THE YEAR IN REVIEW:
CHANGES THAT AFFECT YOU

Presentation by Monica D. Batanero
August 7, 2009

The following cases and letters from the Office of Special Education Programs ("OSEP") provide important guidance on how the courts and OSEP interpret the Individuals with Disabilities Education Act ("IDEA") and California law with respect to special education issues.

Most of the cases below are from the 9th Circuit Court of Appeals, and are therefore, binding on Federal district courts in California. The OSEP letters provide guidance from the U.S. Department of Education on its interpretation of how the IDEA applies in issues such as eligibility, stay-put and independent educational evaluations.

The cases and OSEP letters are broken down into the following categories:

- Autism
- Behavior
- Confidentiality
- Eligibility
- Individualized Educational Plans ("IEPs")
- IEP Team Meetings
- Remedies under IDEA/504
- Stay Put
- Unilateral Placement
- Independent Educational Evaluations ("IEEs")

AUTISM:

- *Joshua A. By Jorge A. v. Rocklin Unified Sch. Dist.*, 52 IDELR 64 (9th Cir. 2009) – 6-year-old boy with autism did not need an ABA-based program to receive FAPE. Although the eclectic program was not peer-reviewed itself, the 9th Circuit held that the program was based on peer-reviewed research to the extent practicable. The program was calculated to provide an educational benefit and was effectively tailored to the student's unique needs. The court did confirm that the IDEA's stay-put provision does apply to disputes during the appeal process and does not stop at the due process hearing level.

BEHAVIOR:

- *San Rafael Elementary Sch. Dist. v. Cal. Spec. Edu. Hear. Office*, 482 F.Supp.2d 1152 (N.D. 2007) – Student with autism had behavior problems, but school maintained that they did not prevent him from making educational progress. Court agreed with District's argument that it is not responsible for ensuring that student translates his behavior skills learned in the classroom to the home or community settings.

CONFIDENTIALITY:

- *Letter to Gray*, 50 IDELR 198 (OSEP 2008) – Schools must obtain consent from parents or adult students to invite representative of outside agencies that are likely to be responsible for providing or paying for transition services to IEP meetings to discuss transition services, and that such consent must be obtained prior to ***each*** IEP meeting in order to comply with FERPA.

ELIGIBILITY:

- *Weissburg v. Lancaster School District*, 50 IDELR 11 (C.D. Cal. 2008) – Parent lost all issues except for one – student should have been identified as having autism as well as mental retardation. The court concluded that this did not make the parent the "prevailing party" for attorneys' fees purposes. The change in the label made no difference to the student's program or services. If the student is classified as a student with a disability and is receiving appropriate services, then the student is receiving FAPE irrespective of the label. This case was handled by our very own Carol Grogan and is on appeal to the 9th Circuit.

- *Letter to Clarke*, 48 IDELR 77 (OSEP 2007) – The U.S. Department of Education's position is that "educational performance" as used in the IDEA and its implementing regulations is not limited to academic performance. This matter involved an on-grade level student with a speech impairment.

- *M.P. v. Santa Monica-Malibu Unified Sch. Dist*., 50 IDELR 220 (C.D. Cal. 2008) – The IEP team and ALJ concluded that student was not eligible because student's failure to complete work was attributable to lack of motivation rather than disability and that a severe discrepancy did not exist between intellectual ability and academic achievement. The court, however, found that student's lack of motivation was caused by his disability (ADHD). The court further found that student was not capable, because of the ADHD, of being motivated and that this is the very definition of discrepancy between ability and achievement. Court found student eligible under SLD and OHI.

    ➪ This case represents pure judicial second guessing of a well-founded and well-supported ALJ decision. The expert who testified for the parent did not testify that the student met eligibility criteria for special education.

INDIVIDUALIZED EDUCATIONAL PLANS (IEPs):

- *Van Duyn v. Baker School District*, 502 F.3d 811 (9th Cir. 2007) – Failure to implement the IEP is a denial of FAPE only if it is a material failure. A material failure occurs when there is more than a minor discrepancy between the services provided to the disabled child and those required by the IEP.

IEP TEAM MEETINGS:

- *H.B. v. Las Virgenes Unified Sch. Dist.*, 48 IDELR 31 (9th Cir. 2007) – predetermination prior to an IEP meeting occurs when an educational agency has made its determination prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives. Thus, a school district violates IDEA procedures if it independently develops an IEP, without meaningful parental participation and then simply presents the IEP to the parent for ratification.

- *R.B. v. Napa Valley Unified Sch. Dist.*, 496 F.3d 932 (9th Cir. 2007) – Although the court found that the school district violated the procedural requirements of IDEA by failing to include a special education teacher of the student on the IEP team, the court held the procedural error was harmless because the student was substantively ineligible for IDEA relief. Student was attending a residential treatment center at the time of the IEP meeting. District included regular education teacher who had served student six years earlier and a certified special education teacher that had never taught student. Court held that the IEP team had to include a regular education and special education teacher who had provided services to the student at ***some*** point. The IDEA no longer requires the presence of the child's current regular or special education teacher.

  ➪ ***Balancing Tip***: It is recommended that you have the current regular and/or special education teacher attend the IEP meeting.

- *S.B. v. Pomona Unified Sch. Dist.*, 50 IDELR 72 (C.D. Cal. 2008) – Student was a preschool student attending a private school. The IEP team was fatally flawed due to the absence of a regular education teacher (student's teacher at the private school). The requirement to have a regular education teacher present at an IEP meeting applies when students are in preschool.

REMEDIES UNDER IDEA/504:

- *Mark H. v. Lemahieu,* 513 F.3d 922 (9th Cir. 2008) – Court held that the fact that remedies are available under IDEA does not preclude a suit under 504 if the parents can prove a violation of 504. Thus, a public entity can be liable for damages ($$$) under Section 504 if it intentionally or with deliberate indifference fails to provide meaningful access or reasonable accommodation to disabled persons. However, if

a hearing officer or court concludes that the IEP in question satisfies IDEA standards, there should be no liability under 504.

STAY PUT:

- *Letter to Watson*, 48 IDELR 284 (OSEP 2007) – School district must convene a meeting of the IEP team, periodically, but not less than annually, to review, and if appropriate, revise, an IEP for a child with a disability, even if the public agency is required to maintain the child's current educational placement while administrative or judicial proceedings are pending (stay put).

  ➪ ***Balancing Tip***: Even if in stay put, you must hold annual IEP review

UNILATERAL PLACEMENT:

- *Forest Grove Sch. Dist. v. T.A.*, (U.S. 2009) – The U.S. Supreme Court held that parents of children with disabilities are not barred from seeking reimbursement for the cost of private school tuition just because their children never received special education services through the public school system. The 6-3 ruling by the Court affirms a ruling by the 9th U.S. Circuit Court of Appeals and sends the case back to the District Court to decide what, if any, relief the parents are entitled to. The opinion centered on the fact that the Forest Grove School District never found the student, T.A., eligible for special education. Now that the Court has said previous receipt of special ed services is not a prerequisite for tuition reimbursement, a potential issue may that it will be even harder to convince parents to give public special ed programs a try.

- *S.J. v. Issaquah Sch. Dist.*, (9th Cir. 2009) – Student was not entitled to reimbursement for his private placement because he did not give the district the requisite notice (10 business days) of his intended private placement, he did not provide the district with an opportunity to address his objections to his IEP prior to his private placement, and he delayed the IEP meeting. The Court did determine that the district's offer was FAPE.

  ➪ **Balancing Tip**: If a parent advises you that he/she is unilaterally placing their child in a private program, be proactive. Schedule an IEP meeting to discuss the parent's objections/concerns with the district's offer. If the parent refuses, you can make the argument that the parent did not provide the district an opportunity to address his/her objections/concerns.

INDEPENDENT EDUCATIONAL EVALUATIONS (IEEs):

- *L.M. v. Capistrano Unified Sch. Dist.*, 556 F.3d 900 (9th Cir. 2008) – Court affirmed the administrative law judge's determination that although district technically violated Cal. Ed. Code 56329 (c) because it restricted to 20-minute increments the observations of the proposed program by a psychologist hired by the parents, it did not result in a

loss of educational opportunity nor did it deprive the parents of their right to meaningfully participate in the due process hearing.

➪ ***Balancing Tip***: Take caution when setting limits on independent classroom observations. The IEE should be given an ***equivalent opportunity*** to observe the current or proposed placement

- *G.B. v. San Ramon Valley Unified Sch. Dist.*, (N.D. Cal. 2008) – District had last assessed student in June 2006. The District reviewed the assessment at an IEP in August 2006. Parents had not received a final copy of the assessment report until March 2008. In March 2008, parents requested an IEE. The district filed for due process on the issue of parents' IEE request and the parents' refusal to sign an assessment plan for a triennial assessment. The court found that the parents were premature in requesting an IEE because the parents ultimately argued that they weren't disagreeing with any district assessment but were seeking an independent evaluation of whether the triennial should take place in the first instance.

- *Harris v. District of Columbia*, 561 F. Supp. 2d 63 (D.D.C. 2008) – The court held that a "functional behavioral assessment" (FBA) is an evaluation. Therefore, a parent may disagree with the district's FBA and request an independent educational evaluation (IEE).

- *Letter to Christiansen*, 48 IDELR 161 (OSEP 2007) – if an FBA is used to evaluate an individual child to assist in determining whether the child is a child with a disability and the nature and extent of special education and related services that the child needs, it is considered an evaluation under IDEA and parent consent is required for an FBA conducted as an individual evaluation or reevaluation. If the FBA is conducted for individual evaluative purposes to develop or modify a behavioral intervention plan for a particular child, a parent who disagrees with the FBA would have the right to request that the district pay for an IEE.

R.B., by and through her Guardian Ad Litem, F.B.; F.B., Plaintiffs-Appellants, v. NAPA VALLEY UNIFIED SCHOOL DISTRICT, Defendants-Appellees.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

496 F.3d 932; 2007 U.S. App. LEXIS 16840

May 18, 2007, Argued and Submitted, San Francisco, California
July 16, 2007, Filed

DISPOSITION: AFFIRMED.

COUNSEL: George D. Crook and Henry Tovmassian, Newman Aaronson Vanaman, Sherman Oaks, California, briefed the case, and Mr. Crook argued the case for the appellants.

Sally Jensen Dutcher, General Counsel, and Scott N. Kivel, Law Offices of Scott N. Kivel, Petaluma, California, argued and briefed the case for appellees.

John E. Hayashida, Parker & Covert, Tustin, California, was on the brief for amicus curiae California School Boards Association Education Legal Alliance.

JUDGES: Before: Cynthia Holcomb Hall and Diarmuid F. O'Scannlain, Circuit Judges, and Irma E. Gonzalez, * Chief District Judge.

* The Honorable Irma E. Gonzalez, United States Chief District Judge for the Southern District of California, sitting by designation.

Opinion by Judge Gonzalez.

OPINION BY: Irma E. Gonzalez

OPINION

[*935] GONZALEZ, Chief District Judge:

R.B., a minor, by and through her Guardian Ad Litem, F.B., and F.B. ("appellants") appeal the district court's entry of summary judgment in favor of the Napa Valley Unified School District ("appellee" or "District"). The district court, in turn, [**2] upheld the decision by the California special education hearing officer ("SEHO") that R.B. is not entitled to special education protection and services under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq* ., and corresponding provisions of the California Education Code. Because R.B. did not qualify for special education services, appellants were ineligible for reimbursement of the expenses they incurred in placing R.B. at Intermountain Children's Home and Services ("Intermountain"), a private school in Helena, Montana.

Appellants challenge the SEHO's decision on procedural and substantive grounds. Appellants claim that R.B.'s individual education program (IEP) team should have included her teacher or therapist from Intermountain and that this procedural violation, in and of itself, denied R.B. a free appropriate public education (FAPE). Appellants further claim that the SEHO and district court erred in finding that R.B. did not have a "serious emotional disturbance" under the criteria enumerated in 34 C.F.R. § 300.7(c)(4) (2003) and Cal. Code Regs. tit. 5 § 3030(i). Appellants contend R.B. could not form satisfactory relationships with peers and teachers, [**3] manifested inappropriate behavior under normal circumstances, and was pervasively depressed.

We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm.

I.

BACKGROUND

R.B. was born in 1991 to a mother who abused cocaine, alcohol, and heroin. In infancy, R.B. demonstrated symptoms of exposure to illegal drugs *in utero* (including irritability, delayed visual maturation, and delayed motor skills). Both of R.B.'s birth parents were incarcerated. F.B., a single parent and schoolteacher, adopted R.B. at eighteen months of age. F.B.'s mother assisted in caring for R.B.

R.B. was molested by her natural father when she was two. Afterward, she required a year of play therapy because of her self-mutilation and inappropriate displays of affection. A psychologist

diagnosed R.B. with Attention Deficit Hyperactivity Disorder (ADHD) and began prescribing medication when she was three. Other diagnoses included Reactive Attachment Disorder and Post Traumatic Stress Disorder.

R.B. was expelled from three preschool programs because of her classroom misconduct. F.B. then placed R.B. with the District, which determined R.B. was eligible for special educational services and developed an IEP program for her. [**4] R.B. transitioned into a regular kindergarten class with resource support, taught by Janis Sparks.

During R.B.'s first grade year at Donaldson Way Elementary School, the District concluded that R.B. no longer qualified [*936] for special educational services. Instead, the District found R.B. was a "qualified handicapped individual" under Rehabilitation Act § 504 and developed a behavioral intervention plan. F.B. acquiesced in these changes only after the District agreed to a neutral psychological evaluation. Dr. Emily Jordan conducted the evaluation and confirmed the District's conclusion that R.B. was no longer a "child with a disability."

R.B.'s elementary school history includes a series of disturbing incidents. In second grade, R.B. banged a classmate's head against a computer monitor for refusing to give up the computer at recess. R.B. was suspended in third grade for throwing chairs and running off campus until law enforcement restrained her. R.B. was suspended again in fourth grade when she refused to take her ADHD medication, yelled at her teacher, and was again restrained by law enforcement.

R.B.'s behavior reached an extreme point during the second trimester of fifth grade. She was [**5] suspended twice in the span of just over a month. First, R.B. twisted a child's arm during recess and said she hoped her music teacher would die. Then, R.B. poked another student with a mechanical pencil while refusing to turn in her work. At the time, R.B. was alternately refusing to take her ADHD medications and receiving occasional double dosages from F.B. Working with R.B. and F.B., the District adopted a behavior management plan, which largely remedied R.B.'s misconduct. Throughout elementary school, R.B. excelled in her classes, scored high marks on achievement tests, and frequently made the honor roll.

In the spring of 2002, F.B. met with an educational consultant who referred R.B. to Dr. Paula Solomon for a psychological evaluation. Without observing R.B. in the classroom, Dr. Solomon recommended treatment in a residential placement program. Therefore, on July 15, 2002, F.B. wrote to the District that R.B. had "reached a crises [sic] point." F.B. said that she would place R.B. in a residential treatment facility within ten (10) days and expected the District to reimburse her for the placement.

F.B. placed R.B. with Intermountain. Tina Morrison, the Intermountain staff psychologist, [**6] was R.B.'s therapist. Morrison observed that R.B. engaged in controlling and physically aggressive behavior toward staff and fellow students, to the point that R.B. was "derailed cognitively" at times. R.B.'s teacher at Intermountain was Kathy Brandt. R.B. took almost twice as long as the average Intermountain student to transition into Brandt's classroom. From November to March 2003, Brandt observed R.B. intimidating other students almost daily.

On August 6, 2002, F.B. requested an impartial due process hearing, pursuant to 20 U.S.C. § 1415(f). Therefore, the District arranged for its psychologist, Denise Struven, to travel to Intermountain to conduct an evaluation. Struven concluded that R.B. did not qualify for special education benefits under the IDEA.

On January 31, 2003, the following individuals met as part of the District's IEP team: Laura Miller, a special education teacher and Director of Special Education for the district; Sparks, then a principal of Donaldson Way Elementary; Struven and Donna Poninski, District psychologists; Sally Dutcher, attorney for the District; Jane F. Reid, then-counsel for appellants; and F.B. No one from Intermountain attended, although Struven reported [**7] her observations of R.B. there. The IEP team concluded R.B. was not eligible for special education benefits.

F.B. appealed to the California State Education Agency, pursuant to 20 U.S.C. § 1415(g). Hearing Officer Jessica Katz of the California Special Education Hearing [*937] Office conducted the hearing over six days in June and August 2003. The SEHO found for the District, concluding that R.B. did not meet the IDEA's standard for a child with a "severe emotional disturbance" for either the 2001-02 school year (R.B.'s fifth grade year at Donaldson Way Elementary) or the 2002-03 school year (R.B.'s first year at Intermountain). The SEHO also found that any procedural violation in the composition of the IEP team did not result in a lost educational opportunity for R.B.

On January 5, 2005, F.B. filed a complaint for

violation of the IDEA in the Northern District of California. The district court granted the District's motion for summary judgment, and denied appellants' cross-motion. After independently reviewing the record and giving due deference to the SEHO, the district court agreed that R.B. did not have a "serious emotional disturbance" under the IDEA and that any procedural violation did [**8] not result in a lost educational opportunity. Appellants timely appealed on July 5, 2005.

This court has jurisdiction under 28 U.S.C. § 1291.

II.

STANDARD OF REVIEW

The court reviews findings of fact for clear error, even if those findings are based on the administrative record. *Amanda J. ex rel. Annette J. v. Clark County Sch. Dist.*, 267 F.3d 877, 887 (9th Cir. 2001). A finding of fact is clearly erroneous if "'the reviewing court is left with a definite and firm conviction that a mistake has been committed.'" *Id.* (quoting *Burlington N., Inc. v. Weyerhaeuser Co.*, 719 F.2d 304, 307 (9th Cir. 1983)). Mixed questions of fact and law are reviewed de novo unless, as here, the question is primarily factual. [1] *Id.*; *Gregory K. v. Longview Sch. Dist.*, 811 F.2d 1307, 1310 (9th Cir. 1987).

> 1 Appellants argue for *de novo* review. However, as we recently stated in another case concerning IDEA eligibility, "the fact-intensive nature of a special education eligibility determination coupled with considerations of judicial economy render a more deferential approach appropriate." *Hood v. Encinitas Union Sch. Dist.*, 486 F.3d 1099, 1104 n.4 (9th Cir. 2007).

When a party challenges the outcome of an IDEA due [**9] process hearing, the reviewing court receives the administrative record, hears any additional evidence, and, "basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(B) (2003). Courts give "'due weight'" to the state administrative proceedings, *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, 481 F.3d 770, 775 (9th Cir. 2007) (quoting *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982)), and, at a minimum, "'must consider the findings carefully,'" *Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467, 1474 (9th Cir. 1993) (quoting *Gregory K.*, 811 F.2d at 1311). The court gives particular deference where the hearing officer's administrative findings are "thorough and careful." *Union Sch. Dist. v. Smith*, 15 F.3d 1519, 1524 (9th Cir. 1994).

III.

DISCUSSION

A. Procedural violation

The purpose of the IDEA is to provide special education services for children with qualifying disabilities. 20 U.S.C. § 1400(d)(1)(A) (2003). [2] In drafting [*938] the IDEA, "Congress placed every bit as much emphasis upon compliance with procedures . . . as it did upon the measurement of the resulting IEP against a substantive standard." *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 205-06, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982). [**10] Procedural compliance "would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP." *Id.* at 206. Therefore, a reviewing court first considers a school district's procedural compliance before reaching the IEP's substance. *Id.*

> 2 The IDEA was subsequently amended by the Individuals with Disabilities Education Improvement Act of 2004, Pub. L. 108-446, 118 Stat. 2647, which took effect on July 1, 2005. Here, we apply the statute and regulations in effect at the time of the events in question. *See Adams v. Oregon*, 195 F.3d 1141, 1148 n.2 (9th Cir. 1999).

The IDEA requires "the provision of a free appropriate public education [FAPE] to [each] child." 20 U.S.C. § 1415(b). A child is denied a FAPE only when the procedural violation "result[s] in the loss of educational opportunity or seriously infringe[s] the parents' opportunity to participate in the IEP formation process." [3] *W.G. v. Bd. of Trustees of Target Range Sch. Dist. No. 23*, 960 F.2d 1479, 1484 (9th Cir. 1992); *accord Park v. Anaheim Union High Sch. Dist.*, 464 F.3d 1025, 1031 (9th Cir. 2006). Where a school district improperly constitutes an IEP team, "IDEA procedural error may be held [**11] harmless[.]" [4] *M.L. v. Fed. Way Sch. Dist.*, 394 F.3d 634, 652 (9th Cir. 2005) (Gould, J., concurring). Therefore, not all procedural violations deny the child a FAPE. *Park*, 464 F.3d at 1033 n.3; *Ford ex rel. Ford v. Long Beach Unified Sch. Dist.*, 291 F.3d 1086, 1089 (9th Cir. 2002).

3 Appellants do not claim that the alleged procedural violations infringed F.B.'s opportunity to participate in the IEP formation process. The sole question is whether the procedural violations resulted in a loss of educational opportunity for R.B.

4 Although each member of the *M.L.* panel wrote separately, that case did not alter our standard for reviewing procedural errors in IDEA cases. Two members of the panel analyzed whether the procedural violation resulted in a lost educational opportunity. *M.L.*, 394 F.3d at 652 (Gould, J., concurring), 658 (Clifton, J., dissenting). As the narrower opinion joining in the judgment for the *M.L.* appellants, Judge Gould's concurrence is the "controlling opinion". *See Center for Fair Public Policy v. Maricopa County*, 336 F.3d 1153, 1161 (9th Cir. 2003) (citing *Marks v. United States*, 430 U.S. 188, 193, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1976)). Judge Gould's concurrence merely clarifies that, where a procedural [**12] violation does not result in a lost educational opportunity for the student, the violation is "harmless error" because it does not deny the student a FAPE. *M.L.*, 394 F.3d at 651-52 (Gould, J., concurring).

One of the IDEA's procedural requirements is the creation of an IEP team to determine a child's eligibility for IDEA benefits. *Cf.* 20 U.S.C. §§ 1414(b)(4)(A), (c)(4). Prior to the 1997 amendments, the IEP team required the presence of "the teacher." 20 U.S.C. § 1401(a)(20) (1994). By contrast, under the amended statute and implementing regulations, the IEP team must include "at least one regular education teacher of such child (if the child is, or may be, participating in the regular education environment)" and "at least one special education teacher, or where appropriate, at least one special education provider of such child." 20 U.S.C. § 1414(d)(1)(B)(ii)-(iii); 34 C.F.R. § 300.344(a)(2)-(3); *cf.* Cal. Educ. Code § 56341(b)(2)-(3) (2001). Appellants claim the District's IEP team failed on both counts by including Sparks, who taught R.B. in kindergarten six years before the IEP meeting, and by not including Brandt, R.B.'s special education teacher at Intermountain.

Whether Sparks's [**13] participation on the IEP team was a procedural violation requires us to interpret the phrase "at least one regular education teacher of such child[.]" 20 U.S.C. § 1414(d)(1)(B)(ii); 34 C.F.R. § 300.344(a)(2). Although appellants acknowledge the statutory amendments in a footnote, they seek to minimize [*939] the significance of those amendments by relying on cases that interpreted the *prior* version of the statute to require the participation of the student's current teacher on the IEP team. *Shapiro ex rel. Shapiro v. Paradise Valley Unified Sch. Dist. No. 69*, 317 F.3d 1072, 1076 (9th Cir. 2003), *superseded by statute on other grounds*, Individuals with Disabilities Education Act Amendments of 1997, Pub. L. 105-17, § 614(d)(1)(B), 111 Stat. 37; *Target Range*, 960 F.2d at 1484. By using *Shapiro* and *Target Range* to assert that our law requires the presence of a child's private school teacher at an IEP meeting, appellants are essentially asking us to conclude that the statutory amendments had no effect. *M.L.* did not resolve this issue because the IEP team there included no regular education teacher, although dicta in two of the opinions take a position at odds with appellants' argument. [5]

5 *See* 394 F.3d at 649 (Alarcon, J.) [**14] ("Indeed, any regular education teacher would have contributed his or her knowledge of the ability of a disabled student to benefit from being placed in a regular classroom."), 657 n.12 (Gould, J., concurring) ("The IDEA mandates that a regular classroom teacher be a member of the IEP team.")

We conclude that, after the 1997 amendments, the IDEA no longer requires the presence of the child's current regular education teacher on the IEP team. The phrase "at least one regular education teacher of such child" gives a school district more discretion in selecting the regular education teacher than the phrase "the teacher." As the *Shapiro* court explained in its interpretation of the pre-1997 IDEA, "the teacher" was Congress's way of requiring more than simply "a teacher" on the IEP team. 317 F.3d at 1077. Allowing "a teacher" to assume the role set aside for "the teacher" interpreted the statute too broadly. *Id.* This case is simply *Shapiro* in reverse. If Congress had wanted the child's current regular education teacher on the IEP team, Congress would have used more specific language than "at least one regular education teacher of such child." Indeed, the phrase "at least one" contemplates [**15] that the IEP team will include regular education teachers other than the child's current teacher. Requiring "the current regular education teacher" to assume the role set aside for "at least one regular education teacher" would interpret the statute too narrowly.

Like the *Shapiro* court, we find support for our

construction in the authorities of the Office of Special Education Programs ("OSEP"). *See* 317 F.3d at 1077 (referencing a footnote in an OSEP regulation to show that the child's current teacher must participate on the IEP team). OSEP's Notice of Interpretation explains, "[t]he regular education teacher who serves as a member of a child's IEP team should be a teacher who is, or may be, responsible for implementing a portion of the IEP, so that the teacher can participate in discussions about how best to teach the child." 34 C.F.R. Pt. 300 App. A--Question 26 (1999). This interpretation imposes no stringent requirement that the child's current regular education teacher attend the IEP meeting. An agency's interpretation of its own regulations carries controlling weight unless the interpretation is plainly erroneous or is inconsistent with the regulations themselves. *Stinson v. United States*, 508 U.S. 36, 45, 113 S. Ct. 1913, 123 L. Ed. 2d 598 (1993); [**16] *Nat'l Ass'n of Home Builders v. Norton*, 340 F.3d 835, 843 (9th Cir. 2003). Because the agency's failure to require the participation of the current regular education teacher is neither plainly erroneous nor inconsistent with the regulation, we do not impose such a requirement. [6]

6 We also reject appellants' argument that Sparks could not have been a teacher "responsible for implementing a portion of the IEP" (if R.B. had been entitled to an IEP). When the IEP team met, Sparks was principal of Donaldson Way Elementary and, thus, was involved in the education of all students in the school. Appellants fail to carry their burden of showing that Sparks would have no responsibility for implementing the IEP by merely pointing out that R.B. would soon enroll in middle school. *See Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 535-37, 163 L. Ed. 2d 387 (2005) (party seeking IDEA relief bears burden of persuasion).

[*940] Whether the district's failure to include Brandt [7] on the IEP team was a procedural violation requires us to interpret the phrase "at least one special education teacher or, where appropriate, at least one special education provider of such child[.]" 20 U.S.C. § 1414(d)(1)(B)(iii) (2003); [**17] 34 C.F.R. § 300.344(a)(3) (2003). Like the companion provision on the regular education teacher discussed *supra*, we interpret this provision not to require the participation of the child's current special education teacher. Therefore, Brandt's exclusion from the IEP team was not a procedural violation *per se*.

7 Appellants also argue that Morrison should have been included on the IEP team, presumably as a "special education provider of such child." Our analysis of whether the IEP team should have included Brandt applies with equal force to Morrison.

This is not the end of the argument, however, for nothing in the record establishes that Miller, the special education teacher on the IEP team, ever taught R.B. We conclude that Miller's participation did not satisfy the IDEA because we interpret the statute and regulation to require a special education teacher who has actually taught the student. Although this requirement would be even clearer if the phrase "of such child" also appeared immediately after "special education teacher" and not merely after "special education provider," [8] we think the statute and regulation are clear enough as written. Furthermore, the OSEP Notice of Interpretation [**18] states, "[t]he requirements of [the regulation] can be met by either: (1) a special education teacher *of the child*; or (2) another special education provider of the child[.]" 34 C.F.R. Pt. 300 App. A--Question 23. OSEP's interpretation of the regulation to require a special education teacher of the child is not plainly erroneous or inconsistent with the regulation itself. *See Stinson*, 508 U.S. at 45; *Norton*, 340 F.3d at 843. Although the District did not have to include Brandt, it did not satisfy its legal obligations by including Miller. Therefore, the District's failure to include a special education teacher or provider on the IEP team who actually taught R.B. was a procedural violation of the IDEA. We now address the question of whether that violation resulted in a loss of educational opportunity for R.B., or was instead harmless error.

8 Under California law, the IEP team must include "[a]t least one special education teacher of the pupil, or, if appropriate, at least one special education provider of the pupil." Cal. Educ. Code § 56341(b)(3). Therefore, even if we did not interpret the IDEA to require the participation of a special education teacher who has actually taught the [**19] child, the composition of R.B.'s IEP team would still have been procedural error under California law, and we would still proceed to the harmless-error analysis *infra*.

We recognize that we have, more often than not, held that an IDEA procedural violation denied

the child a FAPE. *Compare M.L.*, 394 F.3d at 656 (Gould, J., concurring), *Shapiro*, 317 F.3d at 1079, *Amanda J.*, 267 F.3d at 894, *and Target Range*, 960 F.2d at 1484-85 (all finding that the child was denied a FAPE) *with Park*, 464 F.3d at 1033 n.3, *and Ford*, 291 F.3d at 1089 (both finding no denial of FAPE). All of these cases except *Ford*, however, concern students who were eligible [*941] under the IDEA and alleged that the procedural violations resulted in some defect in their IEP. In *M.L.*, for example, the IEP team improperly excluded a regular education teacher and provided the student with an IEP that had few opportunities for "mainstreaming," *i.e.*, interaction with nondisabled students. 394 F.3d at 640 (Alarcon, J.). Judge Gould's concurrence emphasized the statutory preference for mainstreaming and cited evidence from past school years to show that the student could be placed in regular education classrooms with non-disabled students. [**20] *Id.* at 656-57. The procedural violation resulted in a lost educational opportunity, and thus denied the student a FAPE, because a properly constituted IEP team would likely have given greater consideration to mainstreaming and provided the student an IEP with more mainstreaming opportunities. *Id.* at 657.

In *Shapiro*, the failure to include the child's current special education teacher from her private school (under the pre-1997 IDEA) resulted in a loss of educational opportunity because the private school was the only place where the child had received special education. 317 F.3d at 1077, 1079. Without a representative from the private school at the IEP meeting, the school district refused to continue placing the student with the private school and instead offered placement in its own program. *Id.* at 1074-75. The school district's program was far inferior because, at the time of the IEP meeting, the district had not hired a teacher, the program might not continue past the upcoming school year, and the student would be the first and only enrollee. *Id.* at 1074-75. The loss of educational opportunity was similar in *Target Range*, where, in the absence of the regular education teacher from [**21] the child's private school, the school district proposed "a preexisting, predetermined" IEP and refused to consider alternatives. 960 F.2d at 1484. *See also Amanda J.*, 267 F.3d at 894 (failure to disclose student's records, including documents that suggested the possibility of autism, denied child a FAPE by preventing parents' full participation in the IEP meeting).

In these cases involving flaws in the IEP, the child has already jumped through a significant hoop by establishing IDEA eligibility. Once the child qualifies for special education services, the district must then develop "[a]n IEP which addresses the unique needs of the child[.]" *Amanda J.*, 267 F.3d at 892. If the IEP team is improperly constituted, the reviewing court is ill-situated to know what the IEP would look like if the school district had included all the required participants on the IEP team. Nor can the court substitute its judgment for educational policymakers by determining what kind of IEP will best suit the disabled child's needs. A properly constituted IEP team is in the best position to develop an IEP that suits the peculiar needs of the individual student. *See Rowley*, 458 U.S. at 206 (explaining that procedural [**22] compliance would almost always achieve what Congress intended with respect to the substantive IEP provisions).

Like this case, *Ford* presented a different, more preliminary question: whether the student qualified for IDEA benefits in the first instance. In *Ford*, the district assessed the student and found that she was not IDEA-eligible. 291 F.3d at 1087. The student claimed the assessment violated an OSEP regulation because it did not include classroom observation by someone other than her current regular education teacher. *Id.* at 1089. We held that the procedural violation did not result in a lost educational opportunity for the student because three of the student's former teachers testified at the administrative hearing. *Id.* at 1089. In effect, the hearing cured [*942] the procedural violation by including those viewpoints which should have been considered when the IEP team met.

Similarly, in this case, the administrative hearing cured the procedural error in the composition of the IEP team. If the IEP team had included Brandt or Morrison, the District would have satisfied the requirement that a special education teacher or provider of the child be included. Although R.B.'s IEP team lacked [**23] such a person, Brandt and Morrison both testified at length during the hearing. To the extent that Brandt and Morrison believed R.B. should be IDEA-eligible, they were able to say why. The SEHO, district court, and now this court all have the benefit of their testimony in determining whether the District correctly concluded that R.B. was ineligible for special education services. We then apply the law (of IDEA eligibility) to the facts (including the new facts that Brandt and Morrison presented for the first time to the SEHO). In so doing, we apply the same eligibility criteria to all cases and are, therefore, better situated to find an error harmless than in the context of whether an IEP satisfies the unique needs of a child with particular

disabilities.

A procedural violation does not constitute a denial of a FAPE if the violation fails to "result[ ] in a loss of educational opportunity[.]" *M.L.*, 394 F.3d at 651 (Gould, J., concurring); *Target Range*, 960 F.2d at 1485. A child ineligible for IDEA opportunities in the first instance cannot lose those opportunities merely because a procedural violation takes place. *Cf. Nack ex rel. Nack v. Orange City Sch. Dist.*, 454 F.3d 604, 612 (6th Cir. 2006) [**24] (procedural violation denies a FAPE "only if such violation causes substantive harm to the child or his parents" (internal quotation marks and citation omitted)). In other words, a procedural violation cannot qualify an otherwise ineligible student for IDEA relief. Therefore, the omission of a special education teacher or provider from R.B.'s IEP team is harmless if R.B. is ineligible for IDEA benefits. Because we affirm the district court's acceptance of the SEHO's determination that R.B. does not qualify for IDEA relief, we hold that the District's procedural violation in the composition of R.B.'s IEP team is harmless error.

B. Substantive eligibility

1. Deference to the SEHO decision

Before we reach the merits of R.B.'s IDEA eligibility, we must address appellants' arguments concerning the degree of deference we should give to the SEHO's underlying decision. Appellants argue for no deference because they claim the SEHO omitted or distorted certain pieces of evidence. The District argues for the particular deference that we accord to "thorough and careful" findings. *See Smith*, 15 F.3d at 1524.

We treat a hearing officer's findings as "thorough and careful" when the officer participates [**25] in the questioning of witnesses and writes a decision "contain[ing] a complete factual background as well as a discrete analysis supporting the ultimate conclusions." *See Park*, 464 F.3d at 1031. Those criteria were satisfied here, as the SEHO asked follow-up questions of many witnesses, included several pages of factual background in the decision, and discretely analyzed all the issues presented for each of the two academic years in question. To this extent, the SEHO's findings deserve particular deference.

Therefore, we can summarily dismiss most of appellants' objections as impermissible attempts to second-guess the SEHO's characterization and weighing of the evidence. We find no reason for according less deference to the SEHO's decision because [*943] she described R.B.'s misconduct as "episodic" or labeled the transition to Intermountain a "difficult adjustment period." Nor do we quibble with the SEHO's citation to R.B.'s 2002 achievement test scores as evidence that R.B. performed "at or above grade level" (even though R.B.'s 2001 achievement test scores were even higher) or the failure to compare R.B.'s grades at Donaldson Way Elementary to her grades at Intermountain [9]. We reject appellants' [**26] assertion that the SEHO distorted the testimony of Joanna Gardner, the mother of one of R.B.'s friends: the SEHO's conclusions that R.B. spent time with and participated in extracurricular activities with Gardner's daughter were properly drawn from Gardner's testimony. We also refuse to question the SEHO's reliance on the Struven report, which included observations of R.B. in the classroom, rather than the Solomon report, which did not. The SEHO's weighing of the evidence was consistent with the requirement that the IEP team review "[c]urrent classroom-based assessments and observations" and "[o]bservations by teachers and related service providers[.]" 34 C.F.R. § 300.533(a)(1)(ii)-(iii) (2003).

> 9 The SEHO supported her conclusion that R.B. was performing at grade level academically with the results of an achievement test that Struven administered at Intermountain. The SEHO's reliance on achievement test scores rather than grades to measure R.B.'s academic progress was a reasonable choice because of the very different grading systems used by Donaldson Way and Intermountain.

We are concerned, however, by the SEHO's failure to make any reference in her decision to the testimony of Brandt [**27] or Morrison. The absence of discussion is particularly disturbing because the omission of R.B.'s special education teacher/ provider from the IEP team was the procedural violation in this case. The testimony of Brandt and Morrison at the due process hearing helped cure the procedural violation, but the SEHO decision's failure to cite any of their testimony conveys the impression that the SEHO did not thoroughly and carefully consider their viewpoints. The district court's decision is better: to support its conclusion that R.B. did not meet the criteria for IDEA eligibility at Intermountain, it cites Morrison's testimony that R.B.'s behavior eventually improved during her year there. Again, however, the district court did not discuss Brandt's testimony, other than

mentioning in passing that plaintiffs relied on it.

Therefore, in our review of the SEHO's decision, we accord particular deference to the SEHO's "thorough and careful" findings, except to the extent they do not discuss Brandt's and Morrison's testimony. In other words, we accord deference to the SEHO's finding that R.B. was ineligible for IDEA relief in both school years, although we independently review the testimony in the [**28] record that the SEHO failed to consider. *Cf. Katherine G. ex rel. Cynthia G. v. Kentfield Sch. Dist.*, 261 F. Supp. 2d 1159, 1175 (N.D. Cal. 2003) (deferring to the hearing officer's "well-reasoned and well-supported" findings and conclusions while independently reviewing the testimony that the hearing officer failed to consider). Because IDEA eligibility determinations are fact-intensive, we review for clear error the district court's acceptance of the SEHO's decision. *See Hood*, 486 F.3d at 1104. In applying this standard of review, we are mindful that the district court discussed some of the testimony that the SEHO did not.

2. Eligibility criteria

An overarching purpose of the IDEA is to provide a FAPE to "children with disabilities." 20 U.S.C. § 1400(d)(1)(A); *cf.* § 1412(a)(1)(A) (providing [*944] FAPE to all children with disabilities is a condition for federal IDEA funding). The term "child with a disability" includes, *inter alia*, a child with a "serious emotional disturbance" "who, by reason thereof, needs special education and related services." 20 U.S.C. § 1401(3)(A). Under federal and California regulations, a "serious emotional disturbance" requires at [**29] least one of the following characteristics:

> (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.
>
> (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
>
> (C) Inappropriate types of behavior or feelings under normal circumstances.
>
> (D) A general pervasive mood of unhappiness or depression.
>
> (E) A tendency to develop physical symptoms or fears associated with personal or school problems.

34 C.F.R. § 300.7(c)(4) (2003); *cf.* Cal. Code Regs. tit. 5 § 3030(i). The child must "exhibit[ ]" the characteristic(s) "[1] over a long period of time and [2] to a marked degree [3] that adversely affects a child's educational performance." 34 C.F.R. § 300.7(c)(4) (2003).

Each state determines the meaning of the language in the federal regulation. *J.D. ex rel. J.D. v. Pawlet Sch. Dist.*, 224 F.3d 60, 66 (2d Cir. 2000); *Mr. I v. Me. Sch. Admin. Dist. 55*, 416 F. Supp. 2d 147, 157 (D. Me. 2006). Rather than promulgate additional regulations, California relies on case-by-case administrative adjudication of IDEA eligibility. Decisions by the California State Educational Agency ("CSEA") are persuasive authority for resolving the [**30] issues here--namely, appellants' claims that R.B. was eligible for IDEA benefits because she could not build or maintain interpersonal relationships, behaved inappropriately under normal circumstances, and was pervasively depressed.

a. Interpersonal relationships

Relying on Dr. Solomon's conclusions, appellants claim the SEHO and the district court disregarded "overwhelming" evidence of R.B.'s inability to build or maintain relationships. We disagree. The SEHO openly acknowledged the conflicting evidence regarding whether R.B. could maintain satisfactory relationships and cited testimony on both sides. The SEHO found that R.B. could maintain relationships and firmly grounded that conclusion in the record. Gardner testified about R.B.'s friendship with her daughter, and R.B.'s fifth-grade teacher and principal both testified that R.B. had friends.

The SEHO also found that R.B. developed satisfactory relationships with school personnel. This finding is important because the regulation considers relationships "with peers *and teachers*." 34 C.F.R. § 300.7(c)(4)(i)(B) (2003); Cal. Code Regs. tit. 5 § 3030(i)(2) (emphasis added); *cf. Fresno Unified Sch. Dist.*, 39 IDELR 28, at 7 (CA SEA Jan. 16, [**31] 2003) (explaining that the regulation sets "a high standard to meet as it requires [the student's] difficulties to be both with peers *and teachers* " (emphasis added)). The record fully supports the SEHO's conclusion. For example, R.B. had such a good relationship with her third grade teacher that, as a fifth grader, R.B. occasionally visited the third grade classroom to tutor students in reading. R.B.'s fifth-grade teacher attended R.B.'s year-end music recital. The principal

testified that she had a "great relationship" with R.B., who would read to the principal in her office and talk with her on the playground about future plans. Although Solomon opined that R.B. could not form satisfactory relationships with teachers, the SEHO reasonably discounted the [*945] weight of that testimony because Solomon did not observe R.B. at school or speak to school personnel. CSEA decisions regularly give little weight to the opinions of experts who do not consult school personnel. *Ventura Unified Sch. Dist.*, 102 LRP 7625, at 17 (CA SEA Nov. 21, 2000); *Williams Unified Sch. Dist. & Colusa County Office of Ed.*, 26 IDELR 1198, at 10 (CA SEA Aug. 21, 1997).

The testimony of Brandt and Morrison confirms that [**32] R.B. became able to form friendships with peers and teachers at Intermountain. Brandt testified that R.B. overcame initial hostility toward classmates and developed several peer friendships. Morrison likewise testified that R.B. began to describe one peer as a "best friend" and developed strong relationships with adult counselors.

Deferring to the SEHO's findings, a preponderance of the evidence shows that R.B. was able to build and maintain satisfactory relationships with peers and teachers during her fifth grade year at Donaldson Way and her first year at Intermountain. Therefore, R.B. was not eligible for IDEA relief under this prong.

b. Inappropriate behavior

The inappropriateness of R.B.'s behavior during the 2001-02 and 2002-03 school years is manifest. As a fifth grader, R.B. was sent to the principal's office for, *e.g.*, pinching and twisting classmates' arms on the playground on multiple occasions, tearing up classroom materials, verbalizing her hope that her music teacher would die, poking a classmate with a pencil because he would not help her cheat, and using the f-word. Morrison testified that R.B. physically attacked counselors at Intermountain and damaged property at least [**33] daily. R.B. would also attack younger children and throw food. R.B. admitted that she deliberately included grammatical errors in her written work because she enjoyed making life difficult for Brandt. When R.B. became a danger to herself or to others, Brandt would send R.B. to "day coverage": this happened weekly during R.B.'s first four months in the classroom.

Nonetheless, the SEHO questioned whether R.B.'s inappropriate behavior took place under the requisite "normal circumstances" because R.B. was not regularly taking her ADHD medication for most of the fifth grade year. (SEHO Decision, at 9.) We similarly question whether R.B.'s first months at Intermountain were "normal circumstances" because R.B. was adapting to life at a new school away from her family.

Appellants contend the SEHO and district court were blind to R.B.'s long history of behavioral problems. The misconduct that prompted the behavioral support plan during the fifth grade year was allegedly just a continuation of conduct that began in previous years and persisted through the remainder of R.B's fifth grade year and at Intermountain. Appellants make much of the behavioral support plan's passing reference to R.B.'s "habitual [**34] history of this type of resistant behavior," concluding that this language alone establishes the District's knowledge that R.B.'s inappropriate behavior has continued over a long period of time.

Even if these circumstances were "normal" within the meaning of the regulation, a preponderance of the evidence establishes that R.B.'s inappropriate behavior was not to a marked degree over a long period of time. Appellants misconstrue the import of the behavioral support plan that Donaldson Way Elementary implemented during the second trimester of R.B.'s fifth grade year. The whole point of the plan was that R.B.'s "habitual history" of "isolated incidents" of misconduct reached acute levels during that trimester. [*946] Once the District implemented the support plan, R.B.'s behavior improved. In other words, while R.B. engaged in inappropriate behavior over several years of school, that behavior was "to a marked degree" only during one trimester of one grade. We accord particular deference to the SEHO's thorough and careful finding that R.B.'s behavior was not "pervasive and ongoing," and conclude that R.B. cannot establish IDEA eligibility on the basis of inappropriate behavior during her fifth-grade [**35] year.

For the same reasons, R.B. likewise cannot establish IDEA eligibility based on her inappropriate behavior at Intermountain. In a passage cited by the district court, Morrison testified that R.B. began to develop sympathy for others and react to anxious situations without becoming violent. Similarly, Brandt saw "a big improvement" in R.B.'s classroom attitude by April 2003 and began to allow R.B. to participate in class field trips.

R.B.'s inappropriate behavior further does not amount to a "severe emotional disturbance"

because it did not adversely affect her educational performance. California primarily gauges educational performance through academic measures. *See Fresno Unified Sch. Dist.*, 39 IDELR 28, at 3, 5, 13 (CA SEA Jan. 16, 2003); *Ventura Unified Sch. Dist.*, 102 LRP 7625, at 23-25 (CA SEA Nov. 21, 2000). Here, all grades on R.B.'s fifth-grade report card were "4" or "5," indicating work at or above grade level. During the year at Intermountain, a majority of her grades were "A" or "B," with only one "D." R.B.'s achievement test scores were similarly average or better. Even the 2002 spelling score on which appellants so heavily rely placed R.B. in the 57th percentile, above [**36] more than half of her peers. A preponderance of the evidence shows that any of R.B.'s exhibited characteristics did not adversely affect her educational performance.

Appellants claim the SEHO erred by using R.B.'s grades as a "litmus test" instead of considering that R.B.'s educational performance was below her ability. They rely on out-of-circuit cases requiring analysis of the individual student's "potential" to determine IDEA eligibility. Our rule, however, is that the IDEA does *not* guarantee "the absolutely best or 'potential-maximizing' education for the individual child." *Gregory K.*, 811 F.2d at 1314 (quoting *Rowley*, 458 U.S. at 197 n.21); *accord Drew P. v. Clarke County Sch. Dist.*, 877 F.2d 927, 930 (11th Cir. 1989). While the Supreme Court has cautioned that merely advancing from grade to grade does not satisfy the IDEA, *Rowley*, 458 U.S. at 203 n.25, it also limited the IDEA's guarantees to "the basic floor of opportunity", *id.* at 201.

Appellants cite the District's development of Rehabilitation Act § 504 plans and behavioral support plans as further evidence that R.B.'s behavioral problems adversely affected her educational performance. The Rehabilitation Act is, however, a separate [**37] statutory scheme with different qualifying criteria, and R.B.'s satisfaction of those criteria do not automatically make her eligible under the IDEA. *Muller ex rel. Muller v. Comm. on Special Ed. of the East Islip Union Free Sch. Dist.*, 145 F.3d 95, 99 n.2 (2d Cir. 1998); *Yankton Sch. Dist. v. Schramm*, 93 F.3d 1369, 1376 (8th Cir. 1996). Furthermore, California school districts commonly turn to behavioral support plans as alternative remedies for students who do not satisfy the IDEA's criteria for a "severe emotional disturbance." *See Ventura Unified Sch. Dist.*, 102 LRP 7625, at 5, 10 (CA SEA Nov. 21, 2000).

In summary, by a preponderance of the evidence and with deference to the [*947] SEHO's thorough and careful findings, we conclude that R.B.'s inappropriate behavior was not to a marked degree over a long period of time and did not adversely affect her educational performance. Therefore, R.B. was not eligible for IDEA relief under this prong.

c. Pervasive unhappiness or depression

Acknowledging a long history of depression diagnoses, the SEHO nonetheless concluded that R.B. was not depressed during her fifth grade year because school personnel testified that R.B. generally seemed happy. The [**38] SEHO also relied on the District's failure to receive any documentation of depression diagnosis (including the Solomon report) until R.B. finished the fifth grade. However, licensed professionals who examined R.B. during the 2001-03 time frame--including Solomon, Morrison, and Struven--all diagnosed R.B. with depression.

Even if we accepted the opinion of the licensed professionals and rejected the SEHO's finding that R.B. was not depressed during the 2001-02 and 2002-03 school years, appellants would still fail to establish IDEA eligibility because they could not prove that R.B.'s depression was "to a marked degree." The Struven report, which the SEHO found most persuasive, concluded that R.B. only had mild depression below the level required to establish a "severe emotional disturbance." The SEHO heard the testimony of all the experts and was familiar with the various methodologies employed in each report. Therefore, we defer to the SEHO's thorough and careful analysis of the expert reports and accept the conclusion that R.B.'s depression was not to a marked degree.

Finally, for all the reasons stated in Part III(B)(2)(b) of this opinion, R.B.'s depression did not adversely affect [**39] her educational performance. Therefore, R.B. was not eligible for IDEA relief under this prong.

IV.

CONCLUSION

The District violated the procedural requirements of the IDEA by not including a special education teacher or provider of the child on the IEP team. After reviewing the record and giving proper deference to the SEHO's thorough and careful findings, we hold that R.B. did not qualify as a "child with a disability" because she did not meet any of

the criteria for a "severe emotional disturbance." Because R.B. is substantively ineligible for IDEA relief, we hold that the procedural error in the composition of her IEP team was harmless.

AFFIRMED.

FOREST GROVE SCHOOL DISTRICT, PETITIONER v. T. A.

No. 08-305

SUPREME COURT OF THE UNITED STATES

129 S. Ct. 2484; 174 L. Ed. 2d 168; 2009 U.S. LEXIS 4645; 21 Fla. L. Weekly Fed. S 983

April 28, 2009, Argued
June 22, 2009, Decided

DISPOSITION: Affirmed.

SYLLABUS

After a private specialist diagnosed respondent with learning disabilities, his parents unilaterally removed him from petitioner public school district (School District), enrolled him in a private academy, and requested an administrative hearing on his eligibility for special-education services under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.* The School District found respondent ineligible for such services and declined to offer him an individualized education program (IEP). Concluding that the School District had failed to provide respondent a "free appropriate public education" as required by IDEA, § 1412(a)(1)(A), and that respondent's private-school placement was appropriate, the hearing officer ordered the School District to reimburse his parents for his private-school tuition. The District Court set aside the award, holding that the IDEA Amendments of 1997 (Amendments) categorically bar reimbursement unless a child has "previously received special education or related services under the [school's] authority." § 1412(a)(10)(C)(ii). Reversing, [**2] the Ninth Circuit concluded that the Amendments did not diminish the authority of courts to grant reimbursement as "appropriate" relief pursuant to § 1415(i)(2)(C)(iii). See *School Comm. of Burlington* v. *Department of Ed. of Mass.*, 471 U.S. 359, 370, 105 S. Ct. 1996, 85 L. Ed. 2d 385.

Held: IDEA authorizes reimbursement for private special-education services when a public school fails to provide a FAPE and the private-school placement is appropriate, regardless of whether the child previously received special-education services through the public school. Pp. 6-17.

(a) This Court held in *Burlington* and *Florence County School Dist. Four* v. *Carter*, 510 U.S. 7, 114 S. Ct. 361, 126 L. Ed. 2d 284, that § 1415(i)(2)(C)(iii) authorizes courts to reimburse parents for the cost of private-school tuition when a school district fails to provide a child a FAPE and the private-school placement is appropriate. That *Burlington* and *Carter* involved the deficiency of a proposed IEP does not distinguish this case, nor does the fact that the children in *Burlington* and *Carter* had previously received special-education services; the Court's decision in those cases depended on the Act's language and purpose rather than the particular facts involved. Thus, the reasoning of *Burlington* [**3] and *Carter* applies unless the 1997 Amendments require a different result. Pp. 6-8.

(b) The 1997 Amendments do not impose a categorical bar to reimbursement. The Amendments made no change to the central purpose of IDEA or the text of § 1415(i)(2)(C)(iii). Because Congress is presumed to be aware of, and to adopt, a judicial interpretation of a statute when it reenacts that law without change, *Lorillard* v. *Pons*, 434 U.S. 575, 580, 98 S. Ct. 866, 55 L. Ed. 2d 40, this Court will continue to read § 1415(i)(2)(C)(iii) to authorize reimbursement absent a clear indication that Congress intended to repeal the provision or abrogate *Burlington* and *Carter.* The School District's argument that § 1412(a)(10)(C)(ii) limits reimbursement to children who have previously received public special-education services is unpersuasive for several reasons: It is not supported by IDEA's text, as the 1997 Amendments do not expressly prohibit reimbursement in this case and the School District offers no evidence that Congress intended to supersede *Burlington* and

Carter; it is at odds with IDEA's remedial purpose of "ensur[ing] that all children with disabilities have available to them a [FAPE] that emphasizes special education . . . designed [**4] to meet their unique needs," § 1400(d)(1)(A); and it would produce a rule bordering on the irrational by providing a remedy when a school offers a child inadequate special-education services but leaving parents remediless when the school unreasonably denies access to such services altogether. Pp. 8-15.

(c) The School District's argument that any conditions on accepting IDEA funds must be stated unambiguously is clearly satisfied here, as States have been on notice at least since *Burlington* that IDEA authorizes courts to order reimbursement. The School District's claims that respondent's reading will impose a heavy financial burden on public schools and encourage parents to enroll their children in private school without first trying to cooperate with public-school authorities are also unpersuasive in light of the restrictions on reimbursement awards identified in *Burlington* and the fact that parents unilaterally change their child's placement at their own financial risk. See *,e.g., Carter*, 510 U.S., at 15, 114 S. Ct. 361, 126 L. Ed. 2d 284. Pp. 15-16.

523 F.3d 1078, affirmed.

COUNSEL: Gary S. Feinerman argued the cause for petitioner

David B. Salmons argued the cause for the respondent.

Eric D. Miller argued the cause for the United States, as amicus curiae, by special leave of court.

JUDGES: STEVENS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, GINSBURG, BREYER, and ALITO, JJ., joined. SOUTER, J., filed [**5] a dissenting opinion, in which SCALIA and THOMAS, JJ., joined.

OPINION BY: STEVENS

OPINION

[*174] JUSTICE STEVENS delivered the opinion of the Court.

The Individuals with Disabilities Education Act (IDEA or Act), 84 Stat. 175, as amended, 20 U.S.C. § 1400 *et seq.,* requires States receiving federal funding to make a "free appropriate public education" (FAPE) available to all children with disabilities residing in the State, § 1412(a)(1)(A). We have previously held that when a public school fails to provide a FAPE and a child's parents place the child in an appropriate private school without the school district's consent, a court may require the district to reimburse the parents for the cost of the private education. See *School Comm. of Burlington* v. *Department of Ed. of Mass.*, 471 U.S. 359, 370, [*175] 105 S. Ct. 1996, 85 L. Ed. 2d 385 (1985). The question presented in this case is whether the IDEA Amendments of 1997 (Amendments), 111 Stat. 37, categorically prohibit reimbursement for private-education costs if a child has not "previously received special education and related services under the authority of a public agency." § 1412(a)(10)(C)(ii). We hold that the Amendments impose no such categorical bar.

I

Respondent T. A. attended public schools in the [**6] Forest Grove School District (School District or District) from the time he was in kindergarten through the winter of his junior year of high school. From kindergarten through eighth grade, respondent's teachers observed that he had trouble paying attention in class and completing his assignments. When respondent entered high school, his difficulties increased.

In December 2000, during respondent's freshman year, his mother contacted the school counselor to discuss respondent's problems with his schoolwork. At the end of the school year, respondent was evaluated by a school psychologist. After interviewing him, examining his school records, and administering cognitive ability tests, the psychologist concluded that respondent did not need further testing for any learning disabilities or other health impairments, including attention deficit hyperactivity disorder (ADHD). The psychologist and two other school officials discussed the evaluation results with respondent's mother in June 2001, and all agreed that respondent did not qualify for special-education services. Respondent's parents did not seek review of that decision, although the hearing examiner later found that the School District's [**7] evaluation was legally inadequate because it failed to address all areas of suspected disability, including ADHD.

With extensive help from his family, respondent completed his sophomore year at Forest Grove High School, but his problems worsened during his junior year. In February 2003, respondent's parents discussed with the School District the possibility of respondent completing high school through a partnership program with the local community college. They also sought private professional advice, and in March 2003 respondent was diagnosed with ADHD and a number of disabilities related to learning and memory. Advised by the private specialist that respondent would do best in a structured, residential learning environment, respondent's parents enrolled him at a private academy that focuses on educating children with special needs.

Four days after enrolling him in private school, respondent's parents hired a lawyer to ascertain their rights and to give the School District written notice of respondent's private placement. A few weeks later, in April 2003, respondent's parents requested an administrative due process hearing regarding respondent's eligibility for special-education services. [**8] In June 2003, the District engaged a school psychologist to assist in determining whether respondent had a disability that significantly interfered with his educational performance. Respondent's parents cooperated with the District during the evaluation process. In July 2003, a multidisciplinary team met to discuss whether respondent satisfied IDEA's disability criteria and concluded that he did not because his ADHD did not have a [*176] sufficiently significant adverse impact on his educational performance. Because the School District maintained that respondent was not eligible for special-education services and therefore declined to provide an individualized education program (IEP), [1] respondent's parents left him enrolled at the private academy for his senior year.

> 1 An IEP is an education plan tailored to a child's unique needs that is designed by the school district in consultation with the child's parents after the child is identified as eligible for special-education services. See 20 U.S.C. §§ 1412(a)(4), 1414(d).

The administrative review process resumed in September 2003. After considering the parties' evidence, including the testimony of numerous experts, the hearing officer issued [**9] a decision in January 2004 finding that respondent's ADHD adversely affected his educational performance and that the School District failed to meet its obligations under IDEA in not identifying respondent as a student eligible for special-education services. Because the District did not offer respondent a FAPE and his private-school placement was appropriate under IDEA, the hearing officer ordered the District to reimburse respondent's parents for the cost of the private-school tuition. [2]

> 2 Although it was respondent's parents who initially sought reimbursement, when respondent reached the age of majority in 2003 his parents' rights under IDEA transferred to him pursuant to Ore. Admin. Rule 581-015-2325(1) (2008).

The School District sought judicial review pursuant to § 1415(i)(2), arguing that the hearing officer erred in granting reimbursement. The District Court accepted the hearing officer's findings of fact but set aside the reimbursement award after finding that the 1997 Amendments categorically bar reimbursement of private-school tuition for students who have not "previously received special education and related services under the authority of a public agency." § 612(a)(10)(C)(ii), 111 Stat. 63, [**10] 20 U.S.C. § 1412(a)(10)(C)(ii). The District Court further held that, "[e]ven assuming that tuition reimbursement may be ordered in an extreme case for a student not receiving special education services, under general principles of equity where the need for special education was obvious to school authorities," the facts of this case do not support equitable relief. App. to Pet. for Cert. 53a.

The Court of Appeals for the Ninth Circuit reversed and remanded for further proceedings. The court first noted that, prior to the 1997 Amendments, "IDEA was silent on the subject of private school reimbursement, but courts had granted such reimbursement as 'appropriate' relief under principles of equity pursuant to 20 U.S.C. § 1415(i)(2)(C)." 523 F.3d 1078, 1085 (2008) (citing *Burlington*, 471 U.S., at 370, 105 S. Ct. 1996, 85 L. Ed. 2d 385). It then held that the Amendments do not impose a categorical bar to reimbursement when a parent unilaterally places in private school a child who has not previously received special-education services through the public school. Rather, such students "are eligible for

reimbursement, to the same extent as before the 1997 amendments, as 'appropriate' relief pursuant to § 1415(i)(2)(C)." 523 F.3d at 1087-1088.

The [**11] Court of Appeals also rejected the District Court's analysis of the equities as resting on two legal errors. First, because it found that § 1412(a)(10)(C)(ii) generally bars relief in these circumstances, the District [*177] Court wrongly stated that relief was appropriate only if the equities were sufficient to "'override'" that statutory limitation. The District Court also erred in asserting that reimbursement is limited to "'extreme'" cases. *Id.*, at 1088 (emphasis deleted). The Court of Appeals therefore remanded with instructions to reexamine the equities, including the failure of respondent's parents to notify the School District before removing respondent from public school. In dissent, Judge Rymer stated her view that reimbursement is not available as an equitable remedy in this case because respondent's parents did not request an IEP before removing him from public school and respondent's right to a FAPE was therefore not at issue.

Because the Courts of Appeals that have considered this question have reached inconsistent results, [3] we granted certiorari to determine whether § 1412(a)(10)(C) establishes a categorical bar to tuition reimbursement for students who have not previously [**12] received special-education services under the authority of a public education agency. 555 U.S. ___ (2009). [4]

3 Compare *Frank G. v. Bd. of Educ.*, 459 F.3d 356, 376 (CA2 2006) (holding that § 1412(a)(10)(C)(ii) does not bar reimbursement for students who have not previously received public special-education services), and *M. M.* v. *School Bd. of Miami-Dade Cty., Fla.*, 437 F.3d 1085, 1099 (CA11 2006) *(per curiam)* (same), with *Greenland School Dist.* v. *Amy N.*, 358 F.3d 150, 159-160 (CA1 2004) (finding reimbursement barred in those circumstances).

4 We previously granted certiorari to address this question in *Bd. of Educ. v. Tom F. ex rel. Gilbert F.*, 552 U.S. 1, 128 S. Ct. 1, 169 L. Ed. 2d 1 (2007), in which we affirmed without opinion the judgment of the Court of Appeals for the Second Circuit by an equally divided vote.

II

Justice Rehnquist's opinion for a unanimous Court in *Burlington* provides the pertinent background for our analysis of the question presented. In that case, respondent challenged the appropriateness of the IEP developed for his child by public-school officials. The child had previously received special-education services through the public school. While administrative review was [**13] pending, private specialists advised respondent that the child would do best in a specialized private educational setting, and respondent enrolled the child in private school without the school district's consent. The hearing officer concluded that the IEP was not adequate to meet the child's educational needs and that the school district therefore failed to provide the child a FAPE. Finding also that the private-school placement was appropriate under IDEA, the hearing officer ordered the school district to reimburse respondent for the cost of the private-school tuition.

We granted certiorari in *Burlington* to determine whether IDEA authorizes reimbursement for the cost of private education when a parent or guardian unilaterally enrolls a child in private school because the public school has proposed an inadequate IEP and thus failed to provide a FAPE. The Act at that time made no express reference to the possibility of reimbursement, but it authorized a court to "grant such relief as the court determines is appropriate." [*178] § 1415(i)(2)(C)(iii). [5] In determining the scope of the relief authorized, we noted that "the ordinary meaning of these words confers broad discretion on the court" [**14] and that, absent any indication to the contrary, what relief is "appropriate" must be determined in light of the Act's broad purpose of providing children with disabilities a FAPE, including through publicly funded private-school placements when necessary. 471 U.S., at 369, 105 S. Ct. 1996, 85 L. Ed. 2d 385. Accordingly, we held that the provision's grant of authority includes "the power to order school authorities to reimburse parents for their expenditures on private special-education services if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act." *Ibid.*

5 At the time we decided *Burlington*, that provision was codified at § 1415(e)(2). The 1997 Amendments renumbered the provision but did not alter its text. For ease of reference, we refer to the provision by its

current section number, § 1415(i)(2)(C)(iii).

Our decision rested in part on the fact that administrative and judicial review of a parent's complaint often takes years. We concluded that, having mandated that participating States provide a FAPE for every student, Congress could not have intended to require parents to either accept an inadequate public-school education pending adjudication of their claim or [**15] bear the cost of a private education if the court ultimately determined that the private placement was proper under the Act. *Id.,* at 370, 105 S. Ct. 1996, 85 L. Ed. 2d 385. Eight years later, we unanimously reaffirmed the availability of reimbursement in *Florence County School Dist. Four* v. *Carter*, 510 U.S. 7, 114 S. Ct. 361, 126 L. Ed. 2d 284 (1993) (holding that reimbursement may be appropriate even when a child is placed in a private school that has not been approved by the State).

The dispute giving rise to the present litigation differs from those in *Burlington* and *Carter* in that it concerns not the adequacy of a proposed IEP but the School District's failure to provide an IEP at all. And, unlike respondent, the children in those cases had previously received public special-education services. These differences are insignificant, however, because our analysis in the earlier cases depended on the language and purpose of the Act and not the particular facts involved. Moreover, when a child requires special-education services, a school district's failure to propose an IEP of any kind is at least as serious a violation of its responsibilities under IDEA as a failure to provide an adequate IEP. It is thus clear that the reasoning of *Burlington* and *Carter* [**16] applies equally to this case. The only question is whether the 1997 Amendments require a different result.

III

Congress enacted IDEA in 1970 [6] to ensure that all children with disabilities are provided "'a free appropriate public education which emphasizes special education and related services designed to meet their unique needs [and] to assure that the rights of [such] children and their parents or guardians are protected.'" *Burlington*, 471 U.S., at 367, 105 S. Ct. 1996, 85 L. Ed. 2d 385 (quoting 20 U.S.C. § 1400(c) (1982 ed.), [*179] now codified as amended at §§ 1400(d)(1)(A), (B)). After examining the States' progress under IDEA, Congress found in 1997 that substantial gains had been made in the area of special education but that more needed to be done to guarantee children with disabilities adequate access to appropriate services. See S. Rep. No. 105-17, p. 5 (1997). The 1997 Amendments were intended "to place greater emphasis on improving student performance and ensuring that children with disabilities receive a quality public education." *Id.*, at 3.

6 The legislation was enacted as the Education of the Handicapped Act, title VI of Pub. L. 91-230, 84 Stat. 175, and was renamed the Individuals with Disabilities Education [**17] Act in 1990, see ,§ 901(a)(3) Pub. L. 101-476, 104 Stat. 1142.

Consistent with that goal, the Amendments preserved the Act's purpose of providing a FAPE to all children with disabilities. And they did not change the text of the provision we considered in *Burlington*, § 1415(i)(2)(C)(iii), which gives courts broad authority to grant "appropriate" relief, including reimbursement for the cost of private special education when a school district fails to provide a FAPE. "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard* v. *Pons*, 434 U.S. 575, 580, 98 S. Ct. 866, 55 L. Ed. 2d 40 (1978). Accordingly, absent a clear expression elsewhere in the Amendments of Congress' intent to repeal some portion of that provision or to abrogate our decisions in *Burlington* and *Carter*, we will continue to read § 1415(i)(2)(C)(iii) to authorize the relief respondent seeks.

The School District and the dissent argue that one of the provisions enacted by the Amendments, § 1412(a)(10)(C), effects such a repeal. Section 1412(a)(10)(C) is entitled "Payment for education of children enrolled in private schools without consent [**18] of or referral by the public agency," and it sets forth a number of principles applicable to public reimbursement for the costs of unilateral private-school placements. Section 1412(a)(10)(C)(i) states that IDEA "does not require a local educational agency to pay for the cost of education . . . of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child" and his parents nevertheless elected to place him in a private school. Section 1412(a)(10)(C)(ii) then provides that a "court or hearing officer may require [a public] agency to

reimburse the parents for the cost of [private-school] enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available" and the child has "previously received special education and related services under the authority of [the] agency." Finally, § 1412(a)(10)(C)(iii) discusses circumstances under which the "cost of reimbursement described in clause (ii) may be reduced or denied," as when a parent fails to give 10 days' notice before removing a child from public school or refuses to make a child available for evaluation, [**19] and § 1412(a)(10)(C)(iv) lists circumstances in which a parent's failure to give notice may or must be excused. [7]

> 7 The full text of § 1412(a)(10)(C) is set forth in the Appendix, *infra*, at 18.

Looking primarily to clauses (i) and (ii), the School District argues that Congress intended § 1412(a)(10)(C) to provide the exclusive source of authority for courts to order reimbursement when parents unilaterally enroll [*180] a child in private school. According to the District, clause (i) provides a safe harbor for school districts that provide a FAPE by foreclosing reimbursement in those circumstances. Clause (ii) then sets forth the circumstance in which reimbursement is appropriate -- namely, when a school district fails to provide a FAPE to a child who has previously received special-education services through the public school. The District contends that because § 1412(a)(10)(C) only discusses reimbursement for children who have previously received special-education services through the public school, IDEA only authorizes reimbursement in that circumstance. The dissent agrees.

For several reasons, we find this argument unpersuasive. First, the School District's reading of the Act is not supported [**20] by its text and context, as the 1997 Amendments do not expressly prohibit reimbursement under the circumstances of this case, and the District offers no evidence that Congress intended to supersede our decisions in *Burlington* and *Carter*. Clause (i)'s safe harbor explicitly bars reimbursement only when a school district makes a FAPE available by correctly identifying a child as having a disability and proposing an IEP adequate to meet the child's needs. The clause says nothing about the availability of reimbursement when a school district fails to provide a FAPE. Indeed, its statement that reimbursement *is not* authorized when a school district provides a FAPE could be read to indicate that reimbursement *is* authorized when a school district does not fulfill that obligation.

Clause (ii) likewise does not support the District's position. Because that clause is phrased permissively, stating only that courts "may require" reimbursement in those circumstances, it does not foreclose reimbursement awards in other circumstances. Together with clauses (iii) and (iv), clause (ii) is best read as elaborating on the general rule that courts may order reimbursement when a school district fails to [**21] provide a FAPE by listing factors that may affect a reimbursement award in the common situation in which a school district has provided a child with some special-education services and the child's parents believe those services are inadequate. Referring as they do to students who have previously received special-education services through a public school, clauses (ii) through (iv) are premised on a history of cooperation and together encourage school districts and parents to continue to cooperate in developing and implementing an appropriate IEP before resorting to a unilateral private placement. [8] The clauses of § 1412(a)(10)(C) are thus [*181] best read as elucidative rather than exhaustive. Cf. *United States* v. *Atlantic Research Corp.*, 551 U.S. 128, 137, 127 S. Ct. 2331, 168 L. Ed. 2d 28 (2007) (noting that statutory language may "perfor[m] a significant function simply by clarifying" a provision's meaning). [9]

> 8 The dissent asserts that, under this reading of the Act, "Congress has called for reducing reimbursement only for the most deserving . . . but provided no mechanism to reduce reimbursement to the least deserving." *Post*, at 6 (opinion of SOUTER, J.). In addition to making unsubstantiated generalizations about the desert [**22] of parents whose children have been denied public special-education services, the dissent grossly mischaracterizes our view of § 1412(a)(10)(C). The fact that clause (iii) *permits* a court to reduce a reimbursement award when a parent whose child has previously received special-education services fails to give the school adequate notice of an intended private placement does

not mean that it *prohibits* courts from similarly reducing the amount of reimbursement when a parent whose child has not previously received services fails to give such notice. Like clause (ii), clause (iii) provides guidance regarding the appropriateness of relief in a common factual scenario, and its instructions should not be understood to preclude courts and hearing officers from considering similar factors in other scenarios.

9 In arguing that § 1412(a)(10)(C) is the exclusive source of authority for granting reimbursement awards to parents who unilaterally place a child in private school, the dissent neglects to explain that provision's failure to limit the type of private-school placements for which parents may be reimbursed. *School Comm. of Burlington* v. *Department of Ed. of Mass.* held that courts may grant [**23] reimbursement under § 1415(i)(2)(C)(iii) only when a school district fails to provide a FAPE *and* the private-school placement is appropriate. See 471 U.S. 359, 369, 105 S. Ct. 1996, 85 L. Ed. 2d 385 (1985); see *Florence County School Dist. Four* v. *Carter*, 510 U.S. 7, 12-13, 114 S. Ct. 361, 126 L. Ed. 2d 284 (1993). The latter requirement is essential to ensuring that reimbursement awards are granted only when such relief furthers the purposes of the Act. See *Burlington*, 471 U.S., at 369, 105 S. Ct. 1996, 85 L. Ed. 2d 385. That § 1412(a)(10)(C) did not codify that requirement further indicates that Congress did not intend that provision to supplant § 1415(i)(2)(C)(iii) as the sole authority on reimbursement awards but rather meant to augment the latter provision and our decisions construing it.

This reading of § 1412(a)(10)(C) is necessary to avoid the conclusion that Congress abrogated *sub silentio* our decisions in *Burlington* and *Carter*. In those cases, we construed § 1415(i)(2)(C)(iii) to authorize reimbursement when a school district fails to provide a FAPE and a child's private-school placement is appropriate, without regard to the child's prior receipt of services. [10] It would take more than Congress' failure to comment on the category of cases in which a child has not previously received [**24] special-education services for us to conclude that the Amendments substantially superseded our decisions and in large part repealed § 1415(i)(2)(C)(iii). See *Branch* v. *Smith*, 538 U.S. 254, 273, 123 S. Ct. 1429, 155 L. Ed. 2d 407 (2003) ("[A]bsent a clearly expressed congressional intention, repeals by implication are not favored" (internal quotation marks and citation omitted)). [11] We accordingly adopt the reading of § 1412(a)(10)(C) that is consistent with those decisions. [12]

10 As discussed above, although the children in *Burlington* and *Carter* had previously received special-education services in public school, our decisions in no way depended on their prior receipt of services. Those holdings rested instead on the breadth of the authority conferred by § 1415(i)(2)(C)(iii), the interest in providing relief consistent with the Act's purpose, and the injustice that a contrary reading would produce, see *Burlington*, 471 U.S., at 369-370, 105 S. Ct. 1996, 85 L. Ed. 2d 385; see also *Carter*, 510 U.S., at 12-14, 114 S. Ct. 361, 126 L. Ed. 2d 284 -- considerations that were not altered by the 1997 Amendments.

11 For the same reason, we reject the District's argument that because § 1412(a)(10)(C)(ii) authorizes "a court or a hearing officer" to award reimbursement for private-school tuition, whereas [**25] § 1415(i)(2)(C)(iii) only provides a general grant of remedial authority to "court[s]," the latter section cannot be read to authorize hearing officers to award reimbursement. That argument ignores our decision in *Burlington*, 471 U.S., at 363, 370, 105 S. Ct. 1996, 85 L. Ed. 2d 385, which interpreted § 1415(i)(2)(C)(iii) to authorize hearing officers as well as courts to award reimbursement notwithstanding the provision's silence with regard to hearing officers. When Congress amended IDEA without altering the text of § 1415(i)(2)(C)(iii), it implicitly adopted that construction of the statute. See *Lorillard* v. *Pons*, 434 U.S. 575, 580-581, 98 S. Ct. 866, 55 L. Ed. 2d 40 (1978).

12 Looking to the Amendments' legislative history for support, the School District cites two House and Senate Reports that essentially restate the text of § 1412(a)(10)(C)(ii), H. R. Rep. No. 105-95, pp.

92-93 (1997); S. Rep. No. 105-17, p. 13 (1997), and a floor statement by Representative Mike Castle, 143 Cong. Rec. 8013 (1997) (stating that the "bill makes it harder for parents to unilaterally place a child in elite private schools at public taxpayer expense, lowering costs to local school districts"). Those ambiguous references do not undermine the meaning that we discern [**26] from the statute's language and context.

Notably, the agency charged with implementing IDEA has adopted respondent's reading of the statute. In commentary to regulations implementing the 1997 Amendments, the Department of Education stated that "hearing officers and courts retain their authority, recognized in *Burlington* . . . to award 'appropriate' relief if a public agency has failed to provide FAPE, including reimbursement . . . in instances in which the child has not yet received special education and related services." 64 Fed. Reg. 12602 (1999); see 71 Fed. Reg. 46599 (2006).

[*182] The School District's reading of § 1412(a)(10)(C) is also at odds with the general remedial purpose underlying IDEA and the 1997 Amendments. The express purpose of the Act is to "ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs," § 1400(d)(1)(A) -- a factor we took into account in construing the scope of § 1415(i)(2)(C)(iii), see *Burlington*, 471 U.S., at 369, 105 S. Ct. 1996, 85 L. Ed. 2d 385. Without the remedy respondent seeks, a "child's right to a *free* appropriate education . . . would be less than [**27] complete." *Id.*, at 370, 105 S. Ct. 1996, 85 L. Ed. 2d 385. The District's position similarly conflicts with IDEA's "child find" requirement, pursuant to which States are obligated to "identif[y], locat[e], and evaluat[e]" "[a]ll children with disabilities residing in the State" to ensure that they receive needed special-education services. § 1412(a)(3)(A); see § 1412(a)(10)(A)(ii). A reading of the Act that left parents without an adequate remedy when a school district unreasonably failed to identify a child with disabilities would not comport with Congress' acknowledgment of the paramount importance of properly identifying each child eligible for services.

Indeed, by immunizing a school district's refusal to find a child eligible for special-education services no matter how compelling the child's need, the School District's interpretation of § 1412(a)(10)(C) would produce a rule bordering on the irrational. It would be particularly strange for the Act to provide a remedy, as all agree it does, when a school district offers a child inadequate special-education services but to leave parents without relief in the more egregious situation in which the school district unreasonably denies a child access to such services altogether. [**28] That IDEA affords parents substantial procedural safeguards, including the right to challenge a school district's eligibility determination and obtain prospective relief, see *post*, at 11, is no answer. We roundly rejected that argument in *Burlington*, observing that the "review process is ponderous" and therefore inadequate to ensure that a school's failure to provide a FAPE is remedied with the speed necessary to avoid detriment to the child's education. 471 U.S., at 370, 105 S. Ct. 1996, 85 L. Ed. 2d 385 . Like *Burlington*, see *ibid.*, this case vividly demonstrates the problem of delay, as respondent's parents first sought a due process hearing in April 2003, and the District Court issued its decision in May 2005 -- almost a year after respondent graduated from high school. The dissent all but ignores these shortcomings of IDEA's procedural safeguards.

[*183] IV

The School District advances two additional arguments for reading the Act to foreclose reimbursement in this case. First, the District contends that because IDEA was an exercise of Congress' authority under the Spending Clause, U.S. Const., Art. I, § 8, cl. 1, any conditions attached to a State's acceptance of funds must be stated unambiguously. See *Pennhurst State School and Hospital* v. *Halderman*, 451 U.S. 1, 17, 101 S. Ct. 1531, 67 L. Ed. 2d 694 (1981). [**29] Applying that principle, we held in *Arlington Central School Dist. Bd. of Ed.* v. *Murphy*, 548 U.S. 291, 304, 126 S. Ct. 2455, 165 L. Ed. 2d 526 (2006), that IDEA's fee-shifting provision, § 1415(i)(3)(B), does not authorize courts to award expert-services fees to prevailing parents in IDEA actions because the Act does not put States on notice of the possibility of such awards. But *Arlington* is readily distinguishable from this case. In accepting IDEA funding, States

expressly agree to provide a FAPE to all children with disabilities. See § 1412(a)(1)(A). An order awarding reimbursement of private-education costs when a school district fails to provide a FAPE merely requires the district "to belatedly pay expenses that it should have paid all along." *Burlington*, 471 U.S., at 370-371, 105 S. Ct. 1996, 85 L. Ed. 2d 385. And States have in any event been on notice at least since our decision in *Burlington* that IDEA authorizes courts to order reimbursement of the costs of private special-education services in appropriate circumstances. *Pennhurst*'s notice requirement is thus clearly satisfied.

Finally, the District urges that respondent's reading of the Act will impose a substantial financial burden on public school districts and encourage parents to immediately [**30] enroll their children in private school without first endeavoring to cooperate with the school district. The dissent echoes this concern. See *post*, at 10. For several reasons, those fears are unfounded. Parents "are entitled to reimbursement *only* if a federal court concludes both that the public placement violated IDEA and the private school placement was proper under the Act." *Carter*, 510 U.S., at 15, 114 S. Ct. 361, 126 L. Ed. 2d 284. And even then courts retain discretion to reduce the amount of a reimbursement award if the equities so warrant -- for instance, if the parents failed to give the school district adequate notice of their intent to enroll the child in private school. In considering the equities, courts should generally presume that public-school officials are properly performing their obligations under IDEA. See *Schaffer* v. *Weast*, 546 U.S. 49, 62-63, 126 S. Ct. 528, 163 L. Ed. 2d 387 (2005) (STEVENS, J., concurring). As a result of these criteria and the fact that parents who "'unilaterally change their child's placement during the pendency of review proceedings, without the consent of state or local school officials, do so at their own financial risk,'" *Carter*, 510 U.S., at 15, 114 S. Ct. 361, 126 L. Ed. 2d 284 (quoting *Burlington*, 471 U.S., at 373-374, 105 S. Ct. 1996, 85 L. Ed. 2d 385), the incidence [**31] of private-school placement at public expense is quite small, see Brief for National Disability Rights Network et al. as *Amici Curiae* 13-14.

V

The IDEA Amendments of 1997 did not modify the text of § 1415(i)(2)(C)(iii), and we do not read § 1412(a)(10)(C) to alter that provision's [*184] meaning. Consistent with our decisions in *Burlington* and *Carter*, we conclude that IDEA authorizes reimbursement for the cost of private special-education services when a school district fails to provide a FAPE and the private-school placement is appropriate, regardless of whether the child previously received special education or related services through the public school.

When a court or hearing officer concludes that a school district failed to provide a FAPE and the private placement was suitable, it must consider all relevant factors, including the notice provided by the parents and the school district's opportunities for evaluating the child, in determining whether reimbursement for some or all of the cost of the child's private education is warranted. As the Court of Appeals noted, the District Court did not properly consider the equities in this case and will need to undertake that analysis on remand. [**32] Accordingly, the judgment of the Court of Appeals is affirmed.

It is so ordered.

L. M., a minor by and through his Guardian Ad Litem, SAM M. and MARIETTE M.; SAM M., on his own behalf; MARIETTE M., on her own behalf, Plaintiffs-Appellees, v. CAPISTRANO UNIFIED SCHOOL DISTRICT, Defendant-Appellant.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

556 F.3d 900; 2009 U.S. App. LEXIS 6052

June 3, 2008, Argued and Submitted, Pasadena, California February 13, 2009, Amended

DISPOSITION: REVERSED (No. 07-55469); VACATED (Nos. 07-55585/07-56373); AFFIRMED (No. 07-55758).

COUNSEL: S. Daniel Harbottle, Rutan & Tucker; LLP, Costa Mesa, California, for the defendant-appellant/appellee.

Bruce E. Bothwell, Law Office of Bruce E. Bothwell, Long Beach, California, for the plaintiff-appellee/appellant.

JUDGES: Before: Diarmuid F. O'Scannlain and Richard C. Tallman, Circuit Judges, and James K. Singleton, * Senior District Judge. Opinion by Judge Tallman.

* The Honorable James K. Singleton, United States District Judge for the District of Alaska, sitting by designation.

OPINION BY: Richard C. Tallman

OPINION

[*904] TALLMAN, Circuit Judge:

L.M. is the autistic child of two loving parents, Samuel and Mariette (collectively "Parents"), who have spared no expense to obtain private in-home treatment for their developmentally disabled son. The local Capistrano Unified School District ("District") balked at the idea of continuing the in-home educational plan at public expense and offered an alternative plan. The matter ended up before an administrative law [**2] judge in California who conducted a four-day evidentiary hearing to resolve the dispute, ultimately ruling in favor of the District.

[*905] We must decide whether the district court clearly erred by reversing the state administrative agency's finding that a procedural violation of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400-1482, amounted to harmless error. The answer depends on whether the District significantly restricted Parents' right to participate in their disabled child's Individual Educational Program ("IEP") by limiting Parents' classroom observational opportunities to twenty minutes, when the District observed the child in his private education program for up to three hours. The district court had jurisdiction under 28 U.S.C. § 1331 and 20 U.S.C. § I415(i)(3). We have appellate jurisdiction under 28 U.S.C. § 1291.

In reversing the administrative agency, the district court failed to properly consider whether Parents' right to participate was "significantly affected." In other words, the district court failed to consider whether the District's policy of limiting Parents' classroom observational opportunities to twenty minutes was harmless because Parents [**3] nevertheless had a full opportunity to participate in the process to fashion an appropriate educational plan for L.M. with help from an informed and knowledgeable expert. There is no evidence to support a finding that Parents' right to participate was significantly affected. We therefore reverse the district court's order requiring the District to reimburse Parents for the cost of in-home services and vacate its subsequent award of attorneys' fees to Parents as the prevailing party. We also affirm the district court's denial of a "stay put" order requiring the District to reimburse Parents for continuing education expenses beyond that covered in its original order.

I

In July 2004, a pediatric neurologist diagnosed L.M., then two and one-half years old, with autism. L.M. began receiving early intervention services from the Regional Center of Orange County in late

August 2004. Through the early intervention services, L.M. received speech-language therapy, occupational therapy, and started a one-to-one in-home behavioral program. Autism Comprehensive Educational Services ("ACES"), a non-public agency, administered L.M.'s private behavioral program. In December 2004, L.M.'s parents began [**4] paying ACES for a few additional hours of one-to-one services per week, eventually increasing his one-to-one services to twenty-five hours per week.

In November 2004, Parents met with the District's school psychologist Luisa Martinez to begin discussing L.M.'s transition to the District on his third birthday. In December and January, the District conducted several observations of L.M. during his in-home education services. On January 10, 2005, L.M.'s IEP team met to discuss L.M.'s assessment results and initial placement in the District. [1] The District offered to place L.M. in the Palisades Elementary School, provide individual intensive behavior instruction for four hours [*906] per week, speech-language therapy for two thirty-minute sessions per week, occupational therapy for thirty minutes per week, and extended school year services. Parents attended the meeting, asked questions, but did not indicate whether they approved of the District's proposed program.

1 An IEP is a written statement developed for each disabled child by an "IEP team" that typically consists of the parents, a special education teacher, a representative of the local education agency, an expert, and when appropriate, the [**5] child. 20 U.S.C. § 1414(d); *Christoper S. v. Stanistaus County Office of Educ.*, 384 F.3d 1205, 1208 n.1 (9th Cir. 2004). Some of the information the IEP must contain includes: (I) information regarding the child's present levels of performance; (2) a statement of annual goals and short-term instructional objectives; (3) a statement of the special educational and related services to be provided to the child; (4) an explanation of the extent to which the child will not participate with non-disabled children in the regular class; and (5) objective criteria for measuring the child's progress. 20 U.S.C. § 1414(d).

L.M. turned three-years-old on January 22, 2005, but did not begin attending school in the District. Parents continued to fund the one-to-one services provided from ACES. After the initial IEP meeting, Parents twice visited the proposed school, once with the principal and once with Dr. Melanie Lenington, a licensed psychologist. Dr. Lenington asked to observe the proposed program for a continuous ninety-minute period, but was limited to twenty-minute increments because of a district-wide policy. [2] Dr. Lenington never returned to conduct further observations after her initial twenty-minute [**6] visit.

2 To limit classroom disruption, the District did not allow classroom observations to extend beyond twenty minutes. However, Dr. Lenington could have returned anytime for another twenty-minute observation period. She chose not to do so because of the time and expense involved in commuting to and from the school.

In February and March 2005, District psychologist Martinez attempted to contact Parents to discuss the IEP offer. The Parents did not respond, and in March 2005, they filed a request for a due process hearing pursuant to 20 U.S.C. § 1415(0, alleging that the proposed IEP offer denied L.M. a free appropriate public education ("FAPE"). [3] In response to the due process request, on April 7, 2005, the District sent a letter to Parents offering additional services including more tutoring in the home and a formal transition plan.

3 The IDEA guarantees all disabled children a FAPE, which "emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. § 1400(d)(1)(A). The IDEA defines FAPE as

> special education and related services that--
>
> (A) have been provided at public expense, [**7] under public supervision and direction, and without charge;
>
> (B) meet the standards of the

State educational agency;

(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C. § 1401(9).

In June 2005, the IEP team met for a second IEP meeting. During this meeting L.M.'s father, Samuel, asked several pointed questions regarding the research supporting the District's program. After some discussion, District staff objected to Samuel's questions because they felt interrogated. When District staff attempted to change the subject to topics specific to L.M., Samuel objected, and stated that the last two minutes of the meeting should be used to talk about the District's topics. In September 2005, Parents enrolled L.M. in the Center for Autism and Related Disorders program.

The California due process hearing took place in February 2006. The hearing lasted four full days and twelve witnesses were called. During the hearing and in her subsequent Opinion, Administrative Law Judge ("ALJ") Suzanne B. Brown addressed four [**8] separate issues: (1) whether the District offered L.M. a FAPE in the least restrictive environment from January 22, 2005, through April 7, 2005; (2) whether the District offered L.M. a FAPE in the least restrictive environment from April 7, 2005, through June 7, 2005; (3) whether the District offered L.M. a FAPE in the least restrictive environment from June 7, [*907] 2005, to February 2006; and (4) whether L.M. is entitled to reimbursement for privately funded services and prospective placement with his service providers.

The ALJ concluded that the District failed to offer L.M. a FAPE from January 22, 2005, to April 7, 2005, because the District had not clearly offered thirty minutes of weekly individual speech-language therapy [4] and because the District's proposed IEP lacked a transition plan that was designed to address L.M.'s unique need. [5] Although the District offered Parents an IEP with a transition plan on April 7, 2005, the new IEP still neglected to provide L.M. with the necessary thirty minutes of weekly individual speech-language therapy. Therefore, the ALJ concluded that the District also failed to offer L.M. a FAPE in the least restrictive environment from April 7, 2005, to June [**9] 7, 2005. As a result of these procedural violations, the ALJ ordered the District to reimburse Parents for the cost of providing the in-home program from January 22, 2005, to April 7, 2005. The ALJ also ordered the District to reimburse Parents for the cost of providing one hour of speech-language therapy per week from January 22, 2005, to July 22, 2005, and from the start of the 2005-2006 school year until the date of the ALJ's decision filed March 28, 2006.

4 Although the District offered two thirty-minute sessions of speech-therapy, it did not specifically offer at least one thirty-minute session of *individual* speech-language therapy.

5 The District did not appeal the All's findings regarding these violations.

The ALJ also determined that the District violated California Education Code section 56329(c) [6] when it limited Dr. Lenington's classroom observation time to twenty-minute increments, but the ALJ nevertheless concluded that the procedural flaw in the development of the IEP was harmless and did not amount to the denial of a FAPE. The ALI determined that Parents still had the opportunity to participate in the "due process hearing with an expert witness prepared to provide a knowledgeable [**10] opinion about the proposed placement." The ALJ noted that Dr. Lenington admitted during her testimony that she "was still able to develop opinions about the [Palisade program], advise the parents regarding [Palisade], and give informed testimony at the hearing regarding the [Palisade

program]." Moreover, "given Dr. Dores' [(the District's expert)] extensive knowledge about the [Palisade program], [the ALI believed that] an additional 70 minutes of Dr. Lenington's observations likely would not have significantly affected the weight given to her testimony regarding the appropriateness of the [Palisade program]."

6 California Education Code section 56329(c) provides:

> If the parent or guardian obtains an independent educational assessment at private expense, the results of the assessment shall be considered by the public education agency with respect to the provision of free appropriate public education to the child, and may be presented as evidence at a due process hearing pursuant to Chapter 5 (commencing with Section 56500) regarding the child. If a public education agency observed the pupil in conducting its assessment, or if its assessment procedures make it permissible to have in-class [**11] observation of a pupil, *an equivalent opportunity shall* apply to an independent educational assessment of the pupil in the pupil's current educational placement and setting, and observation of an educational placement and setting, if any, proposed by the public education agency, regardless of whether the independent educational assessment is initiated before or after the filing of a due process hearing proceeding.

(Emphasis added.)

[*908] Ultimately, the ALJ did not find a procedural or substantive violation of the IDEA that would allow Parents to receive reimbursement of the costs of in-home care after April 7, 2005. The ALJ also declined to find that L.M. is entitled to prospective placement with his current providers since she determined that the District's proposed IEP amounted to a substantively viable FAPE.

Parents challenged the ALJ's decision to the United States District Court for the Central District of California. Primarily at issue in this appeal is whether the district court clearly erred in reversing the ALJ's finding of harmlessness with regards to the District's technical violation of section 56329(c). The district court concluded that the limitation amounted to more than a "mere [**12] technical violation" since it "constitute[d] a procedural violation of the IDEA by depriving [Parents] of the right to meaningfully participate in the IEP process." By limiting Dr. Lenington's ability to observe the Palisades program, the District "frustrated the *purpose* of Cal. Edu. Code § 56329 by denying [Parents] the opportunity to gather evidence regarding the appropriateness [of] placing [L.M.] at Palisades." The district court ordered the District to reimburse Parents for the cost of all in-home services received between January 22, 2005, until the date the District properly prepared an IEP. The district court remanded the case to the ALJ for a determination on the reimbursement amount. The District timely appealed. [7]

7 Including attorneys' fees, the District was ultimately ordered to pay approximately $ 215,000 to Parents. In appeal No. 07-55585 and No. 07-56373, the District appeals the district court's award of attorneys' fees.

II

A party aggrieved by the findings and decision of an ALJ in a due process hearing may seek review through a civil action in United States district court. 20 U.S.C. § 1415(i)(2)(A). The IDEA provides that in reviewing a due process hearing, the district [**13] court:

> shall receive the records of the administrative proceedings;
>
> shall hear additional evidence at the request of a party; and
>
> basing its decision on the preponderance of the evidence, shall grant such relief as the court

determines appropriate.

20 U.S.C. § 1415(i)(2)(C).

In reviewing administrative decisions, the district court must give "due weight" to the state's judgments of education policy. *Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982); *County of San Diego v. Cal. Special Educ. Hearing Office*, 93 F.3d 1458, 1466 (9th Cir. 1996). In recognition of the administrative agency's expertise, the court "must consider [the agency's] findings carefully and endeavor to respond to the hearing officer's resolution of each material issue." *County of San Diego*, 93 F.3d at 1466 (internal quotation marks omitted). Although the district court "is free to determine independently how much weight to give the administrative findings" the "courts are not permitted simply to ignore [them]." *Id*. (internal quotation marks omitted). A district court shall accord more deference to administrative agency findings that it considers "thorough and careful." *Capistrano Unified Sch. Dist. v. Wartenberg*, 59 F.3d 884, 892 (9th Cir. 1995). [**14] The ALJ's twenty-page Opinion certainly meets that standard in our judgment. We review for clear error a district court's findings of fact in an IDEA case. *Id*.

[*909] III

The IDEA assures that all disabled children receive a FAPE through IEPs. 20 U.S.C. § 1400(d)(1)(A). As a part of their FAPE, the IDEA guarantees certain procedural safeguards for the disabled child and his or her parents. 20 U.S.C. § 1415(a); *W.G. v. Bd. of Trs. of Target Range Sch. Dist. No. 23*, 960 F.2d 1479, 1483 (9th Cir. 1992) ("*Target Range*"), *superseded by statute on other grounds* by Individuals with Disability Education Act Amendments of 1997, Pub. L. 105-17, § 614(d)(1)(B), 111 Stat. 37. "Central among the safeguards is the process of developing an [IEP] for each child." *Id*. (citing 20 U.S.C. § 1401(a)(18)(D), 1412(1)); *see also Rowley*, 458 U.S. at 181 (stating that in reviewing an IDEA case, a court must first determine whether "the State complied with the procedures set forth in the Act").

Procedural flaws in the IEP process do not always amount to the denial of a FAPE. *Target Range*, 960 F.2d at 1484; *see also M.L. v. Federal Way Sch. Dist*., 394 F.3d 634, 652 (9th Cir. 2005) (plurality) (Gould, J., concurring) (citing [**15] 28 U.S.C. § 2111). Once we find a procedural violation of the IDEA, we must determine whether that violation affected the substantive rights of the parent or child. ML., 394 F.3d at 652 (Gould, J., concurring); *Target Range*, 960 F.2d at 1484; *see also Shapiro v. Paradise Valley Unified Sch. Dist*., 317 F.3d 1072, 1079-80 (9th Cir. 2003), *superseded on other grounds by* 20 U.S.C. § 1414(d)(1)(B) (2003); *Amanda J. v. Clark County Sch. Dist*., 267 F.3d 877, 891-92 (9th Cir. 2001). "[P]rocedural inadequacies that result in the loss of educational opportunity, or seriously infringe the parents' opportunity to participate in the IEP formulation process, clearly result in the denial of a FAPE." *Target Range*, 960 F.2d at 1484 (citations omitted). Here, Parents do not contend that by limiting Dr. Lenington's ability to observe, the District caused "a lost educational opportunity." Therefore, we are concerned only with whether the procedural violation "significantly restricted" Parents' participation in the IEP process. *See ML*., 394 F.3d at 653 (Gould, J., concurring); *Target Range*, 960 F.2d at 1484.

California Education Code section 56329(c) provides that "[i]f a public education agency observed [**16] the pupil in conducting its assessment . . . *an equivalent opportunity* shall apply to an independent educational assessment" for the parents with regards to observation of the proposed educational placement and setting. The purpose of section 56329(c) is to level the playing field between the parents and a more knowledgeable school district. *Benjamin G. v. Special Educ. Hearing Office*, 131 Cal. App. 4th 875, 881, 32 Cal. Rptr. 3d 366 (Cal. Ct. App. 2005). "IDEA acknowledges the fact that school districts have better access to information and more educational expertise than parents and thus provides for a 'due process' hearing to 'level the playing field' by permitting the parents to present all the evidence they can muster to challenge the district's decision." *Id*. "To that end, IDEA gives the child and his parents the right to be advised by experts, to have those experts testify at their due process hearing, and to have someone other than a district employee as a hearing officer." *Id*.

The ALI concluded that the District's time limitation, while a violation of California Education Code section 56329(c), did not so undermine the

statute's purpose as to deprive Parents of their right to participate in the [**17] due process hearing with an independent, knowledgeable expert. Indeed, as Dr. Lenington testified, even with the time limitation, she was still able to develop opinions, advise Parents, and give informed testimony at the hearing. Having [*910] heard all of the live testimony, and having concluded that the District's expert --who had extensive knowledge about the Palisade program --was more credible, the ALJ concluded that an additional seventy minutes of observation "likely would not have significantly affected the weight" she gave to Dr. Lenington's testimony.

Despite concluding that the ALJ's careful and thorough opinion deserved "substantial deference," the district court rejected the ALJ's assessment and held that the District's procedural violation deprived Parents of their right to "meaningfully participate in the IEP process." Relying on *Benjamin G.*, the district court held that the District "not only technically violated [section 56329]," it "also frustrated the purpose of [that section] by denying [Parents] the opportunity to gather evidence regarding the appropriateness [of] placing [L.M.] at Palisades." According to the district court, this arose to more than a "mere [**18] technical violation" because some of the most important procedural safeguards are those that protect a parent's right to participate. The district court also noted that the ALJ concluded Dr. Lenington was "'not particularly familiar with [Palisades] or other components of the District's program, and thus [her] testimony regarding the District's program carried less weight than that of [the District's expert,] Dr. Dores, who helped to design the program and continues to supervise it.'" Although the district court did not disagree with the ALJ's assessment of the knowledge and credibility of the witnesses, it disagreed with the ALJ's conclusion that the procedural violation did not deprive Parents of their right to "meaningfully participate in the IEP process."

The district court misconstrued the ALJ's findings, and in doing so, it failed to properly apply the harmless error analysis required by our precedent. Not all procedural flaws result in the denial of a FAPE. We have never adopted as precedent the structural defect approach discussed by Judge Alarcon in *M.L. v. Federal Way School District*, 394 F.3d 634 (9th Cir. 2005) (plurality). See id. at 652-52 (Gould, J., concurring). Our [**19] precedent is clear: a procedural violation may be harmless, and we must consider whether the procedural error either resulted in a loss of educational opportunity or significantly restricted parental participation. *Id.; Shapiro*, 317 F.3d at 1079-80; *Amanda J.*, 267 F.3d at 891-92; *Target Range*, 960 F.2d at 1484.

Although the district court properly recognized that Parents have a substantial right to participate in the IEP process, it neglected to consider whether Parents' right was *significantly affected* by the District's procedural violation. In an action for judicial review of an administrative decision, the burden of persuasion rests with the party challenging the ALJ's decision. *Clyde K. v. Puyallup Sch. Dist., No. 3*, 35 F.3d 1396, 1399 (9th Cir. 1994), *superseded on other grounds as recognized in M.L.*, 341 F.3d at 1063 n.7. Parents fail to present any evidence that undermines the ALJ's credibility findings, or proffer any evidence that they could have found had they received more classroom observation time. Dr. Lenington could have gone back on other occasions for more twenty-minute visits. Dr. Lenington also conceded that she was able to provide Parents with an informed and independent [**20] opinion, and Parents presented the opinion of Dr. Lenington during the due process hearing. Having heard all of the testimony, the ALI determined that there was likely nothing Dr. Lenington could have discovered during an additional seventy minutes of observation time that would have changed the ALJ's ultimate opinion that placement in Palisade was appropriate for L.M. Because we conclude that there is nothing in the [*911] record to support a finding that the procedural flaw during the development of L.M.'s IEP deprived Parents of their right to meaningfully participate in the due process hearing, we conclude that the district court's finding to the contrary was clearly erroneous. [8]

8 Because we reverse the district court's underlying order granting Parents reimbursement for a procedural violation, we vacate the order granting Parents attorneys' fees as the prevailing party (Nos. 07-55585/07-56373).

IV

Parents challenge the district court's denial of a

"stay put" order pursuant to 20 U.S.C. § 1415(j). The "pendent placement" or "stay put" provision requires the child to remain in his "current educational placement" during the course of administrative and judicial proceedings. *Id; Susquenita Sch. Dist. v. Raelee S.*, 96 F.3d 78, 82 (3d Cir. 1996). [**21] Section 1415(j) states:

> Except as provided in subsection (k)(4) of this section, during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

The IDEA does not define the phrase "current educational placement." Courts have generally interpreted the phrase to mean the placement set forth in the child's last implemented IEP. *Johnson v. Special Educ. Hearing Office*, 287 F.3d 1176, 1180 (9th Cir. 2002) ("typically the placement described in the child's most recently implemented IEP"); *Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618, 625 (6th Cir. 1990) ("[the placement at the time of] the previously implemented IEP"); *Drinker v. Colonial Sch. Dist.*, 78 F.3d 859, 867 (3d Cir. 1996) ("the dispositive factor in deciding a child's 'current educational placement' should be the [IEP] . . . actually functioning when the 'stay put' is invoked.") [**22] (internal quotation marks and citation omitted).

Alternatively, if the student has no implemented IEP because he is applying for initial admission to public school, the parents may consent to the student being placed in public school during the pendency of administrative proceedings. In that case, even if the parents disagree with the school's initial proposed placement, the public school becomes the child's "current educational placement" for purposes of a "stay put" action. *See* 20 U.S.C. § 1415(j).

L.M. does not fit into either of these common "current educational placement" categories. First, he never had an implemented IEP. The District and Parents never agreed on a placement for L.M. Second, at the time this litigation commenced, L.M. was making his initial application for public school. But rather than consenting to L.M. being placed in a public school for the duration of the litigation as provided for in § 1415(j), Parents unilaterally placed L.M. in a very expensive private program.

Therefore, Parents' only viable argument for entitlement to "stay put" is to construe the district court's March 13, 2007, reimbursement order as creating a "current educational placement" implied [**23] by law. *Clovis Unified Sch. Dist. v. Cal. Office of Admin. Hearing*, 903 F.2d 635, 641 (9th Cir. 1990) (per curiam) (discussing *Sch. Comm. of the Town of Burlington v. Mass. Dep't of Educ.*, 471 U.S. 359, 105 S. Ct. 1996, 85 L. Ed. 2d 385 (1985), and concluding that "once the State educational [*912] agency decided that the parents' placement was the appropriate placement, it became the 'then current educational placement' within the meaning of section 1415"); *see Mackey*, 386 F.3d at 163 ("'once the parents' challenge [to a proposed IEP] succeeds . . . , consent to the private placement is implied by law, and the requirements of § 1415(j) become the responsibility of the school district.'" (alterations in original) (quoting *Bd. of Educ. v. Schutz*, 290 F.3d 476, 484 (2d Cir. 2002)). Where the agency or the court has ruled on the appropriateness of the educational placement in the parents' favor, the school district is responsible for appropriate private education costs regardless of the outcome of an appeal. *Clovis*, 903 F.2d at 641.

Parents argue their private placement is L.M.'s "current educational placement" because they prevailed before the district court in their procedural challenge. *See Mackey*, 386 F.3d at 163. However, [**24] in each of the cases where a' court implied a "current educational placement," the court or agency below had expressly deemed the private placement appropriate. In *Mackey*, a State Review Officer ("SRO") considered the two plans, found the public placement inappropriate, and concluded the student's needs were met at the private school the parents had chosen. 386 F.3d at 162. In *Clovis*, the administrative hearing officer explicitly found the private hospital placement was appropriate. 903 F.2d. at 639. In *Schutz*, the hearing officer made a "determination that the services selected by the parents were appropriate." 290 F.3d at 484-85.

On the basis of those findings on the merits, the reviewing courts could imply "current educational placements" for the purpose of § 1415(j). The *Mackey* court reasoned that "[t]he regulations provide that a child's current placement may be changed upon agreement between the parents and the state, and that an SRO decision that 'agrees with the parents that a change of placement is appropriate . . . must be treated as such an agreement.'" 386 F.3d at 163 (quoting 34 C.F.R. § 300.514(a) and (c)). The court concluded Mackey's pendency placement changed "once [**25] the SRO rendered a decision." *Id*. In *Clovis*, we concluded the school district was responsible for maintaining the student in that placement "after the administrative decision that the placement was appropriate." 903 F.2d at 641. Similarly, the Second Circuit held in *Schutz* that § 1415(j) applied because the parents had successfully challenged the proposed IEP and the services chosen by the parents were appropriate. 290 F.3d at 484-85.

That did not occur here because, in reviewing the ALJ's decision, the district court found the procedural violation to be structural and ordered the specific relief requested by Parents without ever "adjudicat[ing] the appropriateness of [L.M.'s] private placement." [9] In its May 15, 2007, Order denying the stay put injunction, the district court reiterated that it had not ruled on the merits of L.M.'s placement.

> 9 L.M. points to language in the district court's opinion indicating "the private in-home services . . . were appropriate, under the circumstances" to support his argument that the court did rule on the merits of his placement. He takes this language entirely out of context. In that section of its opinion, the district court addressed the right to [**26] reimbursement under section § 1412(a)(10)(C), which permits reimbursement if the child has received "some educational benefit." The district court deemed the private placement "appropriate under the circumstances" only in the sense that L.M. had received some educational benefit entitling Parents to reimbursement for the one year for which they actually sought relief. It has no bearing on the merits of the two programs for purposes of § 1415(j).

[*913] Unlike in *Mackey, Clovis*, and *Schutz*, the district court here made no determination from which we can imply L.M.'s private program is his "current educational placement." Unless the district court or agency actually reaches the merits of the appropriate placement, we will not imply a "current educational placement" for purposes of § 1415(j)).

Because L.M.'s private program, chosen by his parents alone, does not qualify as a "current education placement" under § 1415(j), the "stay-put" provision does not apply and the district court properly denied Parents' motion.

V

The district court neglected to give the ALJ's careful and thorough assessment of the harmlessness of the District's procedural violation the substantial deference it deserved. Parents [**27] participated in the due process hearing with an informed, knowledgeable, independent expert. There is nothing in the record to suggest that an additional seventy minutes of continuous observation time would have provided any information that would have undermined the ALJ's credibility findings. Because the district court failed to consider whether Parents' substantial rights were significantly affected, and because there is nothing in the record to support a conclusion that they were, we conclude that the district court's factual findings were clearly erroneous. We reverse the district court's reimbursement order (No. 07-55469) and vacate its award of attorneys' fees (Nos. 07-55585/07-56373). We affirm the district court's denial of a "stay put" order (No. 07-55758). Each party shall bear its own costs on appeal.

REVERSED (No. 07-55469); VACATED (Nos. 07-55585/07-56373); AFFIRMED (No. 07-55758).