

BEFORE THE OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT on behalf of STUDENT,

v.

SHANDON JOINT UNIFIED SCHOOL  
DISTRICT.

OAH CASE NO.  
2008090525

**DECISION**

Administrative Law Judge (ALJ) Trevor Skarda, Office of Administrative Hearings (OAH), State of California, heard this matter on January 14-16, 20-23, and 26, 2009, in Shandon and Atascadero, California.<sup>1</sup>

Kathleen Lamay, Attorney at Law, appeared on behalf of Shandon Joint Unified School District. Andy Needles, a school psychologist with the San Luis Obispo County Office of Education (SLOCOE), attended the hearing on the District's behalf. Edwin Egelsee, Attorney at Law, appeared on behalf of Student. Student's Mother was present throughout the hearing.

Student filed his request for a due process hearing on September 17, 2008. Based on a showing of good cause, a continuance was granted on October 10, 2008. Evidence was received on January 14-16, 20-23, and 26, 2009. Good cause was established for a continuance so that the parties could submit written closing briefs. The Student's closing brief was received on February 25, 2009. District's closing brief was not received until March 17, 2009.<sup>2</sup> Thereafter, the record was closed and the matter was submitted for decision.

<sup>1</sup> The hearing convened in Shandon on some hearing days and Atascadero on others.

<sup>2</sup> District requested an extension to February 23, 2009, to mail its closing brief. District's request was granted. Although District's brief was actually received by OAH on March 17, 2009, OAH considered it anyway because Student subsequently produced a proof of service indicating that the brief had been filed in a timely manner.

<sup>3</sup> The issues stated here have been condensed. The sub-issues identified in Student's complaint and in the OAH's Order Following Prehearing Conference are analyzed in the Factual Findings and Legal Conclusions that follow.

<sup>4</sup> As clarified by Student at the prehearing conference, this sub-issue is limited to whether District's failure to hold an IEP team meeting was a procedural violation that resulted in a FAPE denial.

### ISSUES<sub>3</sub>

1. Whether the District denied Student a free and appropriate public education (FAPE) during the 2007-2008 SY because:
  - (a) The District failed to convene an individualized education program (IEP) meeting to discuss and revise Student's behavioral support plan (BSP) on or before October 20, 2007;
  - (b) The District failed to complete a functional analysis assessment (FAA) and hold an IEP team meeting to discuss the results within 60 days of receipt of parental consent for the assessment;
  - (c) The District failed to hold an IEP meeting on or before December 20, 2007, to consider changing Student's placement because he was not making sufficient progress in his moderate-to-severe special day class (SDC);<sup>4</sup>
  - (d) The June 2007 IEP did not designate whether or not the speech and language services offered were to be provided in a group or in an individual setting;
  - (e) Student's BSP was inappropriate;
  - (f) The June 2007 IEP offer of speech and language services (80 minutes per week) was not sufficient to confer meaningful educational benefit because Student required three 50-minute sessions of one-on-one speech therapy per week to address Student's deficits in expressive language, receptive language and articulation in order to make adequate progress;
  - (g) The June 2007 IEP offer of occupational therapy (OT) services (40 minutes of classroom-based services, one time per week) was insufficient because Student additionally required one 50-minute session of clinic-based OT to address sensory integration needs;
  - (h) The June 2007 IEP failed to offer Student any direct physical therapy (PT) to address Student's unique needs related to muscle tone, strength, balance, postural control, and coordination; and
  - (i) The methodology used to teach Student reading (called "Open Court") was not scientifically based and/or peer-researched for children like Student?
2. Whether the FAA and resultant Behavior Intervention Plan (BIP) completed by the District in March 2008 were inappropriate and thereby denied Student a FAPE?
3. Whether the District denied Student a FAPE during the 2008-2009 SY because:
  - (a) The BIP in the June 2008 IEP was inappropriate;
  - (b) The District's June 2008 IEP offer of a SLOCOE "moderate-to-severe" SDC was not sufficient to meet Student's significant behavioral needs, which required placement in a nonpublic school (NPS) geared towards controlling Student's behaviors;

- (c) The June 2008 IEP offer of speech and language services, (80 minutes per week) was not sufficient to confer meaningful educational benefit because Student required three 50-minute sessions of one-on-one speech therapy per week to address Student's deficits in expressive language, receptive language and articulation in order to make adequate progress;
- (d) The June 2008 IEP offer of occupational therapy (OT) services (40 minutes of classroom-based services, one time per week) was insufficient because Student additionally required one 50-minute session of clinic-based OT to address sensory integration needs; and
- (e) The June 2008 IEP failed to offer Student any physical therapy (PT) to address Student's unique needs related to muscle tone, strength, balance, postural control and coordination?

## CONTENTIONS

Regarding procedural violations during the 2007-2008 SY, Student contends that his June 2007 BSP should have been revised at an IEP team meeting prior to October 20, 2007, due to escalating behaviors which became, in relevant part, assaultive. Student further contends that when the District did agree to conduct a new FAA in order to revamp Student's BSP in November 2007, it failed to complete the FAA and hold an IEP team meeting in a timely manner. Student contends that the District should have held an IEP team meeting on or before December 20, 2007, because Student was not making sufficient progress and required a different placement. Finally, Student alleges that the District failed to designate whether speech and language services would be provided in a group or an individual setting.

Substantively, Student argues that the District failed to revise Student's BSP during the 2007-2008 school year (SY) after his behaviors escalated. Student also argues that the District should have offered additional speech and language and OT related services, and that the services provided in those areas was not sufficient. Finally, Student alleges that the District should have offered direct PT, and that the reading program called Open Court provided to Student was not appropriate. Student alleges that the FAA completed by the District in March 2008 was inadequate, as was the resultant BIP.

For the 2008-2009 SY, Student argues that the District offered a program which was indistinguishable from his previous inappropriate program, there was no transition plan, and that a placement specializing in behaviors was required. Student alleges that the speech and language services and OT were inadequate for the same reasons as the previous year, and that the District once again failed to offer PT. Student also alleges that the BIP, which was the same as the one developed in March 2008, remained inappropriate.

District argues that at all times it offered Student a FAPE.

<sup>5</sup>

As discussed below, the LRE requirement is that children with disabilities must be educated with their typically developing, non-disabled peers to the maximum extent appropriate.

## FACTUAL FINDINGS

1. Student is an 8-year-old boy who currently resides within the boundaries of the District with his Mother. He is eligible for special education under the category of mental retardation. Student has global developmental delays in multiple areas, suffers from seizures, and exhibits behaviors which interfere with learning.

*Whether the District offered and/or provided Student a FAPE during the 2007-2008 SY*

2. Special education-eligible pupils are entitled to a FAPE. Substantively, a FAPE includes a program that is: (1) designed to meet a student's unique educational needs; (2) reasonably calculated to provide the student with some or meaningful educational benefit; (3) provided in conformity with an IEP; and (4) provided in the "least restrictive environment" (LRE).<sup>5</sup>

3. Procedural failures may also result in a FAPE denial. Procedural denials result in a FAPE denial only if they significantly impede on the parents' right to participate in the IEP decision making process, impede a child's right to a FAPE, and/or cause a deprivation of educational benefits.

4. For the 2007-2008 SY, Student was placed in the Monterey Road special day class for moderate to severely handicapped children, taught by Rhonda Yates. Ms. Yates is a credentialed special education teacher with 26 years of teaching experience.

*Whether the District Was Required to Convene an IEP Meeting to Discuss and Revise Student's BSP on or Before October 20, 2007*

5. A local educational agency (LEA), such as District, must convene an IEP team meeting at least every year, or within 30 days of a parental request, or whenever a pupil demonstrates a "lack of anticipated progress." Student alleges that the District should have convened an IEP team meeting on or before October 20, 2007, in order to discuss and revise his BSP because of multiple behavioral incidents.

*Student's BSP*

6. Under California law, when a child engages in serious behaviors which interfere with learning, an LEA is required to conduct a functional analysis assessment (FAA) and develop a positive behavioral intervention plan (BIP). Serious behaviors include self injurious, assaultive, or other behaviors which are both pervasive and maladaptive. Moreover, regardless of whether a student exhibits "serious behaviors," state law requires that an IEP team "consider" the use of positive behavioral interventions and supports, and other strategies, to address behavior "in the case of a pupil whose behaviors impedes his or her learning or that of others."

<sup>6</sup>

Although his assessment was an FAA, Mr. Needles never drafted a BIP. Instead, he drafted a "level II BSP," which, as discussed below, is not a BIP.

Under federal law, LEAs are required to engage in a process similar to an FAA, albeit less prescriptive, called a functional behavioral assessment (FBA) when a child engages in behaviors which interfere with learning. Following the FBA, an LEA is required to develop a document also called a BIP. There is no requirement that a child engage in “serious” behaviors before the LEA conducts the FBA. A BIP that results from an FBA is sometimes called a behavioral support plan (BSP) by LEAs, in order to distinguish it from a BIP that results from an FAA.

7. Andy Needles, who is a SLOCOE school psychologist, conducted what was described as an FAA for Student in February and March 2007.<sup>6</sup> The target behaviors were “refusals,” throwing objects/clearing desks, and aggression, including hitting, biting and pinching. For reasons not disclosed by the evidence, Mr. Needles did not present his final assessment results at an IEP team meeting until June 6, 2007, well outside of the mandated 60-day timeline.
8. By the time Mr. Needles presented his completed assessment results to the IEP team meeting on June 6, 2007, some of the target behaviors had, for reasons not disclosed by the evidence, reduced in frequency and intensity.
9. Initially, Mr. Needles drafted a “Level II” BSP. Mr. Needles’s testimony established that there are three levels of behavior plans used by SLOCOE and the District. A “Level I” BSP is developed for mild behaviors. A “Level II” BSP is for moderate behaviors. A “Level III” BIP is required for “serious behaviors” and can only be developed following an FAA. Because Student’s behaviors had lessened, by the time of June 2007 IEP team meeting, Mr. Needles changed his draft plan from a “Level II” BSP to a “Level I” BSP.
10. Mother did not consent to implementation of the BSP at the June 2007 meeting. Instead, she asked if she could take the BSP home and look it over.
11. Mother did not consent to the June 2007 IEP, including the BSP, until November 15, 2007. There was no evidence establishing the District’s attempts to obtain consent soon after the meeting. For example, the District did not file for a due process hearing to establish that the June 2007 IEP and BSP were appropriate. The District did not send letters to the parent offering to hold another IEP team meeting, nor did the District informally meet with Mother in order to persuade her to consent to Mr. Needles’s proposed BSP. In short, the District did nothing to obtain parental consent to implement a BSP that it believed was necessary for Student to receive a FAPE.
12. Student began the 2007-2008 SY without a BSP. Student’s Mother did not consent to implementation of Student’s BSP until the November 15, 2007 IEP team meeting.

*Student's Assaulitive and Aggressive Behaviors in the Fall of 2007*

13. Student's behaviors escalated at the beginning of October 2007 shortly after the school year commenced. Indeed, as discussed below, Student's behaviors, which had reduced in frequency and intensity prior to June 2007 such that Mr. Needles recommended a Level I plan for mild behaviors in lieu of a Level II plan for moderate behaviors increased to the point where Student was an immediate danger to himself and others.

14. On October 5, 2007, Student threw objects in the classroom and assaulted Kelly Chester, who was one of the classroom aides, causing her to bleed. Following the incident, Mother removed him from school for the remainder of the day.

15. Two days later on October 7, 2007, Student had a tantrum in his special day class. This time, he knocked over chairs, yelled, threw other children's possessions and destroyed their written school work. Student also hit one of the classroom aides and tried to scratch and bite her legs. According to the incident report which was prepared by the Kelly Chester, Student did not attend school for two days after the incident. The incident report also states that "Andy Needles, Rhonda Yates, Chris Ungar and [Mother] will meet 10/15/07 to review the situation."

16. On October 10, 2007, Student tantrumed again. This time he hit and clawed District staff. Staff had to physically restrain him. Mother became upset following the incident; when Student arrived home, she discovered what looked like finger marks on his skin.

17. Following the October 10, 2007 incident, Mr. Needles sent an email to Mother, Student's SDC teacher Rhonda Yates, and others. In the email, Mr. Needles wrote that Student is "consistently" having difficulties in Rhonda Yates's class in the afternoon. He suggested that he arrange a "meeting" to discuss the following:

A change in afternoon programming ... Having  
[Student] leave the classroom (a high energy  
environment in the afternoons) and work in a  
quieter area. ... Shortening his day, and  
developing a plan to lengthen it as appropriate.

18. On October 16, 2007, District convened the "phone conference" described in the October 7, 2007 incident report. The phone conference was not an IEP team meeting. The purpose of the conference was to discuss Student's behaviors.

19. On October 22, 2007, Student tantrumed in his SDC. While he was working on his IEP goals and objectives, Student became agitated, threw his work and a toy truck on the floor, and removed his shirt, shoes and underpants. After the aides successfully calmed him down and put his clothes back on, Student cried and refused to work. According to the incident report, at the time of the tantrum, Student represented an "immediate danger to self or others."

20. By October 22, 2007, Student's behaviors had become so frequent and consistent, that the SDC staff made copies of the back page of a completed incident report so that they would not have to write the same thing over and over. The duplicated portion of the incident report states at Section 6, "At the current time, does this student represent an immediate danger to self or others?" The corresponding area is checked "Yes" followed by the following hand-written description:

When [Student] tantrums, he hits staff and students around him.  
He hits objects like the computer, tears materials off the walls  
and out of cupboards. He cries and screams and flails his body.  
He sometimes tries to bite.

21. On October 29, 2007, Student tantrumed in his SDC. He hit staff, attempted to bite staff, and he threw objects. Student again represented an "immediate danger to self or others."

22. District was required to hold an IEP team meeting when Student demonstrated a "lack of anticipated progress." The applicable statutes do not state exactly when such a meeting must be held. However, an LEA must hold an IEP team meeting no later than 30 days after receipt of parental request. In the instant matter, while there was no parental request for a meeting, the very first behavioral incident on October 5, 2007, should have initiated the IEP process. In the absence of an express requirement in the applicable statute, the District was required to convene an IEP team meeting within a reasonable time. The 30-day requirement applicable when a parent requests a meeting is an appropriate benchmark to determine if a district-initiated IEP meeting is held within a reasonable time. Using 30 days as a reasonable time, the District was obligated to convene an IEP team meeting no later than November 4, 2007. The "phone conference" which occurred on October 16, 2007 did not eliminate the need to convene an IEP team meeting by no later than November 4, 2007.

23. The District convened an IEP team meeting on November 15, 2007, 11 days after it was legally required to do so. This was a procedural violation.

24. As explained previously, procedural violations do not constitute FAPE denials unless they, in relevant part, deprive a child of educational benefit. While holding a meeting 11 days late would not ordinarily deprive a child of educational benefit, under the unique facts and circumstances of this case, it did. First, as discussed above, there was no evidence that Student's Mother ever consented to implementation of the Level I BSP developed by Andy Needles and discussed in the June 2007 IEP team meeting. Accordingly, Student was without a BSP at the time of the District's procedural violation. Second, and more importantly, Student continued to exhibit problematic behaviors during the 11-day period. He engaged in behaviors which resulted in an incident report on November 6, November 9, two on November 13, and another on November 15, 2007. All of these behaviors were similar to the behaviors Student consistently exhibited beginning October 5, 2007. Because nothing was in

place to address those behaviors, Student lost educational benefit from November 4, 2007, to November 15, 2007.

25. In sum, it has been found above that District was not required to hold a meeting prior to October 20, 2007, as the issue was pled by Student. The District was required, however, to hold one by no later than November 4, 2007. Because it held one on November 15, 2007, and because the delay deprived Student of educational benefit, District denied him a FAPE for a period of 11 days.

*Whether the District completed the FAA in a timely manner*

26. LEAs are required to hold an IEP team meeting to discuss the results of an assessment and an IEP must be “developed” within 60 days of receipt of signed consent. The 60-day period is extended by law for periods of, in relevant part, “pupil school vacations.” but otherwise can only be extended with written parental consent.

27. District received signed consent on November 15, 2007. As a result of the intervening school breaks, the 60-day period expired on January 30, 2008.

28. District convened the IEP team meeting to discuss Mr. Needles’s FAA on January 31, 2008. However, because of meeting time constraints imposed by District and SLOCOE personnel, the IEP team did not complete the discussion of the FAA and develop the IEP until a reconvened IEP team meeting on March 3, 2008. The IEP resulting from the assessment was developed more than one month late.

29. As discussed above, procedural denials result in a FAPE denial only if they significantly impede on the parents’ right to participate in the IEP decision making process, impede a child’s right to a FAPE, and/or cause a deprivation of educational benefits.

30. The evidence established that Student was deprived of educational benefits because of the approximate one month delay. As discussed above, the most significant need for Student all school year were his serious behaviors, which necessarily interfered with learning. Whenever Student tantrumed and was not quickly brought back into instructional control, he was not able to access the curriculum. Accordingly, the District-caused delay deprived Student of educational benefit. Accordingly, he was denied a FAPE by the District.

<sup>7</sup>

As previously discussed, there was no “current” agreed-upon behavior plan until parent signed consent at the November 15, 2007 IEP. The evidence established that the only behavior plan was Needles’ FAA/BSP that was completed at the June 2007 meeting.

<sup>8</sup>

As previously discussed, an FAA results in a BIP not a BSP. However, because SLOCOE and the District used the terms interchangeably both at the hearing and in the pertinent IEP documents, BSP is used instead of BIP.

31. District argues that Student's Mother was responsible for the delay. The evidence did not establish that Mother had any influence on the process one way or the other. Nonetheless, the 60-day period can be extended only by written parental consent, and there was no evidence the District obtained written consent from Mother.

*Whether the District Should Have Held an IEP Team Meeting to Discuss Changing Student's Placement in December 2007*

32. As previously discussed, Districts are required to hold an IEP team meeting whenever a pupil demonstrates a "lack of anticipated progress." Student argues that the District should have convened and IEP team meeting to discuss a possible change of placement on or before December 20, 2007.

33. As developed above, Student's behaviors escalated at the beginning of the 2007-2008 SY. An IEP team meeting was held on November 15, 2007. The purpose of the IEP team meeting was to discuss Student's behavior, placement and an independent educational evaluation (IEE) of Student conducted by Dr. Robert Patterson.

34. Regarding Student's behavior, the IEP reflects that Mr. Needles reviewed the "current" behavior plan.<sup>7</sup> Mr. Needles reported that Student was attempting to bite others and that "one thought was that he becomes tired later in the school day." The District agreed to conduct another FAA and develop another BSP.<sup>8</sup> Although one of the primary purposes of the meeting was to review Student's behavior, the District did not make any changes to Andy Needles "Level I" BSP that he drafted some time in March 2007 when Student's behaviors were different in terms of frequency and intensity. As developed above, according to Mr. Needles, a "Level I" BSP is for mild behaviors, not behaviors which present an immediate danger to a student and/or others.

35. Regarding changing Student's placement, the IEP states:

Placement and services were also reviewed. The team members present, including the general education teacher, did not believe that a general education program would be appropriate for [Student]. The staff team did not believe general education with modifications would be appropriate. The parents do not believe that special education services provided by a resource specialist would be appropriate. The parents believe that a placement in a mild-moderate program as recommended by Dr. Patterson is appropriate. The school staff recommended that placement be in the moderate/severe program. The parents disagreed with this and request a mild/moderate special education placement.

36. Prior to the November 15, 2007 IEP team meeting, on a date not disclosed by the evidence, the District reduced Student's program to one-half day. Although the precise reasons for its decision was never made clear by either party, there was evidence that Student's assaultive and aggressive behaviors occurred more frequently

in the afternoon, and possibly because Student became fatigued. Regarding the half-school day, the November 15, 2007 IEP states:

There was a discussion on [sic] his classroom day. He is currently attending school on a “half day.” Classroom staff believed that this was with agreement by [Mother]. [Mother] stated that she believed a shortened school day was a school requirement.

37. No additional IEP team meetings were convened until January 31, 2008.

38. Student’s assaultive and aggressive behaviors did not change significantly after the November 15, 2007 IEP team meeting. For example, Student engaged in behaviors which represented an immediate danger to himself or others and that resulted in a behavioral incident report on November 19, 20, 28, 29, 30, 2007, December 3, 5, 6, 7, 12, 13, 17, 18, 19, and 21, 2007, January 10, 11, and 30, 2008, February 12 (two incident reports), 26 (two incident reports), and 27, 2008, March 3 (two incident reports), and 6, 2008. School was out of session or Student was absent from school on many of the days in which there was no incident report after November 15, 2007. Mother removed Student from school on March 6, 2008, and did not return him for the remainder of the school year.

39. On December 19, 2007, the District convened another meeting with several individuals involved in Student’s educational program. The meeting was not an IEP team meeting, although most of the IEP team members were present. The District’s special education director, Mr. Ungar, was present, along with Mother, Father, Mr. Needles, and Rhonda Yates. Mr. Ungar’s assistant, Alicia Saylor, took contemporaneous notes, which she typed and presented to Student’s parent. At the meeting, Mother asked whether Student’s behaviors could be a function of too many demands at school. Mr. Needles told mother that the issue of Student’s behaviors would be best handled at an IEP team meeting. Mr. Ungar stated that the team needed to engage in a discussion about placement, and that the team needed to “explore all placement options that will help make [Student] successful.”

40. The overwhelming weight of the evidence established that the District should have convened an IEP team meeting to discuss changing Student’s placement prior to or by December 20, 2007. At the November 15, 2007 IEP team meeting, the District refused to change Student’s placement from a moderate to severe SDC, failed to change Student’s BSP, and failed to add any services or supports despite Student’s behaviors. After changing nothing of substance at the November 15, 2007 IEP team meeting, nothing improved. Student’s behaviors continued at the same rate. Student demonstrated a “lack of anticipated progress” within days of the November meeting, and another meeting should have been promptly called to discuss options, including changing placement. Under the circumstances, the District was required to act and examine Student’s program and placement.

41. Particularly troubling is the District's second "informal" meeting during the 2007-2008 SY. The first informal meeting, as discussed above, occurred in October 2007. While nothing prohibits an LEA from holding an "informal" meeting to discuss a student with a disability program and/or lack of progress, such meetings cannot be held in lieu of an IEP team meeting. The evidence did not establish why SLOCOE and the District used informal meetings. Had had the December 2007 meeting been an IEP team meeting, Mr. Ungar's concerns and Mother's concerns could have been explored and acted upon by a properly convened IEP team. Instead, Student's program stayed the same and his behaviors continued.

42. District's failure to hold an IEP team meeting was a procedural violation. It caused a deprivation of benefits because Student continued to engage in behaviors which prevented him from accessing the curriculum and which also significantly impeded parent's participation in the IEP process because no meeting was held. The failure to hold a timely meeting in December also ultimately caused Student's parents to remove him from school altogether in March. The District denied Student a FAPE.

*Whether the June 2007 IEP designates if speech and language services would be provided in a group or individual setting*

43. An IEP must contain, in relevant part, a list of the services offered to meet a child's unique educational needs. It must contain a statement of the frequency, location and duration of all services.

44. The June 2007 IEP states that Student would receive 80 minutes of "language and speech" services. The designated location of the services was a "separate classroom in a public facility." On a separate page of the IEP, the District's offer was clarified to include 60 minutes of individual services per week, and 20 minutes of group services.

45. There was no procedural violation. The IEP contains the requisite frequency, location and duration of the speech services offered by the District, as well as an adequate description of the type of speech services (including both individual and group).

*Whether Student's BSP during the 2007-2008 SY was appropriate*

46. Substantively, a FAPE includes a program that is: (1) designed to meet a student's unique educational needs; (2) reasonably calculated to provide the student with some or meaningful educational benefit; (3) provided in conformity with an IEP; and (4) provided in the LRE.

47. When examining the substantive adequacy of an IEP, the IEP must not be judged with the benefit of hindsight. Rather, an IEP must be examined as the "snapshot" in time to determine if it meets the above FAPE requirements.

48. As previously discussed, Student's BSP was developed by Andy Needles in March 2007, and the final "Level I" BSP was recommended at the June 2007 meeting. Student does not challenge the appropriateness of the BSP at the time of the June 2007 meeting. Student argues that, in light of Student's escalating behaviors, Student's BSP should have been revised in the fall of 2007.

49. District provided no persuasive evidence regarding why Student's BSP was not revised on or before November 4, 2007. As determined above, Student's behaviors at the beginning of the 2007-2008 SY were nothing like his behaviors at the end of the previous school year. Accordingly, there was no evidence that a "Level I" BSP was appropriate at the time the District was legally required to convene an IEP team meeting (on or before November 4, 2007). Mr. Needles testified that a Level I BSP was used for mild behaviors. Student required a Level II BSP or a Level III BIP in November 2007 because his behaviors were not mild. Indeed, they presented an immediate danger to Student and others.

50. As found above, the District failed to revise the BSP at the November 15, 2007 IEP team meeting (which should have been held no later than November 4, 2007). While it was appropriate to start a new FAA at the time of the November IEP team meeting, it was not appropriate to do nothing in the interim. Both Mr. Needles and Dr. Patterson established that a BSP can be altered without reassessing Student. Mr. Needles testified that minor changes can be made without convening an IEP team meeting at all

51. The District substantively denied Student a FAPE beginning in November 2007 because it did not change Student's BSP. The BSP, which was the integral component of his IEP given his assaultive and aggressive behaviors, was therefore no longer designed to meet Student's behavioral needs, nor was it reasonably calculated to provide Student with some educational benefit. It, thus, denied him a FAPE.

*Whether Student required Additional Speech and Language Services during the 07-08 SY*

52. LEAs must provide designated instruction and services (DIS), also called "related" services, if necessary to address a pupil's unique needs. DIS services may include, in relevant part, speech and language therapy, occupational therapy, and/or physical therapy if a pupil's unique needs so require.

53. Student received 80 minutes of speech and language therapy from the District pursuant to the June 2007 IEP. Student argues that he required an additional 150 minutes per week, or a total of 230 minutes of speech and language per week.

54. Student's expert witness, Susan Hollar, has been a speech and language therapist for 12 years. She testified that Student required an additional 150 minutes of speech and language services each week because of Student's significant deficits in nonverbal communication, oral motor, expressive and receptive language, articulation

and pragmatic language. Ms. Hollar assessed Student in July 2006 and again in April 2008. She testified that Student had not made progress from assessment to assessment.

55. Ms. Hollar's testimony was suspect and afforded very little weight. Her testimony about Student's lack of gains in the areas of speech and language, specifically her testimony that her two assessments nearly two years apart showed no progress, was contradicted by her own assessments. For instance, in July 2006, Ms. Hollar was unable to use the Clinical Evaluation of Language Fundamentals-Preschool (CELF-P) because "it appeared to be too complex at that time." When she reevaluated Student in 2008, she was able to administer the CELF-P, although she had to use a version for children younger than Student. She also wrote that Student had made "excellent progress" since her last assessment. Additionally, her 2008 report recommended 150 minutes, not 230 minutes, of speech and language services ("three individual one on one 50 minute sessions per week").

56. Judy McPhail testified on behalf of the District. Ms. McPhail is a licensed speech and language pathologist with more than 10 years experience. She provided Student's services during the 2007-2008 SY. Ms. McPhail testified that she actually provided 100 minutes of speech and language services during the 2007-2008 SY; the extra 20 minutes was provided pursuant to a confidential settlement agreement.

57. Ms. McPhail's testimony established that the District's offer of speech and language services was appropriate. Ms. McPhail testified extensively about the improvements she observed during the school year, including slow progress towards achievement of the speech and language goals during the school year. Contrary to Ms. Hollar's recommendations, Ms. McPhail was concerned that 80 minutes was too much. She acknowledged that Student had severe speech deficits in all spheres of language, but she explained that one of Student's weaknesses was that he would become tired and all of the different services he received were "a little stressful" for him. Any additional speech therapy, in her opinion, would have been counter productive. She explained that when she implemented the 100 minutes of services during the SY, she spent "lots" of time dealing with Student's behaviors and getting him back on task. Ms. McPhail's testimony in that regard was consistent with all other witnesses who worked with Student during the school year: his behaviors were the primary concern. Ms. McPhail was more credible than Student's expert witness. 58. Student did not establish by a preponderance of the evidence that he required more than the 80 minutes per week of speech and language services that the District offered. Accordingly, there was no denial of FAPE regarding these services.

#### *Whether Student Required Clinic Based OT during the 2007-2008 SY*

59. District offered Student 40 minutes of classroom-based OT, one time per week, during the 2007-2008 SY. Student contends that this amount was inadequate and that he required one additional 50 minute session of clinic-based OT per week to address

sensory integration needs. Sensory integration refers to the brain's ability to coordinate and process sensory information.

60. District called Annie Burke-Doe, Ph.D, as an expert witness regarding Student's need for clinic-based OT. Dr. Burke-Doe is a physical therapist who has a master's degree in physical therapy; she is not an OT. District did not establish that she could provide an expert opinion regarding sensory integration. Indeed, she testified that she would defer to an OT regarding sensory integration needs.

61. District also called Jaquelyne S. Kinavey, who is an OT employed by SLOCOE. She has over 30 years experience working as an OT with children with disabilities. She evaluated Student, but has not worked with him for more than two years. Ms. Kinavey found that while Student did have sensory integration needs, these needs were accommodated in the educational environment through various strategies and recommendations. Ms. Kinavey did not believe that Student required clinic-based OT to address sensory integration needs.

62. Laura Cooper is a licensed OT who has been providing private services to Student him for two years. She holds a masters' degree in occupational therapy and has been working as a therapist for more than 10 years. Ms. Cooper is certified to administer sensory integration tests. She testified that Student's sensory integration needs were not being met by the District. She noted that the District's March 2006 assessment identified sensory integration deficits. Ms. Cooper explained that Student's sensory integration deficits impacted his auditory processing, distractibility, coordination, endurance and overall behavior. She further opined that sensory integration therapy would assist Student to properly modulate sensory input in the school environment, so that he would not become over stimulated.

63. The evidence established that Student became over stimulated in the school environment. Indeed, Andy Needles's FAA completed in March 2007 states that Student "is a very active boy who is easily over stimulated." Mr. Needles's statement is consistent with Ms. Cooper's opinion.

64. Laura Cooper's testimony was more persuasive than Jaquelyne Kinavey's. Although both present as excellent, experienced witnesses on the topic of sensory integration, Ms. Cooper was more knowledgeable. Ms. Cooper was able to assess for sensory integration problems, and the evidence did not establish that Ms. Kinavey could. Additionally, and most importantly, Ms. Cooper had been working with Student for two years and was much more familiar with his strengths and weaknesses. Ms. Kinavey had not worked with Student for more than two years.

65. The evidence established that Student required one 50 minute session of OT to address sensory integration needs. There was no persuasive evidence from any witness that this service could not be provided in the educational setting, although according to Ms. Cooper, it should be provided in a quiet room. The District denied Student a FAPE by not offering this service during the 2007-2008 SY.

*Whether Student required Direct PT Services during the 2007-2008 SY*

66. Student contends that he required PT in order to receive a FAPE during the 2007-2008 SY. No direct PT was offered during the 2007-2008 SY. Instead, the District offered consultation by a PT for 30 minutes each month.

67. District assessed Student's need for PT in March 2007. Annie Burke-Doe, a physical therapist, completed the assessment. Ms. Burke-Doe has a Master's degree in PT. She used a variety of measures to determine if Student's gross-motor needs were such that he required PT. Ms. Burke-Doe found that Student had low muscle tone, "fair endurance to complete his educational day," poor posture, sensory difficulties, and problems with transitions. She recommended no direct PT. Instead, she provided a series of recommendations that other staff could implement. For instance, she recommended that an OT provide recommendations regarding seating to address Student's low muscle tone. Ms. Burke-Doe recommended, in her assessment report that PT consultation services may be "helpful." Ms. Burke-Doe was generally of the opinion that the types of services provided by PT could be provided in the school setting by other professionals, such as OTs, or adapted physical education (APE) teachers.

68. Dr. Christy Skura is a physical therapist. She has a doctorate degree in PT and works as a supervisor for a nonpublic agency called Therapy West. Dr. Skura assessed Student in April 2008. Her assessment results were similar to those obtained by Ms. Burke-Doe one year prior. She found that Student demonstrated low muscle tone, strength, balance, postural control and coordination. She testified that these issues could be contributing to Student's distractibility and behavior issues, as well as his lack of endurance. She recommended a six-month trial of PT, with a re-evaluation of his needs at the end of that time.

69. While Dr. Skura's testimony was persuasive, she did not testify that the six-month trial should have commenced in June 2007. Her recommendation was prospective. Indeed, she did not testify that the District denied Student a FAPE during the 2007-2008 SY when it offered only consultation.

70. District did not deny Student a FAPE by offering only consultation PT during the 2007-2008 SY. There was no evidence that Ms. Burke-Doe's recommendation, which was persuasive and based on her March 2007 assessment was incorrect, and Dr. Skura's recommendation, based on her evaluation, was information that the District did not have in June 2007. There was no evidence that Student required direct PT services to receive a FAPE.

*Whether Open Court was scientifically based and/or peer-researched for children like Student*

71. Student contends that his reading program during the 2007-2008 SY was not peer researched and scientifically based. Student was provided a reading program called Open Court during the 2007-2008 SY. Student's teacher and aides described the progress, although marginal, that he made during the school year. To the extent appropriate, reading programs must be scientifically based and peer-researched.

72. Dr. Robert Patterson performed an evaluation of Student in March 2007 which was not presented to an IEP team until November 2007. He recommended that a different reading program be utilized with Student. His testimony did not establish that Open Court was not scientifically based or peer-researched for children like Student. He instead recommended a different program which he thought was more appropriate. Based on Dr. Patterson's recommendation, the District agreed to switch to a different reading program in November 2007.

73. At time of the June 2007 IEP team meeting, there was no evidence that Open Court was inappropriate for Student. Dr. Patterson's recommendations were not known to the District until five months after the June meeting, and Student provided no other evidence on this issue. The District did not deny Student a FAPE by utilizing Open Court.

*Whether the FAA and BIP Completed in March 2008 Were Appropriate*

74. Student contends that the FAA and BIP completed in March 2008 were not appropriate to address his behavioral needs? State law requires that an FAA to assess serious behaviors be conducted in a highly prescriptive manner. An FAA must be conducted by or under the trained supervision of a person who has documented training in behavior analysis, with an emphasis on positive behavior interventions. An FAA requires, in pertinent part, a systematic observation to determine the behavior, its antecedents, ecological factors, and consequential events.

A systematic observation requires that the observer document: (1) the frequency of the behavior, (2) the duration of the behavior, and (3) the intensity of the behavior. The person conducting the FAA must report and define the targeted behaviors in measurable terms in order to develop an appropriate intervention.

An ecological analysis includes a determination of the settings in which a targeted behavior occurs most frequently. Factors include the physical setting, the social setting, the activities and the nature of the instructions.

Lastly, an FAA must include a review of the history of the behavior which includes the effectiveness of previously used behavioral interventions.

75. Dr. Patterson, who has a doctorate in psychology and family therapy, is, among other things, a licensed psychologist, a licensed marriage, family, and child counselor, and a licensed educational pathologist with decades of experience assessing exceptional children like Student. He has also conducted thousands of assessments on

behalf of local educational agencies and individuals alike and has testified numerous times as an expert in due process hearings on behalf of students and agencies.

76. Dr. Patterson explained in detail how an FAA should be conducted, including the best practices for a minimally adequate FAA. He explained how Mr. Needles's FAA completed in March 2008 did not meet those minimum criteria. Dr. Patterson explained that Mr. Needles failed to interview Student's other service providers, such as his OT and his speech and language pathologist. Also, because Student was on medication at the time of the FAA, Mr. Needles should have interviewed Student's physician and his treating neurologist (Student also suffers from a seizure disorder), according to Dr. Patterson. Additionally, Mr. Needles only observed Student himself for approximately three hours; much of the data upon which he based his FAA and BSP was collected by other staff. Although it is permissible for a trained person to supervise an untrained person who is collecting data, Dr. Patterson opined that three hours of direct observation was not adequate given Student's significant behavior problems, and the numerous past interventions which were not successful.

Dr. Patterson also found problematic the lack of any analysis of ecological factors that may have been influencing Student's behaviors. This was particularly troublesome because Student's behaviors were not reported to be consistent across all environments. For example, Student's Mother did not observe the same types of behaviors at home that the District witnessed at school. Additionally, Mr. Needles FAA included a vague analysis of "effective behaviors" which Dr. Patterson opined would not help manage Student's behaviors. Dr. Patterson summarized Mr. Needles's resultant BIP as a "hodge podge" that was not specific to Student's needs.

77. Andy Needles, as previously discussed, is a school psychologist employed by SLOCOE. He testified that he is qualified to conduct an FAA and develop a BIP. Mr. Needles's testimony was uncontested on this point.

78. Mr. Needles's testimony was generally suspect because his demeanor, manner and attitude suggested that he was exaggerating. He was unnecessarily defensive during his testimony, and many of his responses were vague during cross-examination. While this is not unexpected on cross-examination, Mr. Needles's responses on direct examination were also vague and not particularly helpful to the fact finder.

79. Overall, the District's FAA was both poorly constructed and poorly documented. Mr. Needles produced only a summary sheet describing his analysis. On cross-examination, Mr. Needles failed to provide an adequate explanation regarding why his FAA did not include, e.g., an analysis of ecological factors. His testimony was essentially that his FAA was done correctly, but he was unwilling to "show his work."

80. Based on a preponderance of the evidence, including Dr. Patterson's persuasive testimony, the District's FAA was not adequate, and the resultant BIP, a "hodge podge" not specific to Student's behavioral needs, was also insufficient.

81. As discussed at length above, Student's primary need during the 2007-2008 SY was behavioral. The District's failure to conduct an appropriate FAA and develop a targeted, data-based, meaningful BIP deprived Student of the essential component in his educational program. Accordingly, the District denied him a FAPE.

*Whether the District Denied Student a FAPE during the 2008-2009 SY*

82. In June 2008, the District convened Student's annual IEP team meeting. Student had been out of school since March 2008. The District's offer was nearly identical to Student's previous placement, except that the location changed. District offered Student: (1) a moderate to severe SLOCOE SDC; (2) 80 minutes of speech and language therapy each week; (3) 40 minutes per week of OT; (4) 30 minutes per week of APE; and, (5) 30 minutes per month of "other special education/related services" (PT consultation).

*Whether the BIP in the June 2008 IEP was Inappropriate*

83. The BIP offered in the June 2008 IEP for the 2008-2009 SY was the March 2008 BIP discussed above. For the reasons discussed above, the BIP was inappropriate. The District's offer was therefore not reasonably calculated to provide Student with some educational benefit and constituted a denial of FAPE.

*Whether the District's Offer of a SLOCOE Moderate to Severe SDC for the 2008-2009 SY was Not Appropriate to Meet Student's Behavioral Need*

84. Student alleges that the District's offer of placement for the 2008-2009 SY was the same program that was provided to him the previous year, one that was not successful. Additionally, Student argues that he had been out of school since March 2008 and that the District failed to offer him a needed transition plan.

85. The District's offer of a SLOCOE SDC nearly identical to the previous school placement, in which Student was not successful, was not reasonably calculated to provide him with some educational benefit. First, District provided no evidence that a change of location alone would result in reduced behaviors and success in school. Second, the goals and objectives offered by the District for the 2008-2009 SY in the June 2008 IEP were substantially the same as the goals in the June 2007 IEP, meaning Student made almost no measurable progress during the SY in the SDC. While Student's behaviors and his eventual removal from the class were both substantial factors contributing to his lack of progress, offering the same placement without first determining how best to eliminate Student's behaviors was inappropriate, and denied Student a FAPE.

86. Additionally, as Student correctly points out, the District failed to offer any type of transition plan. Multiple witnesses testified that Student has difficulty with transitions, including his school aides, Mother, teacher and private assessors. As discussed above, a substantively appropriate IEP must be designed to meet a child's unique needs. A transition plan whereby Student would be slowly and methodically transitioned back into a public school placement was required for Student's unique

need related to difficulties with transitions. The failure to offer one in the June 2008 IEP denied Student a FAPE.

87. Student's expert witness, Dr. Patterson, testified that Student required a placement which specializes in children with disabilities with serious behaviors which interfere with learning. Dr. Patterson testified that the Beacon Day School, a State-certified NPS, would meet Student's unique needs (the NPS is discussed below).

88. For the reasons discussed above, the District's offer of a SLOCOE moderate to severe SDC was not an offer of a FAPE for Student.

*Whether Student required Additional Speech and Language Services during the 08-09 SY*

89. District offered Student 80 minutes of speech and language therapy in the June 2008 IEP. Student argues that he required an additional 150 minutes per week, or a total of 230 minutes, of speech and language per week.

90. As determined above in Factual Findings 53-58, the District's offer of 80 minutes of speech and language therapy was appropriate for the 2007-2008 SY. There was no evidence provided by either party establishing that Student's unique speech and language needs changed during the 2007-2008 SY. Accordingly, for the reasons discussed above in Factual Findings 53-58, the District's offer of 80 minutes of speech and language therapy per week was similarly appropriate for the 2008-2009 SY.

*Whether Student Required Clinic Based OT during the 2008-2009 SY*

91. District offered Student 40 minutes of classroom-based OT, one time per week, in the June 2008 IEP. Student contends that this amount was inadequate and that Student required one additional 50 minute session of clinic-based OT per week to address sensory integration needs.

92. As determined above in Factual Findings 59-65, District should have offered Student one 50 minute session of OT per week to address sensory integration needs during the 2007-2008 SY. There was no evidence provided by either party establishing that Student's unique OT needs changed during the 2007-2008 SY. Accordingly, for the reasons discussed above in Factual Findings 59-65, the District denied Student a FAPE during the 2008-2009 SY by failing to offer Student with one 50 minute session of OT per week to address sensory integration needs. However, as determined above, it was not established that this services had to be provided in a clinic setting.

*Whether Student required Direct PT Services During the 2007-2008 SY*

93. Student contends that he required PT in order to receive a FAPE. No direct PT was offered during the 2008-2009 SY. Instead, the District offered consultation by a PT for 30 minutes each month.

94. It was determined above in Factual Findings 67-70 that Student did not require direct PT services in the 2007-2008 SY, because there was no evidence that Ms. Burke-Doe's recommendation based on her March 2007 assessment was incorrect, and Dr. Skura's recommendation, based on her evaluation, was information that the District did not have in June 2007.

95. Dr. Skura, who assessed Student in April 2008, testified that Student required a six-month trial of weekly direct PT to address his low muscle tone, strength, balance, postural control and coordination. She testified that these issues could be contributing to Student's distractibility and behavior issues, as well as his lack of endurance. Ms. Burke-Doe testified that only PT consultation was necessary, and that all of the weaknesses identified in her assessment completed in March 2007 could be addressed through other services providers, including an OT or APE specialist.

96. For the 2008-2009 SY, Dr. Skura's testimony was more persuasive than that of Ms. Burke Doe. Dr. Skura's testimony was given more weight than Ms. Burke-Doe's because she assessed Student in April 2008, less than two months before the June 2008 IEP meeting. Ms. Burke Doe's assessed Student in March 2007. Accordingly, the data upon which she based her expert opinion was more recent.

97. For the reasons discussed above, District should have offered Student one hour of PT per week, for six months. The failure to offer this service, which was necessary to address Student's low tone, strength, balance, postural control and coordination, denied Student a FAPE because this service was necessary for Student to receive some or meaningful educational benefit.

#### *Remedies*

98. When an LEA denies a child a FAPE, the ALJ may award relief, including compensatory education or reimbursement where appropriate. It has been found above that the District denied Student a FAPE during the 2007-2008 SY. It has also been found above that the District denied Student a FAPE during the 2008-2009 SY. When a District fails to fulfill its legal obligations, appropriate relief may include compensatory education, as well as reimbursement for privately obtained services which fill the gaps left by a district's inappropriate placement or services.

99. As remedies for the District's FAPE denials, Student requests an order requiring, in relevant part, that the District: (1) place Student in the Beacon Day School or an equivalent NPS, (2) provide OT one time per week for 50 minutes per session prospectively to address sensory integration, (3) provide 60 minutes of PT per week for six months to address low tone, strength, balance, postural control and coordination, (4) reimburse Student's Mother for educational costs incurred since March 2008 totaling \$4,787.44, including OT services that Mother obtained and costs incurred home-schooling Student, and, (5) an FAA conducted by an individual not employed by the District or the SLOCOE.

*Beacon Day School*

100. As determined in Factual Findings 2-97, the District denied Student a FAPE from November 2007 to the present. Regarding what is an appropriate compensatory remedy for that FAPE denial, Student called Dr. George Estonactoc. Dr. Estonactoc is the director of the Beacon Day School (Beacon), which is located in Orange, California. He met Student and Mother, and reviewed various special education documents. His testimony established that Beacon can meet Student's unique needs. According to Dr. Estonactoc, Beacon offers a small school environment with individualized support and small group instruction which employs diagnostic and behavioral support methods. Beacon specializes in children with behavioral problems.

101. Mother testified that, because Beacon Day School is located in Orange, California, she would move to there and stay at her parents house for one year, if it is determined that Beacon is appropriate. She waived any right to housing costs and/or transportation to and from her home in Shandon, California, but asked if it is so ordered, that the District be required to pay for travel at the District's customary rate to and from Beacon and her parents' house.

102. District presented no evidence of a local school, public or nonpublic, which specializes in children with difficult behaviors like Student. Dr. Estonactoc and Dr. Patterson's testimony established that Beacon would be an appropriate placement for Student as a compensatory remedy to reduce Student's behaviors so that he can eventually return back to a District (or SLOCOE) program.

103. Accordingly, as compensatory education for the District's FAPE denial principally related to Student's serious behaviors that were not addressed, the District shall place Student at Beacon for period of one year. Unless the parties agree otherwise, Student shall be placed at Beacon within 30 days of this decision. District shall also fund all related services that are necessary for Student to receive a FAPE during the year that he attends Beacon. Student shall additionally be entitled to transportation reimbursement to and from his maternal grandparents' home and Beacon.

*Reimbursement for Private OT and Compensatory OT*

104. As previously determined in Factual Findings 59-65 and 91-92, Student should have received an additional 50 minutes per week of OT addressing sensory integration. The evidence established that Mother procured private OT services to supplement the OT services provided by the District during the 2007-2008 SY and part of the 2008-2009 SY. Laura Cooper provided OT services to Student from July 2007 through November 2008. She provided a total of 43 sixty-minute sessions. Because the District failed to provide Student with needed OT during this period and because Student's Mother obtained the services Student should have received, Mother is entitled to reimbursement for the 43 sessions, at the billed rate of \$90 per hour for a total of \$3,870.

105. In addition to reimbursement for the OT services procured by Mother, District shall provide Student with 20 fifty-minute sessions of OT to address sensory integration. This compensatory education represents the period from December 2008 to the date of this decision in which Mother did not obtain private OT services for Student. Unless the parties agree otherwise, these services shall commence within 30 days of this decision.

*Compensatory PT*

106. It was previously determined in Factual Findings 93-97, that the District denied Student a FAPE by failing to provide him with PT during the current school year. As compensatory education for the District's failure to offer Student PT for the first six months of the 2008-2009 SY, District shall provide Student with PT, 60 minutes per week, for a period of 6 months. Unless the parties agree otherwise, this service shall commence within 30 days of this decision.

*Other Remedies*

107. Mother presented evidence of home educational materials, including educational flash cards, she purchased and used to home school Student after he was removed from Shandon in March 2008. The total cost of the materials was \$242.44. Because the District denied a FAPE, and because Mother used the materials to educate Student, she is entitled to reimbursement for the total amount. District should send Mother a check in the amount of \$242.44 within 30 days of this decision.

*FAA*

108. Because the FAA and resultant BIP were inappropriate, District shall conduct an FAA after Student is placed at Beacon. The FAA shall begin no later than 30 school days after the first day Student attends Beacon, unless the parties agree otherwise. All statutory timelines must be met, and the FAA and resultant BIP shall strictly comply with the relevant statutes and regulations. District must contract with a qualified individual or other entity not employed by SLOCOE to conduct the FAA. The District may not use SLOCOE because a SLOCOE employee conducted the FAA which was found to be inadequate.

109. All other requests for relief are denied.

## LEGAL CONCLUSIONS

1. In an administrative proceeding, the burden of proof is on the party requesting the hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528].) Student requested the hearing and, therefore, has the burden of proof.

2. Pursuant to California special education law, the Individuals with Disabilities in Education Improvement Act of 2004 (IDEA), children with disabilities have the right to a FAPE that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and independent living. (Ed. Code, § 56000.) FAPE consists of special education and related services that are available to the student at no charge to the parent or guardian, meet the State educational standards, include an appropriate school education in the State involved, and conform to the child's IEP. (20 U.S.C. § 1402(9).) "Special education" is defined as specially designed instruction, at no cost to parents, to meet the unique needs of the student. (20 U.S.C. § 1402(29).)

3. Likewise, California law defines special education as instruction designed to meet the unique needs of individuals with exceptional needs coupled with related services as needed to enable the student to benefit fully from instruction. (Ed. Code, § 56031.) The term "related services" includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from special education. (20 U.S.C. § 1401(26).) California Education Code section 56363, subdivision (a), similarly provides that designated instruction and services (DIS), California's term for related services, shall be provided "when the instruction and services are necessary for the pupil to benefit educationally from his or her instructional program."

4. There are two parts to the legal analysis in claims brought pursuant to the IDEA. First, the court must determine whether the school system has complied with the procedures set forth in the IDEA. (*Bd. of Educ. of the Hendrick Hudson Sch. Dist. v. Rowley*, (1982) 458 U.S. 176, 200 [102 S.Ct. 3034].) Second, the court must assess whether the LEA's proposed program was designed to meet the child's unique needs, was reasonably calculated to enable the child to receive educational benefit, and comported with the child's IEP. (*Rowley*, 458 U.S. at pp. 206-07.) In addition, the educational program must be in the LRE, which requires that a child, to the maximum extent appropriate, be educated with typically developing, non-disabled peers. (*Sacramento City Unif. Sch. Dist. Bd. of Educ. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398; cert. denied (1994) 512 U.S. 1207; 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114; see, Ed. Code, §§ 56031, 56342, subd. (b), 56364.2, subd. (a).)

5. Procedural flaws do not automatically require a finding of a denial of a FAPE. A procedural violation constitutes a denial of FAPE only if it 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 child, or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E); Ed. Code, § 56505, subd. (f); see also, *W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1483-1484.) Recent Ninth Circuit Court of Appeals cases have confirmed that not all procedural violations deny the child a FAPE. (*L.M. v. Capistrano Unified School Dist.* (9th Cir. 2009) \_\_\_\_ F.3d \_\_\_, 2009 WL 349795; *Park v. Anaheim Union High Sch. Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033, fn.3.)

6. The IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities. (*Rowley*, 458 U.S. at pp.198-200; see, *Seattle Sch. Dist. No. 1 v. B.S.* (9th Cir. 1995) 82 F.3d 1493, 1500.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is "sufficient to confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit has referred to *Rowley*'s "some educational benefit" simply as "educational benefit" (See, e.g., *M.L. v. Fed. Way Sch. Dist.* (9th Cir. 2004) 394 F.3d 634, 645.) It has also referred to the educational benefit standard as "meaningful educational benefit." (*N.B v. Hellgate Elementary School Dist.* (9th Cir.2007) 541 F.3d 1202, 1212-1213; *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)

7. To determine whether the District offered Student a FAPE, the analysis must focus on the adequacy of the District's proposed program. (*Gregory K. v. Longview Sch. Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) Additionally, the Ninth Circuit has endorsed the "snapshot" rule, explaining that the actions of the school cannot "be judged exclusively in hindsight ... an IEP must take into account what was, and what was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted." (*Adams v. State of Oregon, supra*, 195 F.3d at p.1149 (citing *Fuhrman v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1041).)

8. An IEP is a written statement that must be developed, reviewed, and revised for each student with a disability. (34 C.F.R. § 300.340(a); Ed. Code, § 56345.) The IEP must include a statement of the child's present levels of educational performance, including how the child's disability affects the child's involvement and progress in the general curriculum (i.e., the same curriculum as for nondisabled children). The IEP must also include a statement of the goals of the special education and related services, and of the program modifications or supports for school personnel that are to be provided to enable the student to be involved in and progress in the general curriculum, and to be educated and participate with disabled and nondisabled peers in extracurricular and other nonacademic activities. It must also include the frequency, location and duration of services to be provided. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.347; Ed. Code, §§ 56343, 56345.)

*Issue 1(a): Whether the District failed to convene an IEP team meeting to discuss and revise Student's BSP on or before October 20, 2007*

9. An LEA is required to hold an IEP team meeting, in relevant part whenever a pupil demonstrates a "lack of anticipated progress." (Ed. Code, §§ 56343.)

10. Pursuant to Factual Findings 5-25 and Legal Conclusions 1- 9, the District should have convened an IEP team meeting no later than November 4, 2007, and its failure to do so constituted a procedural violation which deprived Student of educational benefit. The District accordingly denied Student a FAPE after November 4, 2007, up to the November 15, 2007 IEP team meeting.

*Issue 1(b): Whether the District failed to complete the FAA and hold an IEP team meeting within 60 days of receipt of parental consent to assess*

11. An IEP required as a result of an assessment of a pupil shall be developed within a total time not to exceed 60 days from the date of receipt of the parents' written consent for assessment, not counting days between the pupil's regular school sessions, terms, or days of school vacation in excess of five school days, unless the parent otherwise agrees.

12. Pursuant to Factual Findings 26-31 and Legal Conclusions 1-8 and 11, the District was required to develop an IEP incorporating the FAA by no later than January 30, 2008, and it failed to develop the IEP until March 2008. This failure was a procedural violation which deprived Student of educational benefit. The District accordingly denied Student a FAPE from January 30, 2008, to March 3, 2008.

*Issue 1(c): Whether the District failed to hold an IEP meeting on or before December 20, 2007, to discuss a change of Student's placement because he was not making sufficient progress in his moderate-to-severe SDC*

13. Pursuant to Factual Findings 32-42 and Legal Conclusion 8, the District should have convened an IEP team meeting by December 20, 2007, and its failure to do so constituted a procedural violation which deprived Student of educational benefit. The District accordingly denied Student a FAPE after December 20, up to the January 31, 2008 IEP team meeting.

*Issue 1(d): Whether the June 2007 IEP fails to designate whether the speech and language services were to be provided in a group or in an individual setting*

14. Pursuant to Factual Findings 43-45 and Legal Conclusions 1-9, the June 2007 IEP included all required information regarding the District's offer of speech and language services. There was no procedural violation and no denial of FAPE.

*Issue 1(e): Whether Student's BSP during the 2007-2008 SY was appropriate*

15. Pursuant to Factual Findings 46-51 and Legal Conclusions 1-9, the District was required to revise Student's BSP at the November 15, 2007 IEP team meeting. The "Level I" BSP was wholly inadequate because it was designed for mild behaviors and Student was exhibiting behaviors which presented an immediate danger to himself and others. The District's failure to revise the BSP to address Student's behaviors on an interim basis until completion of the FAA in January 2008, constituted a FAPE denial from November 4, 2007 to March 3, 2009. The substantive denial of FAPE began on November 4, 2007, because that is the day by which the District should have convened an IEP team meeting, as found in Legal Conclusion 10, to discuss Student's behaviors and revise his BSP. The substantive violation continued until March 3, 2008, because, as determined in Legal Conclusion 12, that is when the District finished reviewing the FAA at an IEP team meeting.

*Issue 1(f): Whether Student required three 50-minute sessions of one-on-one speech therapy per week to address Student's deficits in expressive language, receptive language and articulation in order to make adequate progress*

16. Pursuant to Factual Findings 52-58 and Legal Conclusions 1-9, Student did not require additional speech and language therapy in order to receive a FAPE during the 2007-2008 SY.

*Issue 1(g): Whether Student required one 50-minute session of clinic-based OT to address sensory integration needs*

17. Pursuant to Factual Findings 59-65 and Legal Conclusions 1-9, Student required one 50-minute session of OT per week in order to receive a FAPE during the 2007-2008 SY. This service was necessary to address sensory integration, which was not addressed by the OT Student was offered. However, there was no evidence that the additional OT must have been provided in a clinic setting.

*Issue 1(h): Whether Student required direct physical therapy (PT) to address Student's unique needs related to muscle tone, strength, balance, postural control, and coordination during the 2007-2008 SY*

18. Pursuant to Factual Findings 66-70 and Legal Conclusions 1-9, Student did not require direct PT in order to receive a FAPE during the 2007-2008 SY. There was no evidence that Ms. Burke-Doe's recommendation, based on her March 2007 assessment, was incorrect, and Dr. Skura's recommendation, based on her evaluation, was information that the District did not have in June 2007.

*Issue 1(i): Whether Open Court was not scientifically based and/or peer-researched for children like Student*

19. Pursuant to Factual Findings 71-73 and Legal Conclusions 1-9, the evidence did not establish that Open Court was inappropriate for Student or that it was not scientifically based and/or peer-researched for children like Student.

*Issue 2: Whether the FAA and resultant BIP completed by the District in March 2008, were inappropriate*

20. Where a student's behavior impedes his or her learning or that of others, the IEP team must consider the use of positive behavioral interventions and supports, and other strategies to address that behavior. (Ed. Code, § 56341.1(b)(1).)

21. When a child exhibits "serious behavior problems," a California LEA must conduct an FAA. Serious behavioral problems are defined as behaviors which are self-injurious, assaultive, or cause serious property damage and other severe behavior problems that are pervasive and maladaptive. (Cal. Code Regs., tit. 5, § 3001, subd. (aa).)

22. An FAA is a highly prescriptive evaluation. An FAA must be conducted by, or be under the supervision of a person who has documented training in behavior analysis with an emphasis on positive behavioral interventions. The qualified assessor must gather information from three sources: direct observation, interviews with significant others, and other available data such as assessment reports and other individual records. (Cal. Code Regs., tit. 5, § 3052, subd. (b).)
23. An FAA must include a systematic observation of the occurrence of the targeted behavior for an accurate definition and description of its frequency, duration, and intensity. (Cal. Code Regs., tit. 5, § 3052, subd. (b)(1)(A).) It must also include systematic observation of the immediate antecedent events associated with each instance of the display of the targeted inappropriate behavior. (Cal. Code Regs., tit. 5, § 3052, subd. (b)(1)(B).) An FAA must include systematic observation and analysis of the consequences following the display of the behavior to determine the function the behavior serves for the student. The communicative intent of the behavior is identified in terms of what the student is either requesting or protesting through the display of the behavior. (Cal. Code Regs., tit. 5, § 3052, subd. (b)(1)(C).)
24. An FAA must include ecological analysis of the settings in which the behavior occurs most frequently. Factors to consider should include the physical setting, the social setting, the activities and the nature of instruction, scheduling, the quality of communication between the student and staff and other students, the degree of independence, the degree of participation, the amount and quality of social interaction, the degree of choice, and the variety of activities. (Cal. Code Regs., tit. 5, § 3052, subd. (b)(1)(D).)
25. An FAA must include a review of records for health and medical factors which may influence behaviors. (Cal. Code Regs., tit. 5, § 3052, subd. (b)(1)(E).)
26. An FAA must include a review of the history of the behavior to include the effectiveness of previously used behavioral interventions. (Cal. Code Regs., tit. 5, § 3052, subd. (b)(1)(F).)
27. Following an FAA, a written report of the assessment shall be prepared, and shall include all of the following: (1) a description of the nature and severity of the targeted behavior(s) in objective and measurable terms (Cal. Code Regs., tit. 5, § 3052, subd. (b)(2)(A).); (2) a description of the targeted behavior(s) that include baseline data and an analysis of the antecedents and consequences that maintain the targeted behavior, and a functional analysis of the behavior across all appropriate settings in which it occurs (Cal. Code Regs., tit. 5, § 3052, subd. (b)(2)(B)); (3) a description of the rate of alternative behaviors, their antecedents and consequences (Cal. Code Regs., tit. 5, § 3052, subd. (b)(2)(C)); and, (4) recommendations for consideration by the IEP team which may include a proposed behavioral intervention plan (Cal. Code Regs., tit. 5, § 3052, subd. (b)(2)(D)).

28. Pursuant to Factual Findings 74-81 and Legal Conclusions 1-9 and 20-27, the District's FAA was insufficient because the assessor failed to communicate with other professionals, conducted insufficient observations of Student, failed to adequately identify and describe behaviors, failed to perform an ecological analysis, and failed to document prior interventions utilized for Student. Because the FAA was insufficient, the resultant BIP was also inappropriate and denied Student a FAPE.

*Issue 3(a): Whether the BIP in the June 2008 IEP was inappropriate*

29. Pursuant to Factual Finding 83 and Legal Conclusions 1-9 and 20-28, the BIP in the June 2008 IEP was the same BIP developed in March 2008, which was found to be inappropriate. For the identical reasons, it was inappropriate in June 2008 and denied Student a FAPE.

*Issue 3(b): Whether the District's June 2008 IEP offer of a SLOCOE "moderate-to-severe" SDC was not sufficient to meet Student's significant behavioral needs, which required placement in an NPS, or other appropriate placement, geared towards controlling Student's behaviors*

30. Pursuant to Factual Findings 84-88 and Legal Conclusions 1-9, Dr. Patterson's testimony, and Student's significant behaviors, which presented an immediate danger to himself and others, established that Student requires a placement which specializes in children with disabilities with serious behaviors which interfere with learning. The SLOCOE moderate to severe SDC was substantively identical to his failed placement the previous school year, and was therefore not reasonably calculated to provide Student with some or meaningful educational benefit. The District therefore denied Student a FAPE.

*Issue 3(c): Whether Student required three 50-minute sessions of one-on-one speech therapy per week to address Student's deficits in expressive language, receptive language and articulation in order to make adequate progress*

31. Pursuant to Factual Findings 89-90 and Legal Conclusions 1-9, Student did not require additional speech and language therapy in order to receive a FAPE during the 2008-2009 SY.

*Issue 3(d): Whether Student required one 50-minute session of clinic-based OT to address sensory integration needs*

32. Pursuant to Factual Findings 91-92 and Legal Conclusions 1-9, Student required one 50-minute session of OT per week in order to receive a FAPE during the 2008-2009 SY. This service was necessary to address sensory integration, which was not addressed by the OT Student was offered. However, there was no evidence that the additional OT must have been provided in a clinic setting.

*Issue 3(e): Whether Student required direct physical therapy (PT) to address Student's unique needs related to muscle tone, strength, balance, postural control, and coordination during the 2008-2009 SY*

33. Pursuant to Factual Findings 93-97 and Legal Conclusions 1-9, Student required one hour of direct PT per week for six months in order to receive a FAPE during the 2008-2009 SY, and the District's failure to provide the services denied him a FAPE.

*Remedies*

34. Compensatory education may be awarded to a pupil who has been denied a FAPE. The right to compensatory education does not create an obligation to automatically provide day-for-day or session-for-session replacement for the opportunities missed. (*Park v. Anaheim Union High Sch. Dist.* (9th Cir. 2006) 464 F.3d 1025 (citing *Student W. v. Puyallup Sch. Dist.* (9th Cir. 1994) 31 F.3d 1489, 1496).)

35. Parents may be entitled to reimbursement for the costs of placement or services they have procured for their child when the school district has failed to provide a FAPE and the private placement or services were appropriate under the IDEA and replaced services that the school district failed to provide. (20 U.S.C. § 1412(a)(10)(C); *School Committee of the Town of Burlington v. Dept. of Education* (1985) 471 U.S. 359, 369-370; *Student W. v. Puyallup Sch. Dist.* (9th Cir. 1994) 31 F.3d 1489, 1496.) Parents may receive reimbursement for their unilateral placement if the placement met the child's needs and provided the child with educational benefit. However, the parents' unilateral placement is not required to meet all requirements of the IDEA. For example, parents are not required to conform their unilateral placement to the content of the child's IEP, need not provide a placement that is certified by the state, and need not provide a placement in the LRE. The placement still must have met the child's needs and provided educational benefit. (*Florence County Sch. Dist., Four v. Carter* (1993) 114 S.Ct. 361; *Alamo Heights Independent Sch. Dist. v. State Bd. of Education* (5th Cir. 1986) 790 F.2d 1153, 1161.)

36. Pursuant to Factual Findings 98-109 and Legal Conclusions 1-35, as compensatory education for the District's FAPE denials during the 2007-2008 and 2008-2009 SY, the District shall place Student at Beacon for period of one year. Unless the parties agree otherwise, Student shall be placed at Beacon within 30 days of this decision. District shall also fund all related services that are necessary for Student to receive a FAPE during the year that he attends Beacon. Student shall additionally be entitled to transportation reimbursement to and from his maternal grandparents' home and Beacon.

37. Pursuant to Factual Findings 98-109 and Legal Conclusions 1-35, Student's Mother is entitled to reimbursement for privately procured OT services obtained during the 2007-2008 and 2008-2009 SY and educational expenses, totaling \$4,112.44.

38. Pursuant to Factual Findings 98-109 and Legal Conclusions 1-35, Student shall receive twenty 50-minutes sessions of weekly OT to address sensory integration as compensatory education for the OT services he should have received from the District

during the 2008-2009 SY. Unless the parties agree otherwise, this service shall commence within 30 days of this decision.

39. Pursuant to Factual Findings 98-109 and Legal Conclusions 1-35, as compensatory education for the District's failure to offer Student PT for the first six months of the 2008-2009 SY, District shall provide Student with PT, 60 minutes per week, for a period of 6 months. Unless the parties agree otherwise, this service shall commence within 30 days of this decision.

40. Pursuant to Factual Findings 98-109 and Legal Conclusions 1-35, District shall conduct an FAA after Student is placed at Beacon. The FAA shall begin no later than 30 school days after the first day Student attends Beacon, unless the parties agree otherwise. All statutory timelines must thereafter be met, and the FAA and resultant BIP shall strictly comply with the relevant statutes and regulations. District may contract with any qualified individual or entity who is not employed by the District or SLOCOE to conduct the FAA.

## ORDER

1. Within 30 days of the date of this order, unless the parties agree otherwise, the District shall place Student at Beacon Day School for period of one year. District shall also fund all related services that are necessary for Student to receive a FAPE during the year that he attends Beacon Day School. Student shall additionally be entitled transportation reimbursement to and from his maternal grandparents' home and Beacon Day School.
2. Within 30 days of the date of this order, District shall pay Mother \$4,112.44, as reimbursement for privately procured OT services and the educational supplies purchased by Mother.
3. District shall provide Student with twenty 50-minutes sessions of occupational therapy to address sensory integration deficits. Unless the parties agree otherwise, this service shall commence within 30 days of this order.
4. District shall provide Student with physical therapy, 60 minutes per week, for a period of six months. Unless the parties agree otherwise, this service shall commence within 30 days of this order.
5. District shall conduct a functional analysis assessment after Student is placed at Beacon. The functional analysis assessment shall begin no later than 30 school days after the first day Student attends Beacon Day School, unless the parties agree otherwise. All statutory timelines must thereafter be met, and the functional analysis assessment and resultant positive behavioral intervention plan shall strictly comply with the relevant statutes and regulations. District may contract with any qualified

individual or entity who is not employed by the District or SLOCOE to conduct the functional analysis assessment.

6. All of Student's other requests for relief are denied.

#### PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing Decision must indicate the extent to which each party has prevailed on each issue heard and decided. The following findings are made in accordance with this statute: Student prevailed on Issue 1, parts (a)-(c), (e) and (g). Student prevailed on Issue 2. Student prevailed on Issue 3, parts (a), (b), (d) and (e). District prevailed Issue 1, parts (d), (f), (h), and (i) and Issue 2, part (c).

#### 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 ninety days of receipt of this decision. A party may also bring a civil action in United States District Court. (Ed. Code, § 56505, subd. (k).)

Dated: May 18, 2009

/s/  
TREVOR SKARDA  
Administrative Law Judge  
Office of Administrative Hearings