clark, Seneca, and the Children's Learning Center. Student was accepted at Clark in late August. Parents did not agree with the EMQ placement offered at the September 2007 IEP team meeting. As noted above, District was required to have an IEP in effect for Student on the first day of the school year, and those components of the program to which Parents had agreed were supposed to be ready for implementation so as not to delay providing instruction and services to Student. Therefore, District was required to provide the NPS placement and program according to the IEP of June 12, 2007, in order to provide a program that comported with the IEP to which Parents had consented. However, District did not do so. As a result, District denied Student a FAPE for the 2007-2008 SY.

#### Prior Written Notice

153. Student claims that the District and ACBHCS failed to provide PWN regarding the refusal to implement the NPS placement agreed upon at the June 2007 IEP team meeting, and regarding the subsequent change in placement to the EMQ program.

154. The notes of the September 2007 IEP team meeting are almost four pages long, and the transcript of the recording of the meeting is over 60 pages long. The notes and transcript reflect a detailed discussion of the Clark program, and the EMQ program offered by the District on the Green campus, which the District was unable to tell Parents about at the June 2007 IEP team meeting. As a result, by the close of the September 2007



IEP team meeting, Parents were aware of the basis for the District's decision not to implement the agreed-upon NPS placement, as well as the basis for the District's new offer of the EMQ program. Therefore, the District and ACBHCS were not required to provide PWN to Parents regarding the decision not to implement the agreed-upon IEP, and to instead offer a new placement, at EMQ, on the first day of the 2007-2008 SY.

## REMEDIES

155. Compensatory education is an equitable remedy. Relief must be calculated to provide the educational benefit that would likely have accrued from the special education services that the school district should have provided.

156. District violated Student's right to a FAPE by failing to draft goals in the areas of reading fluency and depression. ACBHCS violated Student's right to a FAPE by failing to provide baselines or present levels of performance in its goals. As a result, District and ACBHCS must provide compensatory education. The specifics are discussed below.

157. District violated Student's right to a FAPE by failing to conduct an OT assessment after Parents requested an OT assessment at the April 2007 IEP team meeting, and by failing to provide PWN regarding its decision not to conduct an OT assessment. As a result, District must assess Student in the area of OT. Because the District failed to conduct an OT assessment, it is unknown whether Student requires OT services. In any event, had the District conducted a timely OT assessment of Student, an IEP team meeting would have been held in June 2007, and Student could have received OT services in June and July 2007. Therefore, if the District's OT assessment determines that Student requires OT services, District must provide two times the level of recommended services for the first two months of the services, to compensate for the two months of lost OT services Student would have received had District timely assessed Student.

158. District violated Student's right to a FAPE by failing to provide 20 minutes of counseling for the week that Student was placed on home hospital instruction in January

2007. As determined above, Student had not met his goals when he last attended District school in July 2007, and he required counseling due to his unique needs in the areas of behavior, anxiety, and depression. As a result, District must provide compensatory education in the form of 20 minutes of individual counseling.

159. District violated Student's right to a FAPE by predetermining its offer at the September 2007 IEP team meeting. As a result, District must provide compensatory education. The specifics are discussed below.

160. District and ACBHCS were required to be ready to implement a placement on the first day of the 2007-2008 SY, so as not to delay Student's receipt of instruction and services. When Parents refused to consent to the EMQ program, District was required to implement the previously agreed-upon placement, in conformity with the June 2007 IEP: a NPS placement. District and ACBHCS violated Student's right to a FAPE by failing to do so. Accordingly, District and ACBHCS must provide compensatory education. The specifics are discussed below.

161. Student's only proposed resolutions relate to placement at Clark. However, as noted above, Clark does not provide Student with a FAPE in the LRE.

162. As to consideration of the equitable factors applicable to Parents, the evidence was clear that Student requires a structured environment, and that Student would be harmed and/or regress due to his absence from school for multiple months. For example, Ms. Lamborn's notes of the April 2007 IEP team meeting state that Student "struggles more after long breaks in school." As noted above, Student made academic and behavioral progress in the structured environment at EBAC. It would have been much better for Student to attend the EMQ program, with its educational program and therapeutic environment, even though Parents disagreed with that program and maintained this action against the District and ACBHCS, than for Student to sit at home and await the outcome of the due process hearing.

163. As to consideration of the equitable factors applicable to District and ACBHCS, as noted above, District and ACBHCS offered Student a FAPE in the EBAC and the EMQ programs.

## LEGAL CONCLUSIONS

### FOUNDATIONAL LEGAL PRINCIPLES

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

### DURING THE 2006-2007 SY AND ESY, DID THE DISTRICT FAIL TO TIMELY ASSESS STUDENT IN ALL AREAS RELATED TO HIS DISABILITY?

2. A school district shall develop a proposed assessment plan within 15 calendar days of referral for assessment, unless the parent agrees in writing to an extension (Ed. Code, § 56043, subd. (a)), and shall attach a copy of the notice of parent's rights to the assessment plan (Ed. Code, § 56321, subd. (a)). A parent shall have at least 15 calendar days from the receipt of the proposed assessment plan to arrive at a decision whether to consent to the assessment plan. (Ed. Code, § 56403, subd. (b).) A school district cannot conduct an assessment until it obtains the written consent of the parent prior to the assessment (unless the school district prevails in a due process hearing relating to the assessment); assessment may begin immediately upon receipt of the consent. (Ed. Code, § 56321, subd. (c).) Thereafter, a school district must develop an IEP, required as a result of an assessment, no later than 60 calendar days, not counting school holidays longer than five school days, from the date of receipt of the parent's written consent to assessment, unless the parent agrees in writing to an extension. (Ed. Code, § 56043, subds. (c) & (f).)

3. As determined in Factual Findings 2 through 7, and Legal Conclusions 1 and 2, the District had 15 days after school started on about August 30, 2006, to present an assessment plan to Parents. The District did so in 13 days. Therefore, the District's

assessment plan was timely. After obtaining Mother's consent to the assessment plan on September 12, 2006, the District had 60 days to conduct an assessment and hold an IEP. The District did so in 52 days. Therefore, the District's initial assessment was timely.

4. As determined in Factual Findings 8 through 12, and Legal Conclusions 1 and 2, the District failed to present an OT assessment plan, or to conduct an OT assessment, following Parents' request for an OT assessment at the April 2007 IEP team meeting. As a result, District's failures procedurally denied Student a FAPE in the area of OT. The failure to assess means that there is no information to determine whether Student had OT issues, which prevents an analysis of the impact of the District's failures on Student's FAPE or educational benefits, or on Parents' ability to participate in the decision-making process.

5. A pupil must be assessed in all areas related to his or her suspected disability. (20 U.S.C. § 1414(b)(3)(B);<sup>10</sup> 34 C.F.R. § 300.304(c)(4); Ed. Code, § 56320, subd. (f).) Areas of suspected disability include, if appropriate, health and development, vision, hearing, language function, general intelligence, academic performance, communicative status, motor abilities, career and vocational abilities and interests, and social and emotional status. (§ 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4); Ed. Code, § 56320, subd. (f).)

6. A school district's failure to conduct appropriate assessments or to assess in all areas of suspected disability may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High Sch. Dist.* (9th Cir. 2006) 464 F.3d 1025, 1031-1033.)

7. The statutory scheme provides for two types of referral by school districts to a community mental health service. First, a school district may refer a pupil to a community mental health service if: (1) the district has assessed the pupil in all areas of suspected disability and suspects the pupil needs mental health services (see Ed. Code, § 56320); and

---

<sup>10</sup> All statutory references are to the IDEIA, Title 20 of the United States Code, unless specifically noted otherwise.

if: (2) the district has obtained the parent's written consent; (3) the pupil has emotional or behavioral characteristics that (a) are observed by qualified educational staff in educational settings and other settings as appropriate; (b) impede the pupil from benefiting from educational services; (c) are significant as indicated by their rate or occurrence and tendency; and (d) are associated with a condition that cannot be described solely as a social maladjustment or a temporary adjustment problem, and cannot be addressed with short-term counseling; (4) the pupil's functioning, including cognitive functioning, as determined using educational assessments, is at a level sufficient to enable the pupil to benefit from mental health services; and (5) the district has provided appropriate services to the pupil (see Ed. Code, §§ 56331, 56336 [counseling and guidance services, psychological services, parent counseling and training or social work services]), or behavior intervention services (see Ed. Code, § 56520) as specified in the IEP, and the IEP team has determined that the services do not meet the educational needs of the pupil, or were inadequate or inappropriate to meet the pupil's needs, and the IEP team has documented which of the services were considered and why they were determined to be inadequate or inappropriate. (Gov. Code, § 7576, subs. (b) & (c).) If this method of referral is used, the district and community mental health service are required to work collaboratively to ensure that assessments performed prior to referral are as useful as possible to the community mental health service in determining the need for mental health services and the level of service needed. (Gov. Code, § 7576, subd. (b).)

8. As a second method of referral, "[b]ased on the preliminary results of assessments performed pursuant to Section 56320 of the Education Code, a [district] may refer a pupil who has been determined to be, or is suspected of being, an individual with exceptional needs, and is suspected of needing mental health services, to a community mental health service," provided that the pupil meets criteria (2) through (4) above, and "[c]ounseling and guidance services, psychological services, parent counseling and

training, social work services, and behavior or other interventions as provided in the [IEP] of the pupil are clearly inadequate or inappropriate in meeting his or her educational needs." (Gov. Code, § 7576, subd. (c).)

9. Regardless of which of the above method of referral is used, referral packages are required to include certain documentation, and are required to be provided within five working days of a district's receipt of parental consent for the referral. (Gov. Code, § 7576, subs. (c) & (e); see also Ed. Code, § 56331, subd. (a); Cal. Code Regs., tit. 2, § 60040, subd. (a).)

10. The State Department of Mental Health, or any community mental health service, as defined by Education Code section 5602, is responsible for providing psychotherapy or other mental health services, as defined, when required in the child's IEP, whether or not the child is emotionally disturbed. (Gov. Code, 7576, subd. (a).)

11. As determined in Factual Findings 13 through 18, as well as Legal Conclusions 1 and 5 through 9, the District was required to assess Student before it could refer him for a mental health assessment. District chose the fastest method of mental health referral – based on the results of the initial assessment, and without waiting to provide services to determine which, if any, services would be effective. The District complied with its legal obligations under Government Code section 7576, and timely referred Student for a mental health assessment. Accordingly, the District did not fail to assess Student in the area of mental health.

DURING THE 2006-2007 SY AND ESY, DID THE DISTRICT AND ACBHCS FAIL TO PROVIDE STUDENT WITH A FAPE BY FAILING TO DEVELOP, IMPLEMENT, AND MONITOR APPROPRIATE GOALS AND OBJECTIVES?

12. Pursuant to California special education law, the Individuals with Disabilities in Education Act (IDEA), and the Individuals with Disabilities in Education Improvement Act of 2004 (IDEIA), 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. (§1400 et al.; Ed. Code, § 56000.) A FAPE is defined in pertinent part as special education and related services that are provided at public expense and under public supervision and direction, that meet the State's educational standards, and that conform to the student's IEP. (§ 1401(9); Cal. Code Regs., tit. 5, § 3001, subd. (o).) "Special education" is defined in pertinent part as specially designed instruction and related services, at no cost to parents, to meet the unique needs of a child with a disability. (§ 1401(29); Ed. Code, § 56031.) "Related services," known in California law as Designated Instruction and Services (DIS), means transportation and other developmental, corrective and supportive services that may be required to assist the child to benefit from special education. (§ 1401(22); Ed. Code § 56363, subd. (a).)

13. There are two parts to the legal analysis in suits brought pursuant to the IDEA. 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 [Rowley].)

14. In *Rowley*, the United States Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA. But procedural violations constitute a denial of FAPE only if the violations impeded the pupil's right to a FAPE, significantly impeded the ability of the pupil's parents to participate in the decision-making process regarding the provision of a FAPE to the pupil, or caused a deprivation of educational benefits to the pupil. (*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.3 523, 534; *Amanda J. v. Clark County Sch. Dist.* (9th Cir. 2001) 267 F.3d 877, 892; § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (j).) Student's procedural claims are discussed below.

15. The second prong of the *Rowley* test analyzes substantive appropriateness,

specifically, the level of instruction and services that must be provided to a pupil with disabilities to satisfy the IDEA's requirements. The *Rowley* Court determined that a pupil's IEP must be designed to meet the pupil's unique needs, be reasonably calculated to provide the pupil with some educational benefit, and comport with the pupil's IEP.

(*Rowley, supra*, 458 U.S. at pp. 188-189, 200-201.) A school district must offer a program that is reasonably calculated to provide more than a trivial or minimal level of progress.

(*Amanda J, supra*, 267 F.3d at p. 890, citing *Hall v. Vance County Bd. of Educ.* (4th Cir. 1985) 774 F.2d 629, 636.)

16. The IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities. (*Rowley, supra*, 458 U.S. at pp. 198-200; see *Shaw v. Dist. of Columbia* (D.D.C. 2002) 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.) Rather, the *Rowley* Court held 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. (*Rowley, supra*, 458 U.S. at p. 200.) Hence, if the school district's program met the substantive *Rowley* factors, then that district provided a FAPE, even if petitioner's parents preferred another program and even if his parents' preferred program would have resulted in greater educational benefit. (*Gregory K. v. Longview Sch. Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.)

17. An IEP must include, among other things, the child's present levels of educational performance, measurable annual goals, the special education, related services, and supplementary aids and services to be provided, as well as a statement of how the child's progress toward the annual goals will be measured. (§ 1414(d)(1)(A)(i), (ii), (iii) & (vii)(I); 34 C.F.R. § 300.320; Ed. Code, § 56345, subds. (a)(1), (2), (3) & (9).) The measurable



annual goals must be designed to meet the pupil's needs that result from the pupil's disability, in order to enable the child to be involved in and make progress in the general education curriculum, and that meet the pupil's other educational needs that result from his or her disability. (§ 1414(d)(1)(A)(i)(II); Ed. Code, § 56345, subd. (a)(2).) 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.) Because "[a]n IEP is a snapshot, not a retrospective," it is not to be evaluated in hindsight. (*Adams v. Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) Rather, an IEP must be evaluated in light of the information available, and what was objectively reasonable, at the time the IEP was developed. (*Roland M. v. Concord Sch. Comm.* (1st Cir. 1990) 910 F.2d 983, 992.)

18. As determined in Factual Findings 19 through 33, and Legal Conclusions 1 and 12 through 17, Student had unique needs in the areas of writing, written expression, reading fluency and comprehension, behavior, anxiety, and depression. The present levels of performance noted by the District provided adequate information about Student's current level of functioning. The goals developed by the District were measurable. Student's social-emotional (behavior) goal called for Student to increase his ability to use appropriate coping skills. This goal addressed Student's unique needs in the areas of social-emotional/behavior and anxiety. Student's first written language goal called for Student to be able to expand and then edit kernel sentences. Student's second written language goal called for Student to be able to compose and edit five examples of four different types of sentences, related to a picture prompt. These two goals addressed Student's unique needs in written language. Student's first reading comprehension goal called for Student, when given an appropriate text, to restate five details. Student's second reading comprehension goal called for Student, when given a selected third grade expository passage, to distinguish the main idea. These two goals addressed Student's

unique needs in reading comprehension.

19. As determined in Factual Finding 34, and Legal Conclusions 1 and 12 through 17, District failed to address Student's unique needs in the areas of reading fluency and depression. Therefore, District will be ordered to provide compensatory education.

20. As determined in Factual Findings 44 and 45, and Legal Conclusions 1 and 12 through 17, during Student's time in the GE classroom, Ms. Swinney worked on three of Student's goals, and she and Ms. Heath implemented a portion of the BSP. At EBAC, Ms. Uriarte implemented and monitored all of Student's academic goals, and updated the November 2006 IEP to reflect Student's progress. Accordingly, the District appropriately implemented and monitored Student's academic goals.

21. As determined in Factual Findings 62 through 66, and Legal Conclusions 1 and 12 through 17, ACBHCS committed a procedural violation by failing to note Student's present levels of performance. The procedural violation amounted to a denial of FAPE because the lack of baselines/present levels of performance significantly impeded Parents' participation in the decision-making process, in that Parents were not sufficiently informed about Student's present levels of functioning in the three areas the ACBHCS goals were designed to address.

22. As determined in Factual Findings 68 and 69, and Legal Conclusions 1 and 12 through 17, ACBHCS developed three measurable goals, which were designed to stabilize Student's mood, to increase Student's academic functioning, and to decrease Student's aggressive behavior. Each of the three goals had at least one objective that would further the accomplishment of the goal. As determined above, Student had unique needs in the areas of social-emotional/behavior, anxiety, and depression. The initial ACBHCS goals appropriately addressed Student's unique social-emotional/behavioral needs, in that they were designed for Student to benefit from special education.

23. As determined in Factual Findings 67 and 70 through 75, and Legal Conclusions 1 and 12 through 17, the EBAC treatment plan included present levels of performance that provided adequate information about Student's current level of functioning. The EBAC treatment plan noted four areas of need: daily activities, two areas of symptom management – frustration tolerance, and the ability to interact respectfully with others, and the home environment. Each of these areas of need included a measurable goal. The treatment plan included objectives for each goal, as well as numerous interventions that staff could use to assist in achievement of the goal. As determined above, Student had unique needs in the areas of anxiety, depression, and social-emotional/behavior, including difficulty with transitions, avoidance behaviors, and limited self-soothing, coping skills, and replacement behaviors. The EBAC goals appropriately addressed Student's unique needs in these areas, in that they were designed for Student to benefit from special education. Also as determined above, Student made academic and behavioral/social-emotional progress in the EBAC program.

24. As determined in Factual Findings 80 through 91, 102, 103, 119, and 120, as well as Legal Conclusions 1 and 12 through 17, Ms. Mukai monitored EBAC's implementation of the ACBHCS and EBAC goals by observing Student in March and May 2007. Student was doing well. Ms. Mukai also helped to implement the ACBHCS goal of home support by speaking with Mother at least twice on the phone to try to provide assistance to Mother, including suggestions of interventions to try at home. Also, as noted above, Mr. Fenaroli implemented and monitored Student's EBAC goals by drafting two forms for home-school communication and a home behavior plan, all with Parents assistance, by providing individual, group, and family therapy, by providing home support to Parents, by working with EBAC staff, and by participating in the daily meetings with other EBAC staff. In addition, Ms. Uriarte implemented and monitored Student's November 2006 goals at EBAC, and updated Student's progress on the IEP. Therefore, District and

ACBHCS appropriately implemented and monitored Student's goals during the 2006-2007 SY.

DURING THE 2006-2007 SY AND ESY, DID THE DISTRICT AND ACBHCS FAIL TO PROVIDE STUDENT WITH A FAPE BY FAILING TO DEVELOP AND PROVIDE AN APPROPRIATE PROGRAM AND SERVICES AS OFFERED IN THE IEP TEAM MEETINGS ON NOVEMBER 3, 2006, DECEMBER 7, 2006, JANUARY 12, 2007, JANUARY 19, 2007, AND APRIL 19, 2007?

25. A school district is required to make a formal, specific written offer of placement and services. (*Union Sch. Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526.) A key aspect of a parent's right to participate in the IEP process is the school district's obligation to make a formal written offer which clearly identifies the proposed program. (*Ibid*) The requirement that a school district make a specific written offer of placement has an important purpose that is not merely technical and should be rigorously enforced. (*Ibid*.)

26. As determined in Factual Findings 35 through 43, and Legal Conclusions 1, 12 through 17, and 25, the District's offer in the November 2006 IEP was communicated to Parents in writing, and was sufficiently specific for the parties to know what was being offered by the District. The lack of a specific SDC location does not render the District's offer impermissibly vague, because locations may change, so that the setting itself – the SDC – is the most important piece of information. In addition, nine days after Mother signed the IEP, Ms. Teodosio accompanied Parents for an observation of the Mattos SDC. Hence, at least by that time, if not before the observation, the District had informed Parents of the specific SDC being offered.

27. As determined in Factual Finding 41, and Legal Conclusions 1, 12 through 17, and 25, any District error by failing to check the "Offered" box for the "as needed" offer of the RSP room as a quiet spot in the November 2006 IEP was de minimis. District witnesses and the IEP notes establish that it was offered and clearly conveyed to Parents. The District

could not predict when or for how long Student would need the RSP room. As a result, the District was not required to include additional specific information about the availability of the RSP room to Student.

28. School districts and other agencies are required to provide the DIS that a pupil needs to in order to benefit from special education. (Gov. Code, § 7572, subd. (d).)

29 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 (2006).) 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 or 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.” (§ 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(i) & (ii).) A placement must foster maximum interaction between disabled students and their nondisabled peers “in a manner that is appropriate to the needs of both.” (Ed. Code, § 56031.) The law demonstrates “a strong preference for ‘mainstreaming’ which rises to the level of a rebuttable presumption.” (*Daniel R.R. v. State Bd. of Ed.* (9th Cir. 1989) 874 F.2d 1036, 1044-1045; see also § 1412 (a)(5)(A); *Rowley, supra*, 458 U.S. at p. 181 n.4; *Poolaw v. Bishop* (9th Cir. 1995) 67 F.3d 830, 834.) However, the Supreme Court has noted that IDEA’s use of the word “appropriate” reflects Congressional recognition “that some settings simply are not suitable environments for the participation of some handicapped children.” (*Rowley, supra*, 458 U.S. at p. 197.)

30 As determined in Factual Findings 35 through 43, and Legal Conclusions 1, 12 through 16, 28, and 29, the District’s November 2006 offer, which included a mild-moderate SDC and use of the RSP room as a “quiet spot,” was an appropriate interim placement while awaiting the results of the AB3632 assessment. Parents rejected the mild-moderate SDC once they observed the Mattos SDC with Ms. Teodosio. The District did not

offer 20 minutes of counseling because Parents explained that they were not interested in District counseling for Student.

31. As determined in Factual Findings 46 through 53, and Legal Conclusions 1, 12 through 16, 28, and 29, the District's December 2006 offer, which included the Mattos SDC and 20 minutes of counseling, was an appropriate placement while awaiting the results of the AB3632 assessment. Parents rejected the Mattos SDC, and indicated that they were not interested in District counseling for Student. The District appropriately rejected Parents' request for a one-to-one aide.

32. As determined in Factual Findings 54 through 58, and Legal Conclusions 1, 12 through 16, 28, and 29, the District failed to provide the 20 minutes of counseling pursuant to the IEP addendum of January 12, 2007, to which Mother agreed as part of the District's home hospital placement offer. This constituted a failure to provide a program that comported with Student's IEP, and thus denied Student a FAPE. District must provide Student with 20 minutes of individual counseling within 30 days of the date of this decision. However, Student received double the normal amount of home hospital instruction. Therefore, District provided adequate home hospital instruction.

33. As determined in Factual Findings 59 through 61, and 76 through 92, and Legal Conclusions 1, 12 through 16, 28, and 29, the District/ACBHCS offer of placement at the IEP team meeting on January 19, 2007, in the EBAC program, constituted a FAPE for Student. The program provided home support and home-school communication via Ms. Mukai, who observed Student and spoke with Mother, as well as Mr. Fenaroli, who relayed EBAC staff meeting information about Student to Parents, who developed home-school communication forms that he eventually faxed to Parents on a daily basis, and who met with Parents, visited Student's home, and developed a home behavior plan. Also, a substantial portion of the EBAC program addressed Student's behavior, including Mr. Fenaroli's therapy with Student and Student's family, the home behavioral program, and

the level system. The EBAC program also provided sufficient collaboration with Student's private psychiatrist and psychologist. Moreover, Mr. Fenaroli was sufficiently qualified. Finally, Student made academic and behavioral/social-emotional progress while at EBAC.

34. As determined in Factual Findings 93 through 101, and Legal Conclusions 1, 12 through 16, 28, and 29, the April 2007 IEP does not reflect that the IEP team agreed to collect baseline data or to provide additional information about replacement behaviors to Parents, and does not mention the revision of home-based goals or the development of intervention goals. In addition, Mr. Fenaroli developed a home behavioral plan, but Parents failed to follow through on the plan. Also, District and ACBHCS provided sufficient information on replacement behaviors and coping skills for Student, as well as sufficient progress updates to Parents. Finally, the EBAC program did not cause Student to be hospitalized due to instability. Instead, Student's home behaviors, as well as medication issues, caused the instability that resulted in Student being hospitalized.

DURING THE 2006-2007 SY, DID THE DISTRICT AND ACBHCS FAIL TO PROVIDE STUDENT WITH A FAPE BY FAILING TO ENSURE THAT STUDENT'S GOALS AND OBJECTIVES WERE IMPLEMENTED DURING THE ESY?

35. A school district must ensure that personnel working with a disabled pupil are aware of the requirements of the pupil's IEP. (Ed. Code, § 56347.)

36. A school district may be required to provide, in addition to special education and related services during the regular academic school year, ESY services to pupils who have disabilities that are likely to continue indefinitely or for a prolonged period, if interruption of the pupil's educational programming may cause regression, coupled with the pupil's limited recoupment capacity, rendering it impossible or unlikely that the pupil will achieve the level of self-sufficiency and independence that would otherwise be expected in light of his or her disability. (Ed. Code, § 56345, subd. (b)(3); Cal. Code Regs., tit. 5, § 3043; see also 34 C.F.R. § 300.106.)

37. As determined in Factual Findings 104 through 110, and Legal Conclusions 1, 12 through 16, 35, and 36, District committed a procedural violation of Student's right to a FAPE during the 2007 ESY by failing to ensure that Mr. Taubman Walker, Student's teacher, had a copy of the IEP. However, the procedural violation did not amount to a denial of FAPE because Mr. Taubman Walker addressed Student's goals during 2007 ESY, and Student made progress in Mr. Taubman Walker's class. In light of all of the evidence, the fact that Mr. Taubman Walker did not have Student's IEP did not impede Student's right to a FAPE during the 2007 ESY, did not significantly impede Parents' ability to participate in the decision-making process as to the provision of a FAPE to Student during the 2007 ESY, and did not cause a deprivation of educational benefits to Student in the 2007 ESY.

DURING THE 2006-2007 SY AND ESY, DID THE DISTRICT AND ACBHCS FAIL TO PROVIDE STUDENT WITH A FAPE BY FAILING TO PROVIDE PWN REGARDING THE DENIAL OF PARENTS' REQUEST FOR A ONE-TO-ONE AIDE, THE FAILURE TO CONDUCT AN OT ASSESSMENT, AND THE BASIS FOR CONCLUDING THAT THE OFFER OF THE MILD-MODERATE SDC AT MATTOS WAS APPROPRIATE, AND THAT THE OFFER OF 20 MINUTES OF COUNSELING PER WEEK WAS APPROPRIATE?

38. A school district must provide written notice to the parents of a pupil whenever the district proposes to initiate or change, or refuses to initiate or change, the identification, evaluation, or educational placement of the pupil, or the provision of a FAPE to the pupil. (§ 1415(b)(3); 34 C.F.R. § 300.503(a); Ed. Code, § 56500.4.) The notice is to contain: (1) a description of the action refused by the agency, (2) an explanation for the refusal, along with a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the refusal, (3) a statement that the parents of a disabled child are entitled to procedural safeguards, with the means by which the parents can obtain a copy of those procedural safeguards, (4) sources of assistance for parents to contact, (5) a description of other options that the IEP team considered, with the reasons those options were rejected, and (6) a description of the factors relevant to the agency's



refusal. (§ 1415(c)(1); 34 C.F.R. § 300.503(b).)

39. As determined in Factual Findings 111, 112, and 114, and Legal Conclusions 1 and 38, the District failed to provide Student with a FAPE by failing to provide PWN regarding its refusal/failure/decision not to conduct an OT assessment. The District improperly failed to inform Parents that it had concluded that Student did not need an OT assessment. The District's failure deprived Parents of the ability to participate in the decision-making process regarding the provision of a FAPE to Student in the area of OT. Therefore, the District's failure to provide PWN regarding the refusal/failure/decision not to conduct an OT assessment constituted a procedural violation of FAPE.

40. As determined in Factual Findings 111 through 113, and Legal Conclusions 1 and 38, the District provided adequate notice regarding its rejection of Parents' request for a one-to-one aide. The IEP team discussed Parents' request, and Parents were notified in the written IEP document that the District did not agree to their request. Hence, Parents were aware of the basis for the District's rejection of their request, as well as possible alternatives. Therefore, the District was not required to provide additional PWN to Parents regarding the basis for its rejection of their request for a one-to-one aide.

41. As determined in Factual Findings 111 and 115, and Legal Conclusions 1 and 38, the District provided adequate notice regarding the basis for its determination that a mild-moderate SDC, and specifically the Mattos SDC, was appropriate. In light of the discussions at the November and December 2006 IEP team meetings and the clear written offer in the December 2006 IEP document, Parents were aware of the basis for the District's recommendation and offer, as well as possible alternatives. Therefore, the District was not required to provide additional PWN to Parents regarding the basis for its determination that the Mattos SDC was appropriate.

42. As determined in Factual Findings 111 and 116, and Legal Conclusions 1 and 38, the District provided adequate notice regarding its recommendation of 20 minutes of

counseling per week, and did not violate its obligation to provide PWN. Parents were aware of the underlying basis for District counseling, based on the discussion at the November 2006 IEP team meeting. However, Parents indicated that they did not want Student to start a new counseling program when he already had a private psychologist and psychiatrist. In any event, presumably because of Parents' refusal of the counseling, the District did not offer counseling at the November 2006 IEP team meeting.

DURING THE 2007-2008 SY, DID THE DISTRICT AND ACBHCS FAIL TO PROVIDE STUDENT WITH A FAPE BY FAILING TO HAVE THE APPROPRIATE IEP TEAM MEMBERS AT THE IEP TEAM MEETING ON SEPTEMBER 5, 2007?

43. State and federal law requires that the parents of a child with a disability be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement and provision of a FAPE to the child. (Ed. Code, §§ 56304, 56342.5; 34 C.F.R. § 300.501(b).) Thus, parents are required members of the IEP team, which also includes at least one of the child's GE teachers (if the child is or may be participating in the general education environment), at least one special education teacher or provider who provides special education to the child, a representative of the local education agency, an individual who can interpret the instructional implications of the assessments, other individuals who have knowledge or special expertise regarding the child (depending on the discretion of the parents or local education agency), and, whenever appropriate, the disabled child. (§ 1414(d)(1)(B)(i)-(vii); 34 C.F.R. § 300.321(a)(1)-(7); Ed. Code, § 56341, subd. (b).)

44. As determined in Factual Findings 121 and 122, and Legal Conclusions 1, 12 through 14, and 43, the September 2007 IEP signature block, and the transcript of the recording of the meeting, reflect that Ms. Pass, the Green school campus principal, attended the IEP as the GE representative. Ms. Pass had observed Student, was knowledgeable about the GE opportunities at Green, and could share that information

with the other members of the IEP team. Thus, Ms. Pass effectively fulfilled the role of the GE teacher at the meeting. Any technical procedural violation on this point did not create a procedural denial of FAPE.

45. As determined in Factual Findings 121 and 123, and Legal Conclusions 1, 12 through 14, and 43, the September 2007 IEP team meeting notes, and the transcript of the recording of the meeting, reflect that no ACBHCS staff member was present at the meeting. However, Ms. Davis, the EMQ Clinical Director, attended the meeting to tell the team about the EMQ program. In addition, on page 28 of the IEP team meeting transcript, Ms. Davis noted that Ms. Mukai, Student's ACBHCS case manager, had provided "all of the information" regarding ACBHCS crisis support. As a result, an ACBHCS staff member was not required to attend the September 2007 IEP team meeting.

46. As determined in Factual Findings 121 and 124, and Legal Conclusions 1, 12 through 14, and 43, the District and ACBHCS complied with the requirement that a special education teacher of Student be present at the IEP team meeting because Ms. Uriarte was present. Ms. Uriarte was not required to provide information on areas outside of her expertise, and she supported the District's offer of the EMQ program because it was the LRE, and because she believed Student could make progress in the EMQ program.

47. As determined in Factual Findings 121 and 125, and Legal Conclusions 1, 12 through 14, and 43, the District met its obligation to ensure that the IEP team included members who were knowledgeable about Student's unique needs because six of the 10 IEP team members had direct knowledge of Student.

DURING THE 2007-2008 SY, DID THE DISTRICT AND ACBHCS FAIL TO PROVIDE STUDENT WITH A FAPE BY MAKING A PRE-DETERMINED OFFER AT THE IEP TEAM MEETING ON SEPTEMBER 5, 2007?

48. 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.)

49. Each school district is required to initiate and conduct meetings for the purpose of developing, reviewing, and revising the IEP of each pupil 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. G. ex. rel. G. v. Vashon Island Sch. Dist.* (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. (*Deal, supra*, 392 F.3d at p. 857; *Doyle v. Arlington County Sch. Bd.* (E.D. Va. 1991) 806 F.Supp. 1253, 1262.)

50. A parent has meaningfully participated in the development of an IEP when he is informed of his child's problems, attends the IEP meeting, expresses his 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].) While the IEP team should work toward reaching a consensus, the school district has the ultimate responsibility to determine that the IEP offers a FAPE. (App. A to 34 C.F.R. part 300, Notice of Interpretation, 64 Fed.Reg. 12473 (Mar. 12, 1999).)

51. As determined in Factual Findings 126 through 132, and Legal Conclusions 1, 12 through 14, and 48 through 50, the District predetermined its offer for the September 2007 IEP team meeting. First, the IEP team had already agreed to a NPS placement, and Student was accepted at a NPS that the IEP team discussed. Second, the IEP team meeting notice was drafted the day before Parents could have enrolled Student in Clark. Third, only one of the two options considered by the IEP team was an NPS – yet that was not the option offered by the District. Fourth, during the IEP team meeting, Ms. Okamoto said that the District “just need[ed] to make the offer,” which indicates that the District already knew which placement would be offered to Student. This procedural violation constituted a denial of FAPE, because it significantly impeded Parents’ right to participate in the decision-making process. The remedy for this violation is set forth below, in Legal Conclusions 58 through 61.

DURING THE 2007-2008 SY, DID THE DISTRICT AND ACBHCS FAIL TO PROVIDE STUDENT WITH A FAPE BY FAILING TO DEVELOP, IMPLEMENT, AND MONITOR APPROPRIATE GOALS AND OBJECTIVES?

52. As determined in Factual Findings 133 and 134, and Legal Conclusions 1 and 12 through 17, the goals developed by the District and ACBHCS were appropriate, except as determined above. Also, as reflected by Student’s report card and the update notes on the IEP, Student had not yet met his annual goals. Student’s annual IEP was to occur in

November 2007. The District and ACBHCS were not required to update Student's goals at the September 2007 IEP team meeting.

DURING THE 2007-2008 SY, DID THE DISTRICT AND ACBHCS FAIL TO PROVIDE STUDENT WITH A FAPE BY FAILING TO DEVELOP AND PROVIDE AN APPROPRIATE PROGRAM AND SERVICES AS OFFERED IN THE IEP TEAM MEETING ON SEPTEMBER 5, 2007?

53. As determined in Factual Findings 135 through 144, and Legal Conclusions 1, 12 through 16, 28, and 29, the District/ACBHCS offer of the EMQ program provided behavioral services comparable to the Clark program, including positive interventions and a rewards/incentives program. The EMQ program provided three critical things that the Clark program did not have: services for more of the year, a home component, and the least restrictive environment, because Student had the opportunity to mainstream there but not at Clark. For all these reasons, the District and ACBHCS offer of the EMQ program constituted a FAPE for Student.

DURING THE 2007-2008 SY, DID THE DISTRICT AND ACBHCS FAIL TO PROVIDE STUDENT WITH A FAPE BY FAILING TO IMPLEMENT THE PLACEMENT AGREED UPON AT THE IEP TEAM MEETING ON JUNE 12, 2007?

54. Public agencies must have an IEP in effect at the beginning of each school year for each pupil with unique needs within their jurisdiction. (34 C.F.R. § 300.323(a); Ed. Code, § 56344, subd. (b).) One component of a FAPE is that a pupil's educational program must comport with the pupil's IEP. (*Rowley, supra*, 458 U.S. at pp. 188-189, 200-201.) Also, if a parent consents in writing to the receipt of special education and related services for the child, but does not consent to all of the components of the IEP, those components of the program to which the parent has consented shall be implemented so as not to delay providing instruction and services to the child. (Ed. Code, § 56346, subd. (e).)

55. As determined in Factual Findings 145 through 152, and Legal Conclusions 1,

12 through 16, and 54, Parents signed their consent to the IEP of June 12, 2007, which offered a NPS placement. However, once Parents disagreed with the EMQ placement offered at the IEP team meeting on September 5, 2007, District failed to comport with the June 2007 IEP, because the District did not provide the NPS placement and program agreed upon in the June 2007 IEP. Thus, District denied Student a FAPE for the 2007-2008 SY.

DURING THE 2007-2008 SY, DID THE DISTRICT AND ACBHCS FAIL TO PROVIDE STUDENT WITH A FAPE BY FAILING TO PROVIDE PWN REGARDING THE REFUSAL TO IMPLEMENT THE PLACEMENT AGREED UPON AT THE JUNE 2007 IEP TEAM MEETING, AND REGARDING THE SUBSEQUENT CHANGE IN PLACEMENT TO THE EMQ PROGRAM AT GREEN?

56. As determined in Factual Findings 153 and 154, and Legal Conclusions 1 and 38, the District and ACBHCS provided adequate notice to Parents regarding the refusal to implement the June 2007 IEP team meeting agreement to a NPS placement. The notes of the September 2007 IEP team meeting are almost four pages long, and the transcript of the recording of the meeting is over 60 pages long. The notes and transcript reflect a detailed discussion of the Clark program, and the EMQ program offered by the District on the Green campus, which the District was unable to tell Parents about at the June 2007 IEP team meeting. As a result, by the close of the September 2007 IEP team meeting, Parents were aware of the basis for the District's decision not to implement the agreed-upon NPS placement. Therefore, the District and ACBHCS were not required to provide additional PWN to Parents regarding the decision not to implement the June 2007 IEP on the first day of the 2007-2008 SY.

57. As determined in Factual Findings 129, 130, 144, 153 and 154, and Legal Conclusions 1 and 38, the District and ACBHCS provided adequate notice to Parents regarding the decision to offer placement at EMQ. Parents had received letters informing

them that EBAC would no longer be the District's mental health service provider, and later that the new District mental health service provider was EMQ. As noted above, the September 2007 IEP team meeting included a detailed discussion of the Clark and EMQ programs. As a result, Parents were aware of the basis for the District's offer of the EMQ program, as well as the alternatives, and the District and ACBHCS were not required to provide additional PWN.

#### COMPENSATORY EDUCATION

58. The right to compensatory education does not create an obligation to automatically provide day-for-day or session-for-session replacement for the opportunities missed. (*Park v. Anaheim Union Sch. Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033, citing *Student W. v. Puyallup Sch. Dist.* (9th Cir. 1994) 31 F.3d 1489, 1496.) Compensatory education is not a contractual remedy, but an equitable remedy, part of the court's resources in crafting "appropriate relief." (*Student W., supra*, 31 F.3d at p. 1497; see also *School Committee of the Town of Burlington v. Dept. of Education* (1985) 471 U.S. 359, 374 [equitable considerations are relevant in fashioning relief].) "The conduct of both parties must be reviewed to determine whether relief is appropriate." (*W.G., supra*, 960 F.2d at p. 1486; see also *Student W., supra*, 31 F.3d at p. 1496.) Factors to be considered when determining the amount of reimbursement to be awarded include the existence of other, more suitable placements; the effort expended by the parent in securing alternative placements; and the general cooperative or uncooperative position of the school district. (*W.G., supra*, 960 F.2d at p. 1487; *Glendale Unified Sch. Dist. v. Almasi* (C.D. Cal. 2000) 122 F.Supp.2d 1093, 1109.) 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." (*Reid ex. rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.)

59. As determined in Factual Findings 155 through 163, and Legal Conclusion



58, District procedurally denied Student a FAPE by failing to provide PWN regarding the decision not to conduct an OT assessment, and by pre-determining its offer before the IEP team meeting on September 5, 2007, and substantively denied Student a FAPE by failing to address his unique needs in the area of reading fluency and depression, by failing to provide 20 minutes of counseling during the week that Student was on home hospital instruction, by failing to conduct an OT assessment, and by failing to provide the placement and program that comported with the agreement of the IEP team at the meeting on June 12, 2007. ACBHCS denied Student a FAPE by failing to include baselines or present levels of performance in its initial goals. However, the obligation of the District and ACBHCS to provide compensatory education will be reduced because the District and ACBHCS offered Student a FAPE in the EBAC and EMQ programs; Clark does not provide Student with a FAPE in the LRE; and the evidence was clear that Student requires a structured environment, and that Student would be harmed and/or regress due to his absence from school for multiple months, which means that Parents have substantially contributed to Student's regression by failing to make him available to attend school since about August 2007.

60. As determined in Factual Findings 20 through 25, Student has unique educational needs in the areas of writing, written expression, and reading comprehension and fluency. Many of Student's assessment results were in the average range, and Student made educational progress in the small, structured setting of the EBAC program. As a result, Student should be able to benefit from and make academic progress with tutoring. Student was supposed to be in fourth grade for the current SY (2007-2008), but he has not attended school since about August 2007. As a result, Student will require extensive compensatory education to remedy the denial of FAPE. Therefore, District will provide Student with compensatory education in the form 75 hours of tutoring, in the areas of writing, written expression, and reading comprehension and fluency, within one year of the

date of this decision. On average, this would provide Student with about 1.5 hours of tutoring per week for a year, which should help him to recoup any losses in academic skills due to his absence from school while simultaneously helping him to make educational progress.

61. As noted in Factual Finding 20, 22, 24, and 59 through 61, Student also has unique needs in the areas of behavior, anxiety, and depression. Student made behavioral progress in the therapeutic component of the EBAC program. As a result, Student should be able to benefit from additional counseling. Student should have received extensive counseling during the current school year, but he has not attended school since about August 2007. As a result, Student will require extensive compensatory education in the form of counseling to remedy the denial of FAPE. Therefore, ACBHCS will provide Student with compensatory education in the form of 26 hours of individual counseling, and 26 hours of group counseling, which amounts to an average of 30 additional minutes of each type of counseling per week for a year, within one year of the date of this decision.

## ORDER

1. Student's request for relief is granted as to an OT assessment. District shall conduct an OT assessment of Student within 30 days of the date of this decision. If Student is found to need OT assistance, District shall provide double the recommended level of OT services for the first two months of service.

2. Student request for relief is granted as to the special education service of counseling. District shall provide Student with an additional 20 minutes of individual counseling within 30 days of the date of this order.

3. Student's request for relief is granted as to compensatory education. District shall provide 75 hours of tutor assistance within one year of the date of this decision. ACBHCS shall provide 26 hours of individual counseling, and 26 hours of group counseling, within one year of the date of this decision.


## PREVAILING PARTY

Education Code section 56507, subdivision (d), requires a decision to indicate the extent to which each party prevailed on each issue heard and decided. Student prevailed on a portion of Issue 1, a portion of Issue 2a, a portion of Issue 2d, Issue 3b, and Issue 3e. District and ACBHCS prevailed on all of the remaining issues in this matter.

## RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

Dated: February 19, 2008

A handwritten signature in cursive script that reads "John A. Thawley". The signature is written in black ink on a light-colored background.

---

JOHN A. THAWLEY  
Administrative Law Judge  
Special Education Division  
Office of Administrative Hearings