

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

In the Matter of:

STUDENT,

Petitioner,

v.

ANAHEIM UNION HIGH SCHOOL DISTRICT
and ORANGE COUNTY HEALTH CARE
AGENCY,

Respondents.

OAH CASE NO. N 2007030776

DECISION

Administrative Law Judge (ALJ) Clara L. Slifkin, Office of Administrative Hearings, Special Education Division (OAH) heard this matter in Anaheim, California on July 23 through July 27, 2007.

Student (Student) was represented by Inga Sanders, Esq., of the Law Offices of Sanders Bell, LLP. Student's Mother and Father (Parents) were also present during the hearing.

Anaheim Union High School District (District) was represented by Jeffrey J. Riel Esq., Anaheim Union School District Special Youth Services. Ms. Barbara Moore-Brown, Special Services Director, attended on behalf of District.

Orange County Health Care Agency (OCHA) was represented by Nikhil G. Daftary, Deputy County Counsel.¹ Mr. Manny Robles, the AB3632 Coordinator attended on behalf of OCHA.

¹ On June 5, 2007, the District filed a Motion to Join the Orange County Health Care Agency as a necessary party, because OCHA is the lead case manager responsible for residential placement. The Motion was granted and Student's dispute with OCHA is limited to the issue of residential placement.

On March 22, 2007, Student filed a request for a due process hearing. The matter was continued on May 1, 2007. Oral and documentary evidence were received during the hearing. Upon request of the parties, written closing arguments were submitted and the record was closed on August 17, 2007.

ISSUES

1. Did District from March 22, 2005 through the 2006-2007 school year² fail to assess Student in all areas of suspected disability, by failing to perform: a Functional Analysis Assessment³; an Assistive Technology Assessment; a Neuropsychological Assessment; and a Speech and Language Assessment?
2. Did the District deny Student a Free Appropriate Public Education (FAPE) from March 22, 2005 through the 2006-2007 school year by failing to:
 - (a) give prior written notice to Student's Parents of its refusal to perform assessments in all areas of suspected disability;
 - (b) design and implement a Behavioral Intervention Plan (BIP); and
 - (c) offer Student school-based counseling, one to one aide, Assistive Technology (AT), proper speech and language (S/L) services.
3. Did District and OCHA fail to provide Student with FAPE from March 22, 2005 through the 2006-2007 school year because of their failure to place Student in a residential treatment facility requested by Parents?

PROPOSED REMEDIES

Student proposes the following resolutions should he prevail: funding for Independent Educational Evaluations (IEE);⁴ compensatory education in the areas of school based counseling, one-to-one aide, S/L services, and academic instruction; reimbursement for all costs for placement at Eagle Ranch Academy (Eagle Ranch) from November 17, 2006 to present; and continued placement at Eagle Ranch for 2007-2008 school year.

² At the commencement of the hearing, the parties clarified the issues for the Due Process Hearing. Student acknowledged that only claims dating from March 22, 2005, two years before he filed this matter, are contemplated in Student's Due Process Hearing Request.

³ California state statutes and regulations refer to these types of tests as "assessments." Federal statutes and regulations refer to them as "evaluations." District assessors use both terms. Herein, the ALJ will refer to the test as an "assessment" unless the test itself is entitled an "evaluation."

⁴ Student did not present any evidence that an IEE was performed or requested in any areas of suspected disability.

PARTIES' CONTENTIONS

Student contends that the District from March 22, 2005 through the 2006-2007 school year failed to assess Student in all areas of suspected disability. Student asserts that District failed to perform assessments in all areas of suspected disability including: a FAA; an AT assessment; a neuropsychological assessment; and a S/L assessment. Student also contends that District denied Student a FAPE from March 22, 2005 through the 2006-2007 school year by failing to: develop and implement a BIP; offer Student school-based counseling; offer Student a one-to-one aide; offer Student proper S/L; and offer Student AT. Student concludes that this resulted in Student's failure to make progress and benefit from his special education.

Student also asserts that the District and OCHA failed to provide Student FAPE from March 22, 2005 through the 2006-2007 school year because of their failure to offer Student placement in the residential program requested by Parents. Moreover, Student contends that OCHA failed to timely conduct a residential placement evaluation.⁵ This failure resulted in Parent's unilateral placement of Student at Eagle Ranch.

Finally, Student contends that because District failed to provide Student FAPE, Student is entitled to compensatory education, reimbursement for tuition and other expenses Parents incurred when Student was placed at Eagle Ranch.

District contends that from March 22, 2005 through the 2006-2007 school year it assessed Student in all areas of suspected disability. District also contends that its offer contained in Student's IEPs from March 22, 2005 through the 2006-2007 school year provided Student FAPE. The program, services and placement offered enabled Student to benefit from his special education.

The District and OCHA contend that OCHA timely conducted a residential placement evaluation within all statutory deadlines. District and OCHA contend their offer of placement at Provo Canyon, a residential facility, was reasonably calculated to provide Student with educational benefit. District and OCHA also contend that Student's placement at Eagle Ranch was not designed to provide him with an educational benefit. Moreover, according to the Education Code, District and OCHA are prohibited from placing Student at Eagle Ranch because it is not a program certified by the California Department of Education (CDE) and not a non-profit business. Therefore, Student cannot be placed at Eagle Ranch for the 2007-2008 school year and Student is not entitled to any relief.

⁵ The mental health and educational professionals referred to Chapter 26.5 of the Government Code, governing inter agency responsibilities for related services as, "AB 3632." The mental health professionals, exhibits and District use the term "residential placement evaluation." Prior to placing Student in a residential treatment program, OCHA was required to conduct a residential placement evaluation to determine if Student was an appropriate candidate for residential placement.

FACTUAL FINDINGS

Jurisdictional Matters

1. As of January 30, 2007, Student was 16 years old. From March 22, 2005 through the 2006-2007 school year, Student resided with his Parents within the jurisdictional boundaries of the District. He is qualified to receive special education and related services as a student with emotional disturbance (ED) and speech and/or language impairment. Student has been diagnosed with Bipolar Disorder and Attention Deficit Hyperactivity Disorder (ADHD).

Factual Background

2. In December 1999 when Student was in third grade, the Anaheim City School District referred Student to OCHA because of his severe behavior, ADHD, depressive ideation and communication problems. OCHA assessed Student for eligibility for mental health services pursuant to the AB 3632 program (Gov. Code, Ch. 26.5 [governs interagency responsibilities for providing services to students with disabilities].) Student was found to be eligible for mental health services and has been receiving those services from OCHA. Services include psychiatric care to monitor his medication and psychological services both individual and group therapy.

3. At Student's April 27, 2004 IEP meeting, the team proposed a behavior support plan (BSP).⁶ The BSP described the targeted behavior as follows: when Student is presented with a confrontational or stressful situation, Student has to find alternative behaviors to deal with the situation. Behavioral objectives described in the plan focused on Student's responding appropriately to directions thus diminishing his verbal threats. The BSP included strategies to reduce the targeted behavior by utilizing: time outside the classroom; a visit to the school office; token economy; parent teacher communication and conferences; physical release to help de-escalate the situation; and observations of Student's response during these situations.

Did District from March 22, 2005 through the 2006-2007 school year fail to assess Student in all areas of suspected disability

4. Student contends that the District from March 22, 2005 through the 2006-2007 school year failed to assess Student in all areas of suspected disability. Student asserts that during the 2005-2006 school year Student's behavior became assaultive, pervasive and maladaptive, and the instructional/behavioral approaches specified in Student's IEP and Behavior Support Plan (BSP) were ineffective. Thus, Student concludes that District should

⁶ District presented no evidence that it administered an FAA. In its closing brief, District explained that its behavior interventions were placed in a document called a BIP. District's behavior plan was not a behavior intervention plan (BIP) based on an FAA, but it was actually a BSP.

have conducted a FAA and developed a BIP. Student asserts that District failed to perform assessments in all areas of suspected disability including: an AT assessment; a neuropsychological assessment; and a S/L assessment.

Functional Analysis Assessment (FAA)

5. A school district has an obligation to initiate a special education assessment referral of a student upon receiving a written request for such an assessment, or if the school district had a reason to suspect that the student had a disability and that special education and related services may be needed to address that disability. When a student's behaviors impede his or her learning, or that of other students, the IEP team must consider the use of positive behavioral interventions, supports, and strategies to address that behavior. A behavioral assessment may be an appropriate tool to provide the IEP team with analytical data regarding the undesirable behavior, and to provide the team with proposed or tested interventions and strategies. If a student has an existing BSP, the team may determine whether modifications or further information are necessary. In the event of a serious behavior problem, a BIP must be developed and must be based on a functional behavior analysis or assessment (FBA or FAA).⁷

6. From April 27, 2004 to October 5, 2004, Student was disciplined for threats and intimidation, a dress code violation, defiance of authority, and aggression. Student was suspended for a total of nine days. On October 8, 2004, District held an IEP meeting to discuss Student's behavioral issues with Student's Parents. The team reviewed and updated Student's BSP. Parents informed the team that through OCHA, Student would be enrolling in an anger management class. From October 2004 to June 2005, Student's behavior improved. School discipline resulted in only one day of suspension as a result of an assault against a student. At the April 27, 2005 IEP meeting, Student's physical education teacher stated that Student is doing incredibly well in class participation, attitude and behavior. During this time, Student's BSP was an effective tool in monitoring and controlling Student's behavior.

7. In September 2005, Student transitioned to high school at Kennedy. As part of Student's December 15, 2005 triennial IEP, a psychoeducational evaluation was completed and a report prepared. School psychologist and behavioral therapist, Aeri Kwak⁸ conducted this psychoeducational evaluation assisted by several examiners and completed over several days. The assessment team included Student's S/L therapist Ms. Stefanie Lee and Student's

⁷ The primary difference between an FAA pursuant to state law and an FBA under federal law is that the former is required when a student has a "serious behavior problem." A "serious behavior problem" is defined as behavior that is assaultive, self-injurious or other severe behavior problems that are "pervasive and maladaptive for which instructional/behavioral approaches specified in student's IEP are found to be ineffective." (Cal. Code Regs., tit. 5, § 3001, subd. (aa).) Both an FAA and an FBA require a BIP, not a BSP. (34 C.F.R. § 300.346(2)(ii).)

⁸ Ms. Kwak, District's has a bachelor's degree in psychology and a Master of Science in educational psychology. She has been employed at the District since September 2003, where she provides psychological services, administers a wide range of assessments, and develops behavior plans. Ms. Kwak is also a certified behavior intervention case manager (BICM).

SDC-ED teacher Mr. Garrett Sabol. This assessment was based on a review of school records, interview and observation, review of health and developmental history, academic assessment, S/L assessment and the Behavior Assessment Scale for Children, Second Edition (BASC-II). Ms. Kwak reported that Student's medications included Depakote, Lithium and Abilify that treat his bipolar disorder, ADHD and depression. She also noted that when she tested Student she was able to refocus him with redirection and reinforcement. Her observations at school also indicated that he was able to attend to tasks for approximately ten minutes but with a lot of assistance. Ms. Kwak reported that Student had difficulty adapting to changing situations and demonstrated poor expressive and receptive communication.

8. The BASC-II measures numerous aspects of positive and negative dimensions of behavior and personality to aid in the design of a treatment plan. Both parent and teacher forms were used to determine whether home and/or classroom behaviors could be affecting Student's performance. The Student, his teacher, and Parents completed the BASC-II. Student fell within the clinically significant range in hyperactivity, conduct problems, anxiety, somatization,⁹ functional communication skills, social skills and leadership skills. The clinically significant range suggests a high level of maladjustment.

9. Ms. Kwak also reported that Student exhibits an inability to build and maintain satisfactory relationships with peers, inappropriate behavior or feelings under normal circumstances and a general pervasive mood of unhappiness and depression. Ms. Kwak's report concluded that Student's emotional disturbance adversely affected his educational performance. Therefore, he still required special education services as a student with ED.

10. At the December 15, 2005 IEP triennial meeting, Student's BSP was revised again and approved by the team. In comparison to the April 27, 2004 BSP, Student had more negative behaviors for the BSP to target. These behaviors included: using profanity, testing limits, throwing objects, refusing to do his work, speaking in a normal tone, and failing to complete and turn in assignments. To prevent these behaviors the December 15, 2005 IEP team proposed the BSP include these strategies: Student will seek a responsible adult to talk to when upset; continue therapy through Child Guidance Center (CGC), a contract service provider of OCHA since 1999; have progress reports sent to Parents every other week; receive after school tutoring; and receive individual help by instructional aide in reading. The team concluded that privileges appear to work well with Student as positive reinforcement; however, this strategy was not incorporated into Student's BSP. In addition to modifying the strategies in the BSP, the December 15, 2005 IEP team revised Student's IEP to include a behavioral goal. Student was to explore alternative options and behaviors when encountering confrontational or emotional situations. The team also set a behavioral benchmark that by June 2006, Student will be able to identify and label two emotions.

⁹ Somatization is the tendency to be overly sensitive to, and complain about, relatively minor physical problems and discomforts.

11. Despite a behavior goal and revisions to Student's BSP, Student's negative behaviors escalated. In March 2006, District suspended Student for five days for "flipping off" his teacher, using profanity towards school staff and students, threatening to hurt the substitute teacher, and being defiant by not following teacher and administration directions. During this incident, school administration called school security to locate Student because he ran away. On April 7, 2006, the IEP team met for a manifestation determination and determined that Student's behavior was caused by and a direct manifestation of this disability.¹⁰ The IEP team revised Student's BSP.

12. On July 11, 2006, while Student attended the Live and Build summer school program at Loara High School (Loara), Student had an altercation with his teacher, Tad Stricker. Mr. Stricker confiscated Student's cell phone during nutrition class. Student used profanities and then threatened Mr. Stricker. Student stated, "I'll get you, I'm coming back for you." Mr. Stricker felt threatened by Student's comments and the incident was reported to the Anaheim Police Department. Student was suspended from summer school for five days. At a July 19, 2006 IEP, the team discussed the incident. Dave Smith, a teacher for the Live and Build program indicated that Student's behavior was unusual. The team recommended that Student return to the program with supervision during lunch and nutrition, and Student would no longer have Mr. Stricker as his teacher. No modifications were made to Student's BSP.

13. District convened an IEP meeting on August 31, 2006, to discuss appropriate placement because of Student's behavior problems at Kennedy and extended school year (ESY) at Loara. The team offered Student placement at Gilbert South High School SDC-ED program (Gilbert). District offered Gilbert because it had a smaller student enrollment and offered an alternative educational program. However, at the August 31, 2006 IEP Parents wanted to visit Gilbert prior to accepting this placement. Parents visited Gilbert and on September 13, 2006, they informed District they were declining this placement.

14. In September and October 2006, Student's behavior continued to be defiant and disruptive at school, and on several occasions District insisted that his Parents take him home. On October 30, 2006, Student had stolen a student's I-Pod valued at \$300. On October 31, 2006, Student returned to school and Mr. Sabol informed Student that he would not be allowed back into the classroom until he gave him the I-Pod. Student pushed Mr. Sabol who asked the remainder of the class to leave the room. After Student and teacher engaged in loud conversation, Student threatened to stab Mr. Sabol and threw a chair at him striking his right leg. The incident was reported to the Anaheim Police Department.

¹⁰ Once a student's removal is deemed a change of placement, the IEP team must conduct a manifestation determination meeting to determine if the conduct in question was caused by or had a direct and substantial relationship to the child's disability, or if the conduct in question was the direct result of the local educational agency's failure to implement the IEP. (20 U.S.C. § 1415(k)(1)(E)(i); 34 C.F.R. § 300.530(e)(1).)

15. On November 6, 2006, the IEP team met to discuss District's Local School Placement Committee (LSPC) recommendation for expulsion due to Student's verbal and physical aggression towards staff. However, Student was not expelled because it was determined that Student's behavior was a manifestation of his disability. The team revised Student's BSP to reflect three new strategies: establish and implement appropriate consequences for every occurrence of theft; frequently provide praise and attention when Student is behaving well, and help Student gain peer recognition by giving him responsibility. The modifications to the BSP were not implemented because on November 17, 2006, Parents unilaterally placed Student at Eagle Ranch in Nevada.

16. From March 22, 2005, through October 30, 2006, although Student's problematic behaviors continued an FAA was not required. When behavioral interventions are used, the IEP team must consider a student's physical freedom and social interaction and ensure a student's right to placement in the least restrictive educational environment. A FAA is required when the IEP team finds that instructional/behavioral approaches specified in the student's IEP have been ineffective, or after a parent has requested an assessment. If an FAA is performed, a BIP is developed. A BIP is only required when the student exhibits a "serious behavior problem," defined as behavior that is assaultive or self-injurious." Student's problem behaviors would be characterized as defiant, using profanity, testing limits, and refusing to do his school work. Student did not have a "serious behavior problem" requiring an FAA and a BIP because his behavior was not assaultive or self-injurious. Student had a number of IEPs during the spring and summer of the 2005-2006 school year and the team modified Student's BSP to make it more effective. The IEP team did not find that the behavioral approaches in Student's IEPs were ineffective and Student's Parents never requested a FAA. It was not until October 30, 2006, when Student threw a chair at Mr. Sabol that his behavior would be characterized as assaultive. Both Mr. Sabol and Ms. Kwak testified that they were surprised that Student assaulted Mr. Sabol because historically Student's behaviors consisted of verbal threats and not following directions.

17. Student's BSP was revised in December 2005, in April 2006, and in November 2006, so that different interventions and/or disciplines of conflict management were utilized. Ms. Kwak, a BICM, drafted and revised Student's BSP at the December 15, 2005 triennial that identified Student's targeted behaviors, identified strategies for addressing those behaviors and contained an appropriate behavioral goal. The BSPs were designed to offer reinforcement for appropriate behavior and to teach more acceptable replacement behaviors by focusing on Student's being able to identify his feelings. Interventions focused on teaching Student techniques to improve anger management and social skills. In addition, Mr. Sabol and his classroom aides provided a highly structured SDC-ED classroom where behavioral management strategies were utilized throughout Student's day. Ms. Kwak worked closely with Mr. Sabol and Student to modify and adjust the behavioral interventions. Until October 30, 2006, this support system enabled Student to continue at Kennedy, in the LRE, while making progress on his behavioral and academic goals.

18. Dr. Shane Gomes, Student's therapist at CGC, testified that the instructional and behavioral approaches contained in Student's IEPs and BSPs addressed Student's behavior. In addition to the District's services described above, OCHA provided Student with extensive services including the services of a psychiatrist, psychologist, family counselor, wrap around services and a therapeutic behavior specialist (TBS).

19. The evidence established that although Student's behavior problems continued District was not required to conduct a FAA. Parent never requested an FAA and District did not conduct an FAA because it believed that the behavioral approach of Student's BSP was effective. Student did not present any evidence to demonstrate that District's failure to conduct a FAA resulted in Student's failure to make some educational progress benefit from his special education.

Assistive Technology Assessment

20. Student contends that District failed to assess Student in all areas of suspected disability by failing to perform an AT assessment. An AT device is any item or piece of equipment that is used to increase maintain or improve the functional capabilities of a child with a disability. Student claims that his auditory processing deficits adversely affect his ability to comprehend and retain oral and written material and interfere with his ability to formulate and organize his thoughts when writing. Student asserts that because of these deficits he must use a computer with specialized software.

21. As explained in Factual Finding 8, Student's triennial psychoeducational evaluation was written by school psychologist Ms. Kwak. Her report targeted Student's behavior and continued eligibility for special education services and did not recommend an AT assessment. She reviewed and referred to Student's diagnostic tests and school psychologist Heidi Denissen's psychoeducational evaluation from April 30, 2003.¹¹ However, this psychoeducational assessment also did not recommend an AT assessment.

22. Student's IEP teams from March 22, 2005 through 2006-2007 school year, concurred that that Student does not need an AT device or service to benefit from and access his special education. This conclusion is also confirmed by Student's March 7, 2007 IEP conducted at Eagle Ranch, Student's residential placement.

¹¹ Ms. Denissen administered two tests that measure auditory and visual processing deficits, Test of Visual-Perceptual Skills (TVPS) and Wide Range Assessment of Memory and Learning (WRAML). According to Ms. Denissen, Student's auditory processing deficits and weak memory skills adversely affect his ability to comprehend and retain oral and written information and to formulate and organize thoughts when writing. This assessment recommended that teachers use instructional strategies to compensate for his auditory processing deficits that include utilizing: both visual and auditory formats with an emphasis on visual information; visual modeling, note taking, paraphrasing and breaking down tasks; repetition, concrete examples, visual aids and manipulative materials; peer tutoring and paired writing and reading activities; structured note-taking; and mnemonic techniques to aid in learning new information.

23. Ms. Kwak who had conducted Student's psychoeducational evaluation in November 2005 and worked very closely with Student in Mr. Sabol's class, testified that Student did not require an AT assessment. Because she observed Student in class several times a week and conducted two psychoeducational assessments, her testimony was persuasive.

24. District had no reason to suspect that an AT assessment may be needed, and Student did not request an AT assessment in writing or verbally. Student did not present any evidence that he required such an assessment. Thus, District had no obligation to assess Student in AT.

Neuropsychological Assessment

25. Student contends that because Student has ADHD and Bipolar Disorder which are neurologically based, District should have conducted a neuropsychological assessment. Student asserts that because his December 2005 psychoeducational evaluation was over a three day period of time, its results were invalid and he is entitled to a neuropsychological assessment.

26. District had no reason to suspect that Student should be assessed by a neuropsychologist. District's 2005 psychoeducational assessment addressed Student's deficits in focusing and attending to task common characteristics of ADHD. Ms. Kwak, an experienced psychologist, properly administered tests for the 2005 psychoeducational assessment. She based her assessment on reviewing prior assessments, observing Student in class and interviewing Student, Parents, and teachers. Because of the battery of tests she gave Student, the testing took place over several days. Ms. Kwak testified that Student was appropriately assessed in all areas of suspected disability and that no additional psychoeducational or neuropsychological assessments were warranted. Because Ms. Kwak has consistently observed Student, comprehensively tested Student, and completed two prior assessments in December 2005 and November 2006, Ms. Kwak's testimony was persuasive. Student did not provide any testimony to support his contention that he required a neuropsychological assessment. In addition, Student never requested a neuropsychological assessment. Student presented no evidence to challenge the validity of this assessment. Therefore, District had no obligation to conduct a neuropsychological assessment of Student.

Assessments in Speech and Language

27. On November 28, 2005, Stefanie Lee,¹² District's Speech-Language Pathologist conducted a S/L evaluation as a part of Student's December 15, 2005 triennial. Ms. Lee administered tests in receptive and expressive language. In receptive language, she administered the Clinical Evaluation of Language Fundamentals (CELF)-4 and the Peabody

¹² Stefanie Lee, District's Speech-Language Pathologist has a bachelors degree in linguistics, a master's of science in S/L pathology and has worked in speech pathology for 25 years. She performs about 20 to 40 S/L assessments a year and also provides direct services.

Picture Vocabulary Test (PPVT) III-A. She found on the CELF-4 Student demonstrated severely decreased ability overall on receptive language tasks but he displayed moderate deficits in comprehending statements containing comparative, temporal, spatial and passive relationships. On the PPVT Student displayed single-word receptive vocabulary ability that was in the moderately impaired range for his age. In expressive language, Ms. Lee administered the CELF-4 and the Expressive Vocabulary Test (EVT). She reported that Student's expressive language index standard score on the CELF-4 placed him in the severely impaired range. Ms Lee found that Student's social language skills were mildly to moderately decreased for his chronological age. She also reported that Student displays severe receptive and expressive language deficits. Student's emotional disorder affected his pragmatic language skills which are mildly to moderately impaired. At the December 15, 2005 IEP, Ms. Lee indicated that Student's overall language improved but he continues to have deficits in receptive and expressive language deficits. Single word receptive and expressive language skills increased since his previous language assessment. The December 15, 2005 IEP team recommended Student participate in 30 minute weekly language therapy to increase his verbal expressive skills.

28. Ms. Lee provided Student with direct services, and these services continued into Student's 10th grade year. Sometime during 10th grade, Student began S/L group services that were consistent with his IEP. Delivering S/L services in group enabled Student to interact with his peers. Ms Lee testified there were no other areas of S/L in which Student should be assessed. She also noted that Student was making progress in his S/L while he was in the District. Ms. Lee also testified that during the 2004-2005, 2005-2006 and 2006-2007 school years, she did not receive any request from Parents for further S/L assessments. Because Ms. Lee had conducted two thorough S/L evaluations of Student, worked collaboratively on S/L with his special education teacher, and monitored his progress, her testimony was persuasive. Student did not present any expert or percipient witness to contradict Ms. Lee's testimony.

29. Student's contention that the District should have conducted another S/L assessment to determine if these deficits were the root of his behavior is not supported by any evidence. Parents never requested any further S/L assessments. Student did not present any evidence that demonstrated that Student's S/L problems affected his behavior. Student was making progress in S/L and no further assessments were warranted.

Free Appropriate Public Education (FAPE) from March 22, 200, through the 2006-2007 school year

Prior Written Notice

30. A school district must provide parents with prior written notice whenever it proposes or refuses to initiate or change the identification, evaluation or educational placement of their child. Student contends that the District failed to give Student prior written notice of its refusal to conduct a FAA, AT assessment, a neuropsychological assessment and a S/L assessment.

31. A parent must request an assessment of their child in writing unless the parent is not capable of putting the request in writing. Student presented no evidence that Parents made a written request for an assessment of Student in any area of suspected disability. Student did not present any evidence that Parents were not capable of putting such a request in writing. Parents did not make any request for these assessments during meetings at Student's numerous IEPs during the 2004-2005, 2005-2006 and 2006-2007 school years. District Witnesses Ms. Kwak, Ms Lee, and Mr. Sabol, testified that Student's Parents did not make a written request for additional assessments. Thus, District was not required to provide Student with prior written notice.

Student's Unique Needs

32. It is not disputed that Student takes prescribed psychotropic medications daily and has been receiving therapy services from CGC to address Student's Bipolar Disorder. It is also not disputed that Student has unique needs in the areas of reading, written expression, mathematics, behavior, attention, communication skills, and speech and language. Student has difficulty with staying on task, focusing, and completing his work. At issue is District's failure to offer services and placement from March 22, 2005 through the 2006-2007 school year to meet Student's unique needs.

33. Special education is defined as specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability that are needed to assist the child to benefit from instruction. Related services include, among others, mental health counseling services as may be required to assist a child with a disability to benefit from special education. In order to provide a legally adequate FAPE, a district is required to provide supplementary, or related, services, including mental health, speech and language and assistive technology services necessary for the child to access his or her education and to meet his or her unique needs. If the school district's program is designed to address Student's unique educational needs and is reasonably calculated to provide some educational benefit, then the program is appropriate. The term "unique educational needs" is to be broadly construed and includes the student's academic, social, emotional, communicative, physical and vocational needs. A child's progress must be evaluated in light of his disabilities. The appropriateness of an IEP is determined based on the information available to the IEP team at the time it was developed.

34. Student contends that District denied Student FAPE from March 22, 2005 through the 2006-2007 school year because it failed to provide Student with a Behavioral Intervention Plan (BIP) based on an FAA, school based counseling, a one-to-one aide, AT services, appropriate S/L services, and an appropriate residential placement. Student argues that because District failed to offer Student a program and services to meet his unique needs and reasonably calculated to provide some educational benefit, Student was denied FAPE.

Behavior Intervention Plan (BIP)

35. An IEP team must consider whether a child's behavior impedes his or her learning or that of others. If the team determines that it does, it must consider a BSP that utilizes positive behavioral interventions, supports and other strategies to address the behavior. A behavior intervention is "the systematic implementation of procedures that result in lasting positive changes in the individual's behavior." It includes the design, evaluation, implementation, and modification of the student's individual or group instruction or environment, including behavioral instruction, to produce significant improvement in the student's behavior through skill acquisition and the reduction of problematic behavior.

36. The more stringent prerequisite of a BIP is that a Student has a "serious behavior problem." A "serious behavior problem" is defined as behavior that is assaultive, self-injurious or other severe behavior problems that are "pervasive and maladaptive for which instructional/behavioral approaches specified in student's IEP are found to be ineffective." When a child exhibits a serious behavior problem, California law imposes specific and extensive requirements for the development of a functional analysis assessment and a behavior intervention plan.

37. The April 27, 2004 IEP team for the 2004-2005 school year addressed Student's unique needs in behavior, communication, and attention. For the first time, the team determined and designed a BSP to address his difficulty in finding alternative behaviors so that he could deal with confrontational and stressful situations. The BSP contained behavioral goals, objectives and strategies. The team confirmed that Student continued to receive counseling services and medication for his ADHD and bipolar disorder through the OCHA's Child Guidance Center.

38. Student's placement at Walker for the 2004-2005 school year in a SDC-ED, a small classroom, met Student's unique needs in behavior and attentiveness. Student received the attention he needed so that his teacher was able to work closely with Student on his behavior and implement his BSP.

39. During the 2004-2005 school year, Student's behavior improved and his negative behaviors appeared to be under control contributing to Student's social and academic progress. For example, at the April 27, 2005 IEP team meeting Student's physical education teacher reported that Student was doing incredibly well in class, in participation, attitude and behavior. The team recommended a summer program that is a "hands on" program that would engage Student. The team also offered Student individual counseling once a week at the child Guidance Center through OCHA.

40. For the 2005-2006 school year, the operative IEP was developed at an initial IEP meeting on April 27, 2005, when Student, then 14 years old, was in eighth grade at Walker. Student's unique needs were identified in the area of attention, behavior, and

receptive and expressive language. The IEP team developed goals in the areas of attention, communication skills, behavior, prevocational¹³ and S/L.

41. The April 27, 2005 IEP team consisted of Student's Parents, Dr. Gomes, Student's therapist, Ms. Lee, S/L specialist, a school counselor and a regular education teacher. The IEP team also proposed placement for high school and suggested that Kennedy would best suit Student's needs. The proposed SDC-ED classroom placement would provide Student with a small structured class to meet Student's unique needs in behavior. Parents approved the services offered and the placement for the 2005-2006 school year. Thus, the program and services District offered at the April 27, 2005 IEP were reasonably calculated to meet Student's unique needs and provide educational benefit.

42. Parents requested an early triennial date and an IEP triennial team meeting of December 15, 2005, was selected. District referred Student to Ms. Kwak for a psychoeducational evaluation and Ms. Lee for a S/L assessment. Student's psychoeducational evaluation was written by Ms. Kwak and completed over several days by several examiners, as a part of the assessment team. Factual Findings 7, 9 and 12 describe how Ms. Kwak administered the BASC-II and findings on Student's behavior, and Factual Findings 27-29 describe S/L.

43. At the December 15, 2005 triennial, the IEP team reviewed and revised Student's BSP to target more behaviors and set more goals. Factual Finding 10 details the targeted behaviors, strategies and goals. Dr. Gomes reported to the team that Student had been more resistant to therapy. He also stated that he developed an individual and family counseling treatment plan for Student that he believed would be effective. The team agreed that Student responded to positive reinforcement such as earning privileges for good behavior. Mr. Sabol and Ms. Kwak indicated that they would work closely with Student to improve his behavior.

44. Mr. Sabol testified that Student made progress in behavior with the revised BSP. Student would regularly seek out a responsible adult on campus to talk to when he was upset. Student also made progress in the goal of exploring alternative behaviors when confronted with a situation by talking to him, the security guard or one of the aides. Mr. Sabol indicated that an important goal was that Student would be able to label two emotions. Student improved at recognizing his emotions and responding to frustrating situations. Mr. Sabol sent progress reports to his Parents home.

45. Mr. Sabol's testimony confirmed that Student responded well to behavioral strategies, such as positive reinforcement. He indicated that Student's behavior improved in November 2005 through January 2006 because Student wanted his Parents to give him birthday and Christmas presents. Student was also motivated by extra curricular activities. Mr. Sabol testified that Student's behavior and school work improved when Parents offered

¹³ Prevocational goals and objectives focused on Student's behaviors that impede his progress in academics. These goals would enable Student to stay on task and not get frustrated when doing basic class work.

him acting classes. Student attended acting classes that would culminate in his performing in commercials. However, when Parents discontinued Student's acting classes, his behavior declined as Student lost his incentive and motivation to behave. Sabol's testimony was persuasive.

46. Ms. Kwak testified that Student responded well to the behavioral approaches in his BSP. She indicated that his BSP was revised a couple times to address his verbally threatening behavior, profanity, defiance, and stealing. Student established a relationship with a number of staff members: Ms Kwak, Mr. Sabol and two aides, the Vice Principal, and the security guard. Student would seek an adult if he wanted to talk to someone about his behavior. Staff encouraged Student to take his medication on a regular basis, and continue his weekly therapy and after-school tutoring.

47. Ms. Kwak also testified that Student's behavior did not warrant District's conducting a FAA. Student's behavior was not pervasive and he did not require a BIP. Student did not have a "serious behavior problem," because his behavior was not assaultive, self-injurious or other severe behavior problems that are "pervasive and maladaptive for which instructional/behavioral approaches specified in student's IEP are found to be ineffective." She explained that Student made empty verbal threats since kindergarten. However, there were no incidents to indicate that he would hurt others. She and other staff were very surprised that at the end of October 2006 when Student threw a chair at Mr. Sabol. Before that incident, Ms. Kwak testified, Student's behavior did not warrant a FAA. Therefore, Student did not exhibit a serious behavior problem until October 30, 2006, and require a functional analysis assessment and a BIP.

School based counseling

48. School-based counseling is weekly individual counseling sessions that help students with talk about their needs and feelings. At the April 27, 2005 IEP, the team indicated that Student was making progress socially and academically. Student did not need school based counseling to make educational progress.

49. It is not disputed that Student did not like to be pulled out of his classroom for services. Student would have to be pulled out of class for school based counseling. During the 2005-2006 school year, both Ms. Kwak and Mr. Sabol provided in class counseling services for Student. Ms. Kwak testified that Mr. Sabol would contact her when Student had behavior problems. She would respond and have an informal counseling session with Student in the back of the classroom, on an as need basis. Student would sometimes want to talk to her and on other days, Student did not want to see her. Mr. Sabol and Ms. Kwak planned to work closely with Student to improve his behavior. This informal approach to counseling met Student's unique needs.

50. Student did not need school based counseling because the BSP and OCHA services effectively dealt with his behavior in the classroom. Dr. Gomes testified that as early as Student's December 2005 triennial, Student had been more resistant to therapy. He

also stated that he developed an individual and family counseling treatment plan for Student that he believed would be effective. Because of Student's resistance to counseling, the team agreed that rather than school based counseling Student responded to positive reinforcement such as earning privileges for good behavior.

51. Student presented no evidence to show that he required school based counseling to make some educational progress and benefit from his education. Both Ms. Kwak's and Dr. Gomes's testimony was persuasive on this issue.

One-to-One Aide

52. From March 22, 2005 through the 2006-2007 school year, Student did not require a one-to-one aide in order make educational progress and to benefit from his education. Student's placement at Kennedy was in a small SDC-ED classroom and Student did not need the services of a one-to-one aide to keep him focused and on task. Mr. Sabol's class had five students and three adults, plus Ms. Kwak who was regularly present. Because of the student teacher ratio, Student received one-to-one staff support to help him to complete tasks, to focus and to behave appropriately. This system met Student's unique needs.

53. Ms. Kwak indicated that she spent time in Student's class working with him on an individual basis to help him focus and redirects him so that he could improve academically. Ms. Kwak testified that if Student preferred one of the aides to the teacher on a given day, then that aide would give him support. A one-to-one aide is very restrictive and Student did not like to be singled out. With the support he was receiving in the classroom, Student did not require a one-to-one aide to make some educational progress and benefit from his education. Ms. Kwak testified that she spent time in Student's class working with him on an individual basis. She worked with him on focus and redirection so that he could improve academically. Student received the behavioral supports he needed from the program that was offered to him.

54. Mr. Sabol implemented the accommodations contained in Student's IEPs. These accommodations included: sitting close to Mr. Sabol's desk; visual aids; flashcards; one-to-one support to clarify directions; graphic organizers; and posting classroom rules. Mr. Sabol testified that he would vary the assignment lengths and books they worked on. He would not force Student to do assignments; he would give him something similar, but more interesting. Such accommodations helped Student focus and stay on task.

55. Student presented no evidence that he required a one-to-one aide to make progress and benefit from his education. Both Ms. Kwak's and Dr. Sabol's testimony was persuasive on this issue.

Speech and Language Services

56. From March 22, 2005 through the 2006-2007 school year, Student did not require additional or different speech and language services in order to make educational progress and to benefit from his education. The April 24, 2004 IEP team agreed to address Student's deficits in communication by developing a S/L assessment plan and recommending that a specialist assess Student. On June 3, 2004, the IEP team met to discuss the results of Student's language assessment, indicating Student had deficits in receptive and expressive language. The team agreed that since Student would not participate in language activities directed by the speech pathologist, consultative services once a month for 20 minutes would be continued.

57. The April 27, 2005 IEP team discussed Student's language deficits and progress in social language. District continued to offer Student 20 minutes a month of consultative services in S/L. Ms. Lee, Student's S/L teacher, testified that during the 2004-2005 year Student was meeting his educational goals and making progress in this area. This conclusion was also based on Ms. Lee's observation of Student and her consultative work with Student's special education teacher. Because Student was very sensitive about being different and being singled out in class, S/L services were limited to consultative services. Student presented no evidence to support Student's contention that he needed additional or different S/L services to meet his unique needs.

58. As described in Factual Finding 27, on November 28, 2005, Ms. Lee conducted a S/L evaluation as a part of Student's December 15, 2005 triennial. On December 15, 2005, the IEP team met to review Student's triennial assessment results. Ms. Lee reported that Student's S/L improved but he still had deficits in receptive and expressive language. In order to address Student's deficits in receptive and expressive language, Mr. Sabol was willing to work with Student in pull-out S/L services; the IEP team intensified this service by offering Student S/L services for thirty minutes a week.

59. As indicated in Factual Finding 28, Student's pull-out service transitioned into a group service. Delivering S/L as a group service enabled Student to interact with his peers and develop socially.

60. Student presented no evidence that he needed additional or different S/L services. In contrast, Ms. Lee, Student's S/L teacher, testified Student made educational progress in S/L. This conclusion was based on her work with Student individually and in group session.

AT Services

61. As discussed in Factual Findings 20, 21, 22, 23 and 24, an AT assessment was not necessary for Student to make some educational progress. The April 27, 2005 and December 15, 2005 IEP teams concluded that AT services would not assist Student in meeting his educational goals and objectives. Parents approved both IEPs.

62. Parents did not request AT services and Student did not present any evidence to support his contention that Student required AT services. Therefore, the services offered by the April 27, 2005 and December 15, 2005 IEP teams were designed to meet Student's unique educational needs, reasonably calculated to provide some educational benefit thus providing Student FAPE.

Residential Treatment Facility

63. School districts are required to provide each special education student with a program in the least restrictive environment with removal from the regular education environment occurring 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 could not be achieved satisfactorily.

64. In determining whether the District offered a FAPE, the focus is on the adequacy of the proposed placement. A placement is adequate if it is reasonably calculated to provide educational benefit to the student. The focus is on the placement offered by the school district and not on the alternative preferred by the parents. A district's program must provide only a "basic floor of opportunity" that consists of access to specialized instruction and related services. A school district can only place a student with special needs in a nonpublic school, if no appropriate public education program is available. If District's program met the substantive factors, then District provided a FAPE, even if Student's Parents preferred another program and even if his Parents preferred program would have resulted in greater educational benefit.

65. At the December 15, 2005 triennial IEP, the team met to discuss the results of Student's assessments, review his goals, progress and placement as discussed in Factual Findings 7-10, 27, 43, 58, 62, and 65. The team continued to offer the SDC-ED classroom at Kennedy; Parents agreed with this placement. Student is not challenging the December 15, 2005 IEP team's offer of placement. Thus, Student's placement at Kennedy in a SDC-ED class provided Student FAPE.

66. Student claims that the District's continued offer of placement in an SDC-ED classroom did not meet Student's unique needs because of OCHA's failure to timely assess Student for residential placement and its failure to find an appropriate residential placement resulted in a denial of FAPE from March 22, 2005 through the 2006-2007 school year. In order to determine the appropriateness of a placement offer, the offer must be evaluated based on the information known to the District at the time the offer was made.

Residential Placement Evaluation

67. Prior to the determination that a residential placement is necessary for the pupil to receive special education and mental health services, the expanded IEP team shall consider less restrictive alternatives, such as providing a behavioral specialist and full-time behavioral aide in the classroom, home and/ other community environments, and /or parent

training in these environments. District and County have a duty to explore alternatives before recommending a residential placement assessment and placement. For Student to receive an offer of FAPE, he must be offered a placement that meets his unique needs in the least restrictive environment.

68. In spring of 2006, Student's behavior became more problematic and on March 31, 2006, Student flipped off his teacher, threatened to hurt his substitute teacher, used profanity towards two students and was defiant by not following teacher and administration directions. District suspended Student for five days. On April 7, 2006, an IEP team met to make a manifestation determination and reviewed Student's placement and IEP. The team determined that the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability, ED. The team reviewed Student's BSP and revised it. The team discussed residential placement and Parents indicated that they would look into this option. The team discussed other placements, including Polaris an alternative education program. The team agreed to meet again after spring break to discuss placement and to include the alternative education staff.

69. The team reconvened on May 2, 2006, to discuss placement options for 2006-2007 school year. A representative from Polaris was present to discuss this program. The team discussed other possible placements including Student remaining at Kennedy. The team agreed the workability program¹⁴ at Kennedy would be the most appropriate program. Because of Parents' concern about Student's disciplinary problems in the months before this meeting, Parents requested an assessment for a residential placement.

70. Dr. Gomes explained the procedure to Parents and told them that Student did not fit the criteria for the program. However, in order to discuss Parents' request and concerns about Student's behavior and to include a representative of OCHA, District scheduled an expanded IEP meeting. In addition, during this time, the District wanted to explore other options to residential placement which is an extremely restrictive environment. The District's decision to hold an expanded meeting and explore other options was reasonable and complied with State and Federal Law.

71. As discussed above in Factual Findings 5-19, Student's behavior fluctuated. He went through periods of good and bad behavior and could behave when he was particularly motivated. Both Student's teacher and Dr. Gomes testified that during the months of Christmas and his birthday Student's behavior improved. Dr. Gomes conferred with Dr. Tom Shaw, a OCHA service chief, about Student's request for residential placement.

¹⁴ Project workability is a program for disabled students in secondary school to help them transition from high school to work. (Gov. Code, § 7577, subd. (a)(b).)

72. From the May 2, 2006 IEP until the June 16, 2006 IEP meeting, Student's behavior improved. During this time period, OCHA explored alternative resources. OCHA enrolled Student in Wraparound Orange County (Wraparound) and also explored using a therapeutic behavior therapist to improve Student's behavior at home and at school. Dr. Gomes and Dr. Robin Ciafone, Student's psychologist at CGC,¹⁵ testified about the effectiveness of Wraparound and how these services could be used to keep Student at home. They both described Wraparound as a program where Student and Parents are each assigned a "partner" to work with the family to create a plan that could help to support Student and his family. Both partners become a part of the therapeutic team and consult with Student's therapist regarding their progress. Mr. Sabol testified that Student's behavior improved during this period of time and Parent's testified that Student's behavior improved somewhat.

73. On June 16, 2006, District convened an expanded IEP meeting, to discuss Parents' concerns about Student's behavior and lack of academic progress. At this meeting, one of Student's teachers, Ms. Kwak and Mr. Sabol all noted that Student's behavior had improved. The team also discussed the Bridges program and asked Parents to visit the Bridges school. Dr. Shaw, a representative from OCHA discussed the Wraparound program and concluded that at this time a residential placement assessment was not warranted. The team believed that it was important to explore alternatives so that Student could remain at home in a less restrictive environment than residential placement. The June 16, 2006 IEP team rejected Parent's request for a residential placement evaluation and concluded that another meeting would be scheduled before the end of September to discuss placement for the 2006-2007 school year. Since Student's behavior had improved and OCHA had offered Wraparound services, and the District was exploring alternative placements, the IEP team's decision to not conduct a residential placement evaluation was reasonable and did not deny Student FAPE.

74. On August 31, 2006, the IEP team met again to discuss Student's placement because Student was having behavioral difficulties and not making academic progress at Kennedy. The team offered Student an SDC-ED class at Gilbert. The Gilbert program was on a smaller campus, with a smaller class. The academic day consisted of only three periods. The team believed that Gilbert would meet Student's unique needs: more individual attention to work on his academic and behavior deficits; a shorter day would be helpful because of his ADHD; and a smaller campus would help Student with his behavior problems. Parents requested time to visit Gilbert to see the proposed class and program. Parents visited Gilbert when school was in session and rejected this placement. Parents objections were: a teacher had not yet been assigned to the SDC class; and the principal expressed her reservations about Student attending the program because of his behavior problems. Student returned to the Kennedy program.

¹⁵ Dr. Ciafone received her master's degree in psychology in 1986 from Loyola Marymount University and received her doctorate in clinical psychology from California School of Professional Psychology Alliant University in 1996. She has been employed by CHC since August 1997 and in July 1999 became the assistant clinical program director.

75. On October 11, 2006, the IEP team met to discuss Student's placement and Student's continuing behavior difficulties. Parents and Mr. Sabol reported that Student's behavior had become more aggressive and defiant. The IEP team again discussed the Gilbert program and concluded that he would be more successful in a smaller school with a more structured program. The team also recommended behavioral emotional support from the counselor at Gilbert to help him transition into the program. The team agreed that Student would remain at Kennedy until an enrollment meeting with Gilbert staff was scheduled. On October 26, 2006, Parents and Student agreed to placement at Gilbert, affirming the decision of the rest of the IEP team. District's offer of placement at Gilbert in the SDC-ED classroom provided Student a program to meet his unique needs in the LRE.

76. While Student continued to attend Kennedy, waiting to transfer to Gilbert, Student's behavior continued to deteriorate. Up until October 30, 2006, Student's maladaptive behavior at school involved using profanity against staff. Thereafter, his behavior escalated to his first unprovoked physical altercation at school aimed at Mr. Sabol. The incident is described in Factual Finding 14. Both Mr. Sabol and Ms. Kwak, who worked consistently with Student during the school day, testified that Student's physical aggression surprised them.

77. Because Student assaulted his teacher, District referred the matter for a manifestation determination. An IEP team met on November 6, 2006, to determine if Student's behavior was a manifestation of his disabling condition, ED. The team found Student's behavior was a manifestation of his disabling condition. LSPC recommended expulsion but because Student's behavior was a manifestation of his disability he was ineligible for expulsion.

78. The November 6, 2006 IEP team included Gilbert representatives Sue Sachs, assistant principal, and Miriam Lambeth, special education teacher. These representatives voiced concerns about Student's placement at Gilbert because of Student's severe behavior problems. The team indicated that Student needed a more restrictive placement than what Gilbert could offer at this time. Parents requested an assessment for residential placement and the team agreed that Student should be evaluated by OCHA for residential placement. The November 6, 2006 IEP team agreed that Student would remain at Gilbert pending the evaluation. The team indicated that they would return to an IEP in December to complete Student's annual IEP and review the results of OCHA's evaluation. Student's behavior plan was reviewed and revised to aid Student in his temporary placement at Gilbert.

79. Prior to the October 30, 2007 incident, Student had not required one of the most restrictive placements, residential placement. At the November 6, 2006 IEP meeting the team recommended that OCHA evaluate Student for residential placement. At this meeting, District recognized and timely identified when Student's behaviors at school and at home required a more structured and restrictive program than even Gilbert could offer.

80. Because Gilbert was an alternative school with a small campus environment, and its SDC-ED classroom had a very low Student to teacher ratio, Student would be more

closely supervised. He would receive more individualized academic instruction and the education model provided greater flexibility to enable Student to complete his work assignments and credits. District also offered psychological services and school based counseling to help him transition to Gilbert. Student's teachers confirmed that Gilbert was an appropriate interim placement. They testified that when Student was on the Gilbert campus, Student did not exhibit any behavioral problems. Thus, the District's offer of an interim placement in the LRE at Gilbert would address Student's unique needs in behavior and academics while OCHA completed Student's evaluation for residential placement. District offered Student FAPE.

Timelines for Residential Placement Evaluation

81. Residential placement is not an emergency service based on the timeline and procedures required by regulation. First, an expanded IEP team meeting with a member of the local community health service must be held within 30 days if a member of the IEP team believes residential placement is necessary. Either the community service or the LEA determines that additional mental health services are needed. Community health services must assess a student for mental health services within 50 days of the parent's written consent and present a recommendation at an IEP team meeting. The evaluator should review the recommendation of the report with the parent and appropriate members of the IEP team and make a copy available to parents at least two days prior to the IEP team meeting. If no mental health assessment is determined necessary, the reasons shall be documented by the community health services and the parents must be notified.

82. On December 6, 2006, the expanded IEP team recommended a residential placement assessment. The IEP team agreed to meet on December 22, 2006, to discuss the results of the residential placement assessment. A supervisor at OCHA assigned this assessment to Asmeret Hagos, who has worked as a placement case manager for seven years. She had performed approximately 100 assessments and approximately 100 searches for residential placement. Ms. Hagos received written parental consent for the assessment plan on November 22, 2006. OCHA prepared a report by December 18, 2006, less than 30 days after receiving Parents' consent and only twelve days after the expanded IEP team requested a residential placement evaluation. Mr. Hagos met with Parents on December 20, 2006, to review the residential placement evaluation and they agreed with OCHA's analysis. On December 22, 2006, the IEP team approved OCHA's recommendation that Student be placed in a residential placement. Thus, OCHA was well within the timelines for assessing Student, completing the written assessment, discussing the report with Parents, and presenting a recommendation to the IEP team.

83. At the December 22, 2006 expanded IEP meeting, OCHA's representative, Ms. Hagos, agreed to search both in California and out of state for an appropriate residential treatment center. Ms. Hagos has performed over 100 searches for residential treatment programs and is very familiar with available programs. Parents requested placement at ERA. OCHA and District informed Parents that they could not fund Student's placement at ERA, because ERA was not certified by the California Department of Education, and it was

organized and operated for profit. The fifteenth day to complete the search was January 5, 2007. Because the District was not in session on that day, Parents agreed to a three day extension of time and IEP residential placement meeting was set on January 8, 2007.

84. On December 26, 2006, OCHA sent packets of information to four schools, two in California and two out of state facilities. Student was not accepted at the less restrictive California schools because of his volatile behavior. On January 3, 2007, Provo Canyon in Utah accepted Student, and on January 4, 2007, Ms. Hagos met with Student's father, discussed Provo Canyon and gave him information about the placement. Parents cancelled the January 8, 2007 meeting because they were traveling. The meeting was rescheduled to January 24, 2007. Even though the placement meeting was not held within 15 days, because of Parents' actions (time waiver and request to continue placement meeting), this meeting was timely. The ALJ finds that OCHA did a thorough search for Student's residential placement and met the required timelines for locating an appropriate residential placement program.

Student's Unilateral Placement at Eagle Ranch Academy

85. Reimbursement for the costs of a private school may be reduced or denied if the parents did not give written notice to the school district 10 business days before removing their child from the public school rejecting the proposed placement, stating their concerns, and expressing their intent to enroll the student in a private school at public expense. However, Parents may forego complying with the notice requirement if compliance would likely result in physical or emotional harm to the child.

86. Parents contend that Student would be physically or emotionally harmed if he remained at Gilbert. They testified that they were concerned about staff's failure to supervise Student when he arrived at Gilbert, Student's truancy, his association with alleged gang members and their inability to control Student's behavior.

87. District initiated supports to allay Parents concerns while OCHA assessed Student for residential placement. Student's teacher at Gilbert, Ms. Lambeth altered her schedule so that she would begin teaching one hour earlier to supervise Student when he arrived at school. District offered Student counseling to help in his transition to Gilbert but Student refused to participate. Parents did not request an IEP meeting to discuss a more structured placement, such as a non-public school (NPS). In fact, at the December 6, 2007 IEP meeting District offered Student placement in a NPS during the residential assessment period.

88. OCHA offered many services to assist Student and his Parents so that Student would continue his placement in the LRE first at Kennedy and then at Gilbert. On October 31, 2007, Robin Ciafone offered Student group therapy to supplement his individual therapy. Student agreed to group therapy, because he wanted to make better choices, improve self-control and receive feedback from his peers. In addition, OCHA supported Student with its WRAP team and referred a therapeutic behavioral therapist (TBS coach) to work with

Student on his behaviors at home. On November 2, 2007, Student and Parents met with the WRAP team and the TBS coach to discuss interventions. At this session, Student expressed fears of being separated from his Parents by being sent to juvenile hall or residential placement. Encouraged by Student's discussing his feelings, the coach was prepared to develop a client behavior plan and start direct services. The TBS coach believed that with more time Student would be more responsive. Thus, District and OCHA gave Student and his Parents the support that was necessary to keep Student in his home and at Gilbert pending his assessment by OCHA.

89. Parents did not give OCHA's intensive program including its WRAP team, the TBS coach, group therapy and the interim program at Gilbert an opportunity to see if all of these supports would enable and motivate Student to improve his behavior so that he would be able access his education. Student was enrolled at Gilbert for only 10 days when Parents withdrew him from Gilbert and on November 17, 2006, placed him at Eagle Ranch. The incident that precipitated Parents' unilateral placement of Student involved Student's mother following the school bus, observing Student enter and then quickly exit school and get into a car containing adults that she believed were gang members. However, mother testified that Student returned to school almost immediately. She was unable to explain why she believed they were gang members. When mother confronted these alleged gang members, about driving her son away from campus, they apologized for taking her son. Parents removed Student primarily because of his association with alleged gang members and their inability to control Student. The ALJ finds that this incident and Parents' concerns described in Factual Finding 85 are not sufficient to conclude that Student's interim placement at Gilbert would likely result in physical or emotional harm to Student. Thus, Parents should have complied with the 10 day notice requirement in order to be reimbursed for the costs of a private school.

90. Parents' also argue that they gave the District proper notice of Student's placement. The morning after Student was placed Student's mother called the attendance office to inform the District that Student would not return. On November 21, 2006, father wrote to Dr. Barbara Moore, Director of Special Education for the District, informing her that Student was unilaterally placed at Eagle Ranch because Student was in imminent danger at that time. In this letter, father reported Parents reasons for unilateral placement as discussed in Factual Finding 85. However, Parents letter was written after Student was placed at Eagle Ranch. Thus, Parents' notice to District is not timely.

91. Before Student's behavior declined in late October 2006 and Parents requested residential placement, Parents searched for a residential placement, and on February 21, 2006, discussed Student's placement with Eagle Ranch's director. On March 28, 2006, Parents completed a questionnaire to ascertain if Student was an appropriate candidate for Eagle Ranch. On November 15, 2006, Parents contacted the Eagle Ranch director about placing Student immediately in the program. On November 17, 2006, at 5:00 a.m., the Eagle Ranch representatives arrived at Student's home, awakened Student and transported him to this school in Utah. Because Parents began their search months before Student's behavior declined, it appears that Parents intended to place Student in Eagle Ranch without notifying

District of their intent to withdraw him from Gilbert and enroll Student in a residential placement.

92. Parents had more options than placement at Eagle Ranch. Student had many supports in the community which were not being fully utilized. Through OCHA Student had the support of a psychologist, a psychiatrist, a behaviorist, group therapy and the WRAP team. Parents did not request an IEP meeting to find out about school options and supports through OCHA. Although Parents requested a residential placement assessment, they had not discussed the restrictions District or OCHA might have regarding qualifications and quality of residential placement facilities.

District and OCHA's Offer of Residential Placement at Provo Canyon

93. School districts are required to provide each special education student with a program in the least restrictive environment, with removal from the regular education environment occurring 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 could not be achieved satisfactorily. To determine whether the District offered Petitioner a FAPE, the analysis must focus on the adequacy of the District's proposed program. An IEP need not conform to a parent's wishes in order to be sufficient or appropriate. At the January 24, 2004 IEP meeting, the team offered Parents placement at Provo Canyon a residential treatment facility in Utah.

94. Parents rejected Provo Canyon because they preferred Eagle Ranch. According to Parents, they disliked Provo Canyon because it was a locked facility and Student did not need to be in such a restrictive placement. By the time OCHA and District recommended Provo Canyon, Student had been living at Eagle Ranch for more than a month. Parents asserted that District and OCHA should allow Student to remain at Eagle Ranch because he has a difficult time acclimating to new places. In addition, father researched Provo Canyon on the internet and found out that a number of lawsuits and complaints were posted on his website.

95. Parents testified that after they refused the offer of Provo Canyon, OCHA and the District left the IEP meeting and cut off discussion. However, District and OCHA witnesses testified that they did not leave the meeting and discussed several issues with Parents. OCHA remained at the IEP meeting to answer Parents' questions. District and OCHA informed Parents that they would each stop service to Student because he was enrolled at Eagle Ranch, and out of the District. OCHA informed Parents that their services could begin again with a new referral. OCHA directed Parents to Manny Robles, the AB3632 Coordinator, if they had any questions about criteria for residential placement facilities. District's and OCHA's witnesses were persuasive. Parents were informed about their rights and options.

96. However, the analysis must focus on Provo Canyon. District and OCHA assert that their offer of placement at Provo Canyon would meet Student's unique needs in behavior, S/L and help him to access to his education in the LRE. Provo has been certified by the California Department of Education and its teachers are certified in special education. Provo Canyon offers its students therapeutic services including individual therapy, family therapy, and a chemical dependence program.¹⁶ Student would be given individual attention in: small classrooms with one-to-one instruction; intensive therapy; and medication monitoring. Speech and language services are also available. Thus, the services available at Provo Canyon were designed to address Student's unique needs and provide educational benefit.

97. Provo Canyon's structured program would address Student's specific behavioral needs. The structured program is consistent and therapeutic. Student has a history of behavior problems, physical and verbal aggression and of running away from school and home. At Provo Canyon, if Student behaves, he is rewarded and given more privileges. Thus, the Provo Canyon program provides a controlled environment where Student would take more responsibility for his behavior in order to help him control his impulsive behavior. Provo Canyon's secure perimeter addresses Student's safety issues that involve his association with gang members and absences from school and home. The Provo Canyon program and services meet Student's unique needs. Therefore, District's and OCHA's offer of residential placement provides Student with FAPE.

98. By December of 2006, Parents, District and OCHA agreed that Student should be placed in a residential program. At that time, Student was not able to benefit from placement in a SDC-ED class and his unique needs could only be met in a residential placement. On November 17, 2007, Parents unilaterally placed Student at Eagle Ranch. OCHA did an extensive search for a residential placement for Student. The California placements are less restrictive than those in other states. However, the California programs would not accept Student because of his aggressive behavior and being a flight risk. Though Provo Canyon is more restrictive than Eagle Ranch, as explained above, it is a program that meets Student's unique needs. Therefore, Provo Canyon is a program in the least restrictive environment.

Eagle Ranch's Program Is Not Designed to Meet Student's Unique Needs

99. Eagle Ranch's program cannot meet Student's unique needs and provide him with educational benefit. Eagle Ranch does not employ any certified special education teachers and there is only one certified teacher for the 48 students enrolled at Eagle Ranch, Mandy Anderson. Ms. Anderson has no special education teaching experience and Student's IEP was the first that she ever drafted. Eagle Ranch uses an internet based learning system, 3-D Learn, to teach its students their core subjects. Teachers employed by 3-D Learn communicate with students by e-mail. In class, there are only three teacher's aides for 12 to 15 students. Eagle Ranch's contract S/L therapist is too expensive for Parents to hire to work

¹⁶ Student's parents and therapist reported that Student had developed a substance abuse problem.

with Student. In addition, Eagle Ranch is not certified by the California Department of Education. Therefore, Student has not received any special education services.

100. Student did not present any evidence that he was receiving educational benefit from the program at Eagle Ranch. Penny Frank, therapist at Eagle Ranch, testified that Student has made some progress in therapy. However, no transcript of grades or testimony was presented to demonstrate that Student was making academic progress. An offer of placement at Eagle Ranch would not provide Student with FAPE.

101. A school district may be required to reimburse a parent for the costs of a private school if the child previously received special education services from the district and the district failed to make a FAPE available to the child.

102. As determined in Factual Findings 32-66, District made FAPE available to Student from September, 2005, to August 2006 when District offered Student a program and placement in the LRE at Kennedy. As determined in Factual Findings 67-80 and District made FAPE available to Student from August 2006 to November 2006 when District offered Student a program and placement in the LRE at Gilbert. As determined in Factual Findings 93-98, District and OCHA made FAPE available to Student when they offered Student a program and placement for the remainder of the 2006-2007 school year at Provo Canyon, a residential placement.

103. As discussed in Legal Conclusions 20 and 21, an ALJ may not render a decision that results in out of state placement in a residential program that is not been certified by the California Department of Education and is for-profit.

104. Eagle Ranch is not certified by the Department of Education and it is a for profit school. Even if Student could be prospectively placed at Eagle Ranch, it is not an appropriate placement for Student as determined in Factual Findings 99 and 100.

LEGAL CONCLUSIONS

1. Petitioner has the burden of proving non-compliance with the IDEA by a preponderance of evidence. (*Schaffer v. Weast* (2005) 546 U.S. 49, 126 S.Ct. 528, 163 L.Ed.2d 387.)

Requirements of a FAPE

2. A child with a disability has the right to a FAPE under the Individuals with Disabilities Education Improvement Act and California law. (20 U.S.C. §1412(a)(1)(A); Ed. Code, § 56000.) A FAPE is defined in pertinent part as special education and related services that are provided at public expense and under public supervision and direction, that meet the State's educational standards, and that conform to the student's IEP. (20 U.S.C. §1401(9); Cal. Code Regs., tit. 5, § 3001, subd. (o).) Special education is defined in

pertinent part as specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability that are needed to assist the child to benefit from instruction. (20 U.S.C. § 1401(29); Ed. Code, § 56031.) Special education related services include in pertinent part developmental, corrective, and supportive services, such as mental health counseling services, as may be required to assist a child with a disability to benefit from special education. (20 U.S.C. § 1401(26); Ed. Code, § 56363.)

3. To determine whether the District offered Petitioner a FAPE, the analysis must focus on the adequacy of the District's proposed program. (*Gregory K. v. Longview Sch. Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) An IEP need not conform to a parent's wishes in order to be sufficient or appropriate. (*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*, at p. 207.) Nor does the IDEA require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's potential. (*Rowley*, at pp. 198-200.) Rather, the *Rowley* Court held that school districts must provide only a "basic floor of opportunity" that consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the student. (*Rowley*, 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.*, *supra*, 811 F.2d at p. 1314.)

4. A child's unique educational needs are to be broadly construed to include the child's academic, social, health, emotional, communicative, physical and vocational needs. (*Seattle Sch. Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500, citing J.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106.) A school district must offer a program that is reasonably calculated to provide more than a trivial or minimal level of progress. (*Amanda J. v. Clark County Sch. Dist.* (9th Cir. 2001) 267 F.3d 877, 890, citing *Hall v. Vance County Bd. of Educ.* (4th Cir. 1985) 774 F.2d 629, 636.) A child's progress must be evaluated in light of the child's disabilities. (*Bd. of Educ. v. Rowley*, *supra*, 458 U.S. at p. 202; *Mrs. B. v. Milford Bd. of Educ.* (2d Cir. 1996) 103 F.3d 1114, 1121.)

5. The congressional mandate to provide a FAPE to children includes both a procedural and a substantive component. In *Rowley*, *supra*, 458 U.S. 176 at p. 205, the United States Supreme Court utilized a two-prong test to determine if a school district had complied with the IDEA. First, the district is required to comply with statutory procedures. Second, a court will examine the child's individual education program (IEP) to determine if it was reasonably calculated to enable the student to receive some educational benefit (See also, *W.G. v. Bd. of Trustees of Target Range Sch. Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1483.)

6. The IDEA requires that a due process decision be based upon substantive grounds when determining whether the child received a FAPE. (Ed. Code, § 56505 (f)(1).) A procedural violation therefore only requires a remedy where the procedural violation

impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of a FAPE to the parent's child, or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E); Ed. Code, § 56505, subd. (j); *Rowley, supra*, 458 U.S. at pp. 206-07; see also *Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877.) Procedural violations which do not result in a loss of educational opportunity or which do not constitute a serious infringement of parents' opportunity to participate in the IEP formulation process are insufficient to support a finding that a pupil has been denied a free and appropriate public education. (*W.G. v. Board of Trustees, supra*, 960 F.2d at p. 1482.)

7. Under *Rowley* and state and federal statutes, the standard for determining whether a district's provision of services substantively and procedurally provided a FAPE involves four factors: (1) the services must be designed to meet the student's unique needs; (2) the services must be reasonably designed to provide some educational benefit; (3) the services must conform to the IEP as written; and (4) the program offered must be designed to provide the student with the foregoing in the least restrictive environment. While this requires a school district to provide a disabled child with meaningful access to education, it does not mean that the school district is required to guarantee successful results. (*Walczak, supra*, 142 F.3d at p. 133.)

8. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams by & Through Adams v. Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) "An IEP is a snapshot, not a retrospective." (*Roland M. v. Concord Sch. Comm.* (1st Cir. 1990) 910 F.2d 983, 992; *Adams by & Through Adams v. Oregon, supra*, 195 F.3d at p. 1149, citing *Fuhrmann v. East Hannover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1041.) The IEP must be evaluated in terms of what was objectively reasonable when it was developed. (*Roland M. v. Concord Sch. Comm., supra*, 910 F.2d at p. 992.)

Assessments

9. Before any action is taken with respect to the initial placement of an individual with exceptional needs, an assessment of the student's educational needs shall be conducted. (Ed. Code, § 56320.) Thereafter, special education students must be reassessed every three years or more frequently, if conditions warrant, or if the student's parent or teacher requests a new assessment and that a new IEP be developed. (Ed. Code, § 56381.) The student must be assessed in all areas related to his or her suspected disability, and no single procedure may be used as the sole criterion for determining whether the student has a disability or to develop an appropriate educational program for the student. (20 U.S.C. § 1414 (a)(2), (3); Ed. Code, § 56320, subds. (e), & (f).) Tests and assessment materials must be administered by trained personnel in conformance with the instructions provided by the producer of such tests. (20 U.S.C. § 1414(a)(2), (3); Ed. Code, § 56320, subds. (a) & (b).)

10. A child must be assessed by a school district in all areas related to the suspected disability including, if appropriate, social-emotional status. (34 C.F.R. § 300.532(g); Ed. Code, § 56320, subd. (f).) 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.)

Prior Written Notice

11. A school district must provide parents with "prior written notice" whenever it proposes or refuses "to initiate or change, the identification, evaluation or educational placement of the child... ." (34 C.F.R. § 300.503(a).) The minimum requirements for prior written notice include: a description of the action proposed or refused by the district; an explanation of why the district proposes or refuses to take an action; a description of each evaluation procedure, assessment, record, or report the district used as a basis for the proposed or refused action; and a description of other options considered by the IEP team and the reasons why those options were rejected. (34 C.F.R. § 300.503(b)(1)-(7).)

Requirements When Child's Behavior Impedes His Learning

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

13. When a child exhibits a serious behavior problem, such as self-injurious or assaultive behavior, California law imposes specific and extensive requirements for the development of a functional analysis assessment and a behavior intervention plan. (Cal. Code Regs., tit. 5, §§ 3001, subd. (f), 3052.)

14. Less serious behaviors require the IEP team to consider and, if necessary, develop positive behavioral interventions, strategies and supports. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i); Ed. Code, § 56341.1, subd. (b)(1).) In California, a behavior intervention is "the systematic implementation of procedures that result in lasting positive changes in the individual's behavior." (Cal. Code Regs., tit. 5, § 3001, subd. (d).) It includes the design, evaluation, implementation, and modification of the student's individual or group instruction or environment, including behavioral instruction, to produce significant improvement in the student's behavior through skill acquisition and the reduction of problematic behavior. (*Ibid.*) Behavioral interventions should be designed to provide the student with access to a variety of settings and to ensure the student's right to placement in the least restrictive educational environment. (*Ibid.*) An IEP that does not appropriately address behavior that impedes a child's learning denies a student a FAPE. (*Neosho R V Sch. Dist., v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028; *Escambia County Bd. of Educ. v. Benton* (S.D. Ala. 2005) 406 F.Supp.2d 1248, 1265.)

15. Education Code section 56520, subdivision (b)(1), provides, “That when behavioral interventions are used, they be used in consideration of the pupil's physical freedom and social interaction, be administered in a manner that respects human dignity and personal privacy, and that ensure a pupil's right to placement in the least restrictive educational environment.” California regulations provide that a functional analysis assessment (FAA) and a behavior intervention plan (BIP) which is derived from the FAA, occur after the IEP team finds that instructional/behavioral approaches specified in the student’s IEP have been ineffective, or after a parent has requested an assessment pursuant to Education Code section 56320 et seq. (Cal. Code Regs., tit. 5, § 3052, subd. (b).) The BIP is a written document that becomes part of an IEP and is developed when the student exhibits a serious behavior problem that significantly interferes with the implementation of the goals and objectives of the student’s IEP. A “serious behavior problem” is defined as behavior that is assaultive, self-injurious or other severe behavior problems that are “pervasive and maladaptive for which instructional/behavioral approaches specified in student’s IEP are found to be ineffective.” (Cal. Code Regs., tit. 5, §§ 3001, subd. (f) & (aa), 3052, subd. (a)(3).)

Least Restrictive Environment

16. School districts are required to provide each special education student with a program in the least restrictive environment, with removal from the regular education environment occurring 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 could not be achieved satisfactorily. (20 U.S.C. § 1412, subd. (a)(5)(A); Ed. Code, § 56031.) Mainstreaming is not required in every case. (*Heather S. v. State of Wisconsin* (7th Cir. 1997) 125 F.3d 1045, 1056.) However, to the maximum extent appropriate, special education students should have opportunities to interact with general education peers. (Ed. Code, § 56031.) In order to measure whether a placement is in the LRE, four factors must be considered: (1) the academic benefits available to the disabled student in a general education classroom, supplemented with appropriate aids and services, as compared with the academic benefits of a special education classroom; (2) the non-academic benefits of interaction with children who are not disabled; (3) the effect of the disabled student's presence on the teacher and other children in the classroom; and (4) the cost of mainstreaming the disabled student in a general education classroom. (*Sacramento Unified School District v. Holland* (9th Cir. 1994) 14 F.3d 1398, 1403.)

Residential Placement

17. Title 2, section 60100 of the California Code of Regulations governs a local education agency’s (LEA) identification and placement of seriously emotionally disturbed pupil and states the procedures that should be followed when an IEP team member recommends a residential placement for a student who is designated as emotionally disturbed. First, when a request for residential placement is made an expanded IEP team meeting shall be convened within 30 days with an authorized member of the community mental health service. (Cal. Code Regs., tit. 2, § 60100, subd. (b)(1).) When either the

community health service or the LEA determines that additional mental health services are needed the LEA and the community health service shall proceed in accordance with sections 60400 and 60045.

18. If no mental health assessment is determined to be necessary the reasons shall be documented by the community health service and the parents shall be notified. (Cal. Code Regs., tit. 2, § 60045, subd. (a)(1).)

19. Prior to the determination that a residential placement is necessary for the pupil to receive special education and mental health services, the expanded IEP team shall consider less restrictive alternatives, such as providing a behavioral specialist and full-time behavioral aide in the classroom, home and/ other community environments, and /or parent training in these environments. The IEP team shall document the alternatives to residential placement that were considered and the reason why they were rejected. (Cal. Code Regs., tit § 60100, subd. (c).)

20. In pertinent part, Regulations section 60100 subd (h) provides:

Residential placements for a pupil with a disability who is seriously emotionally disturbed may be made out of California only when no in-state facility can meet the pupil's needs and only when the requirements of subsections (d) and (e) have been met. Out-of-state placements shall be made only in residential programs that meet the requirements of Welfare and Institutions Code Sections 11460(c)(2) through (c)(3). For educational purposes, the pupil shall receive services from a privately operated, non-medical, non-detention school certified by the California Department of Education.

21. An ALJ may not render a decision that results in the placement of a student in a nonpublic, nonsectarian school if the school has not been certified by the California Department of Education under Education Code section 56366.1. (Ed. Code, § 56505.2, subd. (a).)

22. The process of obtaining special education mental health services is not designed for an emergency situation. (Gov. Code, § 7576, subd. (f); Cal. Code Regs., tit. 2, § 60040, subd. (e).) If a student requires emergency services, a parent must seek other resources. (Gov. Code, § 7576, subd. (g); Cal. Code Regs., tit. 2, § 60040 (e).)

Reimbursement for Residential Placement

23. A district is not required to pay for the cost of education, including special education and related services, for a child attending a private school if the district made a FAPE available to the child and the parents chose to place the child in a private school. (20 U.S.C. § 1412(a)(10)(C)(i); 34 C.F.R. § 300.148(a); Ed. Code, § 56174.)

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

25. Reimbursement for the costs of a private school shall not be reduced or denied for failing to provide notice of intent to remove the child from the public school in any of the following circumstances: (1) the school prevented the parent from providing notice; (2) the parents were not informed of the notice requirement; or (3) complying with the notice requirement would likely result in physical harm to the child. (20 U.S.C. § 1412(a)(10)(C)(iv)(I); 34 C.F.R. § 300.148(e)(1); Ed. Code, § 56177, subd. (a).)

Determination of Issues

Did District from March 22, 2005 through the 2006-2007 school year fail to assess Student in all areas of suspected disability, by failing to perform: a Functional Analysis Assessment; an Assistive Technology Assessment; a Neuropsychological Assessment; and a Speech and Language Assessment?

Functional Analysis Assessment

26. Based on Factual Findings 1-21 and 37-49 and Legal Conclusions 5-7, 9-10, 12-15, District did not fail to assess Student in an area of suspected disability by not conducting a FAA to develop a BIP. From March 22, 2005 through October 30, 2006, although Student's problematic behaviors continued an FAA was not required. A FAA is required when the IEP team finds that instructional/behavioral approaches specified in the student's IEP have been ineffective, or after a parent has requested an assessment. If an FAA is performed, a BIP is developed. A BIP is only required when the student exhibits a "serious behavior problem," defined as behavior that is assaultive or self-injurious." Student's problem behaviors would be characterized as defiant, using profanity, testing limits, and refusing to do his school work. Student did not have a "serious behavior problem" requiring an FAA and a BIP because his behavior was not assaultive or self-injurious. Student had a number of IEPs during the spring and summer of the 2005-2006 school year and the team modified Student's BSP to make it more effective. The IEP team did not find that the behavioral approaches in Student's IEPs were ineffective and Student's Parents never requested a FAA. It was not until October 30, 2006, when Student threw a chair at Mr. Sabol that his behavior would be characterized as assaultive.

27. Student's BSP was revised in December 2005, in April 2006, and in November 2006, so that different interventions and/or disciplines of conflict management were utilized. Student's BSP identified Student's targeted behaviors, identified strategies for addressing those behaviors and contained an appropriate behavioral goal. The BSPs were designed to offer reinforcement for appropriate behavior and to teach more acceptable replacement behaviors by focusing on Student's being able to identify his feelings. Interventions focused on teaching Student techniques to improve anger management and social skills. In addition, Student classroom aides provided a highly structured SDC-ED classroom where behavioral management strategies were utilized throughout Student's day.

28. A failure to assess is a procedural violation of the IDEA. However, a procedural violation is a denial of FAPE only if it impeded the student's right to a FAPE, or caused a deprivation of educational benefits to the student. Here there was no procedural violation of FAPE.

Assessments in Assistive Technology, Neuropsychological and Speech and Language

29. Based on Factual Findings 2-4, 22-31, and Legal Conclusions 5-10, District assessed Student in all the areas of suspected disability. District had an obligation to initiate a special education assessment referral of Student upon receiving a written request for such an assessment, or if District had a reason to suspect that Student had a disability and a reason to suspect that special education and related services may be needed to address that disability. However, Parents did not request, in writing or otherwise, an AT or neuropsychological assessment. The District had no reason to suspect that the Student had a disability. Student had been assessed in S/L on April 27, 2004 and November 28, 2005, and received services to address his unique needs in this area.

Did District deny Student a FAPE from March 22, 2005 through 2006-2007 school years by failing to provide Student with services to meet his unique needs by failing to: (a) give prior written notice to Student's Parents of its refusal to perform assessments in all areas of suspected disability; (b) design and implement a Behavioral Intervention Plan (BIP); and (c) offer Student school based counseling, a one to one aide, assistive technology; and appropriate speech and language services?

Prior Written Notice

30. Based on Factual Findings 30-31 and Legal Conclusions 5-7, 11, District had no duty to provide parents with prior written notice because it did not propose or refuse to initiate or change the identification, evaluation or educational placement of Student. A parent must request an assessment or referral for assessment of their child in writing unless the parent is not capable of putting the request in writing. Student presented no evidence that Parents made a written request for an assessment of Student in any area of suspected disability or that Parents were not capable of putting the request in writing.

Design and Implement a BIP

31. Based on Factual Findings 1-4, 35-47 and Legal Conclusions 2-10 District was not required to initiate a FAA which is necessary to design a BIP. The more stringent prerequisite of a BIP is that a Student has a “serious behavior problem.” A “serious behavior problem” is defined as behavior that is assaultive, self-injurious or other severe behavior problems that are “pervasive and maladaptive for which instructional/behavioral approaches specified in student’s IEP are found to be ineffective.” District has provided Student with services that were designed to meet Student’s unique needs and reasonably calculated to provide some educational benefit.

School-Based Counseling, a One-to-One Aide, Appropriate Speech and Language Services and Assistive Technology

32. Based on Factual Findings 48-51, 52-55, 56-60, 61-62 and Legal Conclusions 2-10, Student was in a small classroom setting where he received direct instruction and redirection from Mr. Sabol and Ms. Kwak. Student received individual and family psychological, psychiatric, wrap around and TBS services from OCHA. Student did not consistently participate in counseling through OCHA and therefore, would not participate in school based counseling. Moreover, pullout school based counseling and a one-to-one aide would not help Student access his education. Student did not like to be singled out and receive pullout services or participate in services that would make him feel different from the other students. Student would not benefit from AT services. Finally, District provided Student with S/L services that addressed his unique needs.

Did the District and OCHA fail to provide Student with FAPE in the LRE for the 2006-2007 school year because of their failure to place Student in a residential treatment facility requested by Parents placement at Eagle Ranch?

33. Based on Factual Findings 63-81 and Legal Conclusions 3-4, 6-8 and 16, District provided Student with a FAPE in the LRE for the 2005-2006 school year when it offered Student placement at Kennedy in its SDC-ED. To determine whether the District offered Student a FAPE, the analysis must focus on the adequacy of the District’s proposed program and placement. Student’s placement in a SDC-ED class at Kennedy provided Student with a small structured class that met Student’s unique needs in behavior and academics. An IEP need not conform to a parent’s wishes in order to be sufficient or appropriate. Nor does the IDEA require school districts to provide special education students with the best education available. District provided Student with services that were designed to meet Student’s unique needs and are reasonably calculated for Student to receive some educational benefit. Therefore, District offered Student FAPE from March 22, 2005 through the 2005-2006 school year.

34. Based on Factual Findings 74-80 and Legal Conclusions 3-4, 6-8 and 16, District provided Student with a FAPE in the LRE for the 2006-2007 school year when it offered Student temporary placement at Gilbert in its SDC-ED. To determine whether the

District offered Student a FAPE, the analysis must focus on the adequacy of the District's proposed program and placement. District and OCHA had a duty to keep Student in the LRE. Parents wanted Student to be assessed for residential placement and be offered residential placement. However, District and OCHA used Gilbert and many services in an attempt to keep Student in the community. Gilbert met Student's needs in that it was a smaller campus than Kennedy and it was a shorter school day. Student could be given more individual attention at Gilbert. An IEP need not conform to a parent's wishes in order to be sufficient or appropriate. Nor does the IDEA require school districts to provide special education students with the best education available. District's offer of Gilbert provided Student with FAPE.

35. Based on Factual Findings 81-84 and Legal Conclusions 18-22, District and OCHA complied with all of the timelines for Student's residential placement. Residential placement is not an emergency service based on the timeline and procedures required by regulation. OCHA was well within the timelines for: assessing Student, completing the written assessment; and discussing the report with Parents; and presenting a recommendation to the IEP team. OCHA did a thorough search for Student's residential placement and met the required timelines for locating an appropriate residential placement program. Therefore, there was no procedural violation.

36. Based on Factual Findings 93-98 and Legal Conclusions 17-22, District and OCHA provided Student with FAPE in the LRE for 2006-2007 school year when Student was offered residential placement at Provo Canyon. To determine whether the District offered Student a FAPE, the analysis must focus on the adequacy of the District's proposed program and placement. District and OCHA had a duty to keep Student in the LRE. Parents wanted Student to be assessed for residential placement and be offered residential placement. Parents unilaterally placed Student at Eagle Ranch. Eagle Ranch was Parents' preference but it did not meet Student's unique needs based on Factual Findings 99-100. An IEP need not conform to a parent's wishes in order to be sufficient or appropriate.

37. Based on Factual Findings 88-92, 101-104 and Legal Conclusions 23-25, District and OCHA are not required to pay for the cost of education and related services for Student at Eagle Ranch because District and OCHA made FAPE available to Student.

ORDER

All of Student's claims and requests for relief are denied.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires this decision to indicate the extent to which each party prevailed on each issue heard and decided. District prevailed on all issues. OCHA prevailed on issue three, the only issue that pertained to OCHA.

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: November 16, 2007

A handwritten signature in cursive script that reads "Clara L. Slifkin". The signature is written in black ink and is positioned above a horizontal line.

CLARA L. SLIFKIN

Administrative Law Judge
Special Education Division
Office of Administrative Hearings