

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

In the Matter of:

STUDENT,

Petitioner,

v.

LAS VIRGENES UNIFIED SCHOOL  
DISTRICT,

Respondent.

OAH CASE NO. N 2007010278

**DECISION**

Robert D. Iafe, Administrative Law Judge, Office of Administrative Hearings, Special Education Division, heard this matter on May 21, 22, 23, 24, and June 11, 12, and 13, 2007, in Calabasas, California.

Father (Father) and Mother (Mother) of Student (Student) appeared on behalf of petitioner Student. Father and Mother were present during the hearing. Student did not appear during the hearing.

Wesley B. Parsons of Fagen, Friedman & Fulfrost, LLP, appeared on behalf of respondent Las Virgenes Unified School District (District). Mary Schillinger, Director of Pupil Services for District, was present during the hearing.

**PROCEDURAL BACKGROUND**

On January 9, 2007, Student filed the request for due process hearing in this case. On January 10, 2007, OAH gave notice setting March 5, 2007, as the date for the due process hearing to commence. On January 30, 2007, at the request of District, OAH continued the initial due process hearing date. OAH then gave notice of the continued due process hearing to commence on May 14, 2007. During an April 30, 2007, prehearing conference, and at the joint request of the parties, OAH continued the due process hearing to commence on May 21, 2007.

The administrative law judge (ALJ) opened the record on May 21, 2007. The ALJ received sworn testimony and documentary evidence during the hearing dates through June 13, 2007. The record remained open for the submission of written closing arguments and replies. Upon receipt of the parties' written closing arguments and final reply briefs on July 13, 2007, the record was closed and the matter was submitted.

## ISSUES

A. Did the District's offer of placement and services contained in Student's October 23, 2006, individualized education program (IEP) constitute a free and appropriate public education (FAPE) designed to meet need Student's unique needs in the least restrictive environment (LRE) for the 2006-2007 school year?

B. If Student prevails, is Student entitled to the following remedies:

1. Placement in a nonpublic school (NPS).
2. Speech and language services for three hours per week to address writing and working memory issues, comprehension, and auditory memory.
3. Reimbursement for all costs associated with Student's placement at the nonpublic Summit View School, transportation, social skills group, and speech and language services since October 23, 2006.

## PARTIES' CONTENTIONS

Student contends District did not offer a free, appropriate public education (FAPE) in its proposed IEP dated October 23, 2006. Student points to the failure of District to provide appropriate services to meet his unique and complex needs in the least restrictive environment. Student contends District failed to meet its obligation to provide him with individualized services. Student contends that his disability and deficits prevent him from gaining educational benefit from his proposed placement in District's special education and general education settings for portions of each day. Additionally, Student's deficits in language and memory would likely be anxiety producing and embarrassing in a large general education classroom environment. Student is seeking an order that he is entitled to placement at Summit View School, a certified nonpublic school for the 2006-2007 school year. He is also seeking speech and language services for three hours per day, and reimbursement for private education services.

District contends the proposed IEP drafted for Student was a comprehensive program which addressed each and every one of Student's needs in an appropriate manner. District contends its offer of placement and services was supported by qualified staff capable of implementing the program for Student. District contends Student is not entitled to any

reimbursement because District's proposed placement provides Student with a FAPE in the LRE.

## FACTUAL FINDINGS

### *Jurisdictional Matters*

1. Student is a nine year old boy who is eligible for special education and related services under the category of autistic-like behaviors. He has been eligible for such services since he was three years old. At the time the due process hearing request was filed, Student was attending the fourth grade at Summit View School, a certified nonpublic school located in Valley Glen, California. During the entire time period at issue, Student has resided with his Mother and Father (collectively Parents) in Calabasas, California, within the geographical boundaries of District.

### *Background*

2. This case arises from the disagreement between Student and District over whether District's proposed IEP dated October 23, 2006, constitutes a FAPE for the 2006-2007 school year. To resolve the issue of whether District's offer constitutes a FAPE in this case, Student must show there was some substantive<sup>1</sup> violation of the Individuals with Disabilities Education Act (IDEA).

3. Student began his elementary education at District's Bay Laurel Elementary School (Bay Laurel). He attended Bay Laurel for kindergarten during the 2001-2002 school year and first grade during the 2002-2003 school year. His IEP for first grade provided for placement in a special education classroom for 51 percent of his school day. As a result, Student spent about three hours in a special education setting and about three hours in a general education setting each day. During an IEP team meeting near the end of the first grade, District team members recommended to Parents that Student be retained and repeat the first grade.

4. Parents were unwilling to have Student repeat the first grade at Bay Laurel. For the 2003-2004 school year Parents privately enrolled Student to repeat first grade at Fairfield School, a nonpublic school. Parents changed schools again for the 2004-2005 school year when they privately enrolled Student for second grade at Sage Academy, another nonpublic school.

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<sup>1</sup> The landmark case of *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 206-207, required an inquiry into both the procedural and substantive issues. However, in this case Student does not allege any procedural violations in the formulation of the proposed IEP.

5. In addition to enrolling Student in nonpublic school, Parents sought private tutoring services to help Student with his education. Beginning as early as January 2004, Parents hired Tammy Van Fleet (Van Fleet) as a tutor for Student. Parents and Student knew Van Fleet because she had been Student's first grade special education teacher at Bay Laurel during the previous year. Parents paid Van Fleet to tutor Student between one and three times per week during much of the time Student attended nonpublic schools. She tutored Student for a period of about three years.<sup>2</sup>

6. For the 2005-2006 school year, Parents enrolled Student in the third grade at Summit View School (Summit View), a certified nonpublic school. Near the end of the third grade, Parents notified District they wanted to investigate the possibility of re-enrolling Student in a District school upon development of a program to educate him. In view of the fact that Student had not attended a District school for three years, District needed current assessment information for Student to develop an IEP. Parents and District agreed to an assessment plan at the very end of the school year in June 2006.

7. Student began the 2006-2007 school year in the fourth grade at Summit View with the understanding District would conduct the agreed assessments, and convene an IEP team meeting, during the beginning of the school year.

#### *District's Assessments in the Fall of 2006*

8. After the 2006 school year commenced, District conducted assessments of Student. The assessments were designed and conducted to gather information needed to develop an educational program in anticipation of an October 23, 2006, IEP meeting. The assessments included a speech-language assessment and a multi-disciplinary psycho-educational assessment. Parents do not allege any violations with respect to the design or conduct of the District's assessments of Student.

#### *A. The September 2006 Speech-Language Evaluation of Student*

9. Mindy Gold (Gold), MSSLP, conducted a speech and language assessment of Student on September 15, 2006. Gold has been a speech language pathologist for 28 years and has been licensed in both New York and California. She has been employed by District as a speech language pathologist for two years. Before being employed with District, Gold was a speech language pathologist for several school districts on Long Island, New York, worked for a private clinical speech pathology clinic, and worked earlier in her career as a speech language pathologist for the New York City Board of Education. Gold was well-qualified to conduct this evaluation.

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<sup>2</sup> In January 2007, Van Fleet explained to Parents she could not tutor Student while these due process hearing procedures were pending.

10. Gold prepared a written report of her evaluation of Student titled Speech-Language Evaluation dated September 18, 2006 (Gold Report). Her report included test results on standardized tests she administered including the Peabody Picture Vocabulary Test, Third Edition (PPVT-III) and the Comprehensive Assessment of Spoken language (CASL).

11. The PPVT-III is designed to test for comprehension of vocabulary. It not only tests for understanding of nouns and verbs but also begins to address the examinees ability to make inferences. Student had a standard score (SS) of 72 on this test which was below average. Consistent with this score, Gold noted Student exhibits difficulty in word retrieval and he is limited in his variety of semantic use. She described Student's deficit in this area as moderate.

12. The CASL is designed to test different components of language, including receptive and expressive language. On the tests administered, Student's scores included the following: an antonyms SS of 81; a syntax construction SS of 67; a paragraph comprehension SS of 70; a non-literal language SS of 68; and a pragmatic judgment SS of 54. Gold explained these results show Student has severe delays in receptive and expressive language. Student's scores on these subtests fell in the range from profoundly below average to mildly below average.

13. Throughout her evaluation of Student, Gold noted significant deficits in auditory processing. Student required several repetitions of instructions for the various subtests administered. She also noted that at times it appeared Student understood the instructions and responded correctly, but later he needed instructions explained again, and was confused as to what was expected. She also noted it appears Student initially begins with one thought or idea in mind, then loses the focus of his communicative intent, and completes his verbalization with unrelated content. He has difficulty processing structured factual material as well as with his ability to infer meaning. He also has severe delays with abstract information.

14. Gold concluded that Student exhibited significant deficits in receptive and expressive language consistent with a condition of acquired childhood aphasia and Landau-Kleffner Syndrome. She noted Student's language impairment was reflective of the symptoms characteristic of this syndrome. The following are associated problems Student is observed to have: difficulty understanding speech in competing noise situations, disorders of auditory comprehension, writing, reading, and naming.

15. At the hearing, Gold described the extent of Student's deficits as found by her testing. She described these deficits across the range from mild to moderate to severe. She explained Student's delays to responding to informal questioning are mild to moderate based on his paragraph comprehension score. Beyond this area of testing, Student's deficits were described as either moderate to severe or severe.

16. Several of Student's deficits fall in the range of moderate to severe. Student's receptive and expressive deficits are moderate to severe. His lack of memory for correct verb tense is also moderate to severe. Student's disorganization of thoughts is moderate to severe. Gold explained this difficulty with organizing thoughts was dependent upon the topic of conversation, since a preferred topic may allow him to be more organized. Student's inability to connect sentences in a complex manner is moderate to severe. This is also dependent upon what he is trying to convey in conversation.

17. Several more of Student's deficits fall in the range of severe. Gold described Student's comprehension of pragmatic judgment as profoundly delayed. She attributed this result to Student's language processing problem. Gold also confirmed Student's deficits in auditory processing are severe. Student's deficits requiring several repetitions of information are severe. Student's difficulty in retrieving words is severe. Student's delays in memory are severe.

18. During the hearing, Gold admitted that Student was one of the most complex cases to assess that she had ever experienced in her 28 years as a speech language pathologist. This was based on his different areas of weaknesses and his overlapping deficits. One of the toughest challenges in conducting the assessment was determining what caused a delayed response by Student: whether it was a comprehension issue, or a memory issue, or a distractibility issue, or a focus issue.

#### *B. The October 2006 Multi-Disciplinary Psycho-Educational Assessment*

19. In September and October of 2006, Jeffrey C. Lough (Lough), M.S., school psychologist for District, conducted a multi-disciplinary psycho-educational assessment of Student. Following his assessment, he prepared a confidential multi-disciplinary psycho-education report dated October 11, 2006. He conducted this assessment with the assistance of Jennifer Sobczyk (Sobczyk), a special education teacher for District. Lough had a B.A. in psychology from University of California, Berkeley, and a M.S. in school counseling from California State University, Northridge. He also holds a Pupil Personnel Services teaching credential. Lough became a full time, fully credentialed school psychologist for District in the fall of 2004. He was hired first by District as an intern in early 2004. Before becoming a school psychologist he was a special education teacher for a few years with the Los Angeles Unified School District teaching fourth and fifth grade students on an emergency teaching credential. As a special education teacher he taught a range of students from those who were severely learning disabled to students who had mild disabilities.

20. As a school psychologist for District, Lough worked with children from kindergarten through fifth grade at Bay Laurel and another elementary school. His duties include conducting assessments in psychological areas that would affect a student's education, including cognitive functioning, information processing, memory, areas of academics, and social emotional areas. He is also trained a behavior intervention case manager and conducts behavior consultation with teachers, in both special and general education. As a school psychologist, Lough also participates in IEP meetings for some

District students and parent consultations. Lough was well qualified to conduct his assessment of Student.

21. Lough's testimony and written report established that he assessed Student in all areas of suspected disability related to psycho-educational functioning. Lough evaluated Student in areas including social-emotional behavior, self help and adaptive skills, visual-motor development, and intellectual development. Lough selected the tests for this assessment of Student. The evaluation methods included administration of several standardized tests, one meeting with Student, one classroom and one recess observation of Student, a review of past evaluations, and information gathered from Student's Parents and his then-current teacher at Summit View School.

22. In conducting his assessment, Lough administered a number of formal standardized tests. With regard to Student's cognitive functioning, Lough administered the Test of Nonverbal Intelligence, Third Edition (TONI-3) and the Wide Range Assessment of Memory and Learning, Second Edition (WRAML-2). On the TONI-3, Lough reported Student's quotient was 81, placing him in the 10th percentile among all students. On the WRAML-2, all of the standard scores reported were below the 10th percentile including the following: a verbal memory standard score (SS) of 80, at the 9th percentile; a visual memory SS of 67, at the 1st percentile; an attention/concentration SS of 62, at the 1st percentile; and a general memory SS of 62, at the 1st percentile. These findings indicate significant deficits in psychological processing in these attention and memory areas, with his overall performance in the extremely low range. As a separate consideration from Student's autistic-like behaviors, Lough noted that deficits in memory can be anxiety-producing and embarrassing for children.

23. To assess psychomotor integration, Lough administered the Beery-Buktenica Developmental Test of Visual-Motor Integration, Fifth Edition (VMI). ON this test, Student received a SS of 86, placing him in the 16th percentile rank. This score is in the low-average range, which is commensurate with his cognitive potential as tested by Lough. He had similar results on the Woodcock Johnson Test of Academic Achievement, Third Edition (WJ-III). He received a broad reading SS of 83 and broad math SS of 84. These scores were down an average of 10 points when compared to the same tests administered to Student two years earlier in 2004. (The 2004 scores included a broad reading SS of 93 and a broad math SS of 96.) In contrast, Student had a broad written language SS of 97, a score that was more than 10 points higher than the same test administered in 2004. (The 2004 broad written language reading SS was 84.) Among Student's relative strengths were a calculation SS of 102; a writing fluency SS of 102; a spelling fluency SS of 99; and a word attack SS of 98. Among Student's weaknesses were an applied problems SS of 72; a quantitative concepts SS of 77; a passage comprehension SS of 82; and a reading fluency SS of 83. Although Student has acquired basic academic skills, limitations arise when he is required to use higher-order thinking skills such as inferencing, comparing and contrasting, and drawing conclusions.

24. In addition to the cognitive and academic assessment, Lough also administered the Behavior Assessment Scale for Children, Second Edition (BASC-2) and the Social Skills Rating System with responses from both Student's Mother and his classroom teacher at Summit View. Results from these assessments revealed Student has some general age appropriate adaptive skills in being able to take care of some personal needs and move around the classroom and school campus. However, he is not reliable in remembering personal information such as names, his telephone number, or accurately locating or giving needed information. Ratings on the BASC-2, however, indicate a greater level of internalizing problems at both home and school. Lough noted that symptoms related to anxiety were evident and that Student tends to worry about school work and about what other students think of him. He also noted that given his cognitive deficits, including memory, and his speech language deficits, it is probable Student experiences greater academic and social pressure.

25. Beyond the anxiety produced by his cognitive and speech language deficits, Lough noted Student's autism also likely adds to his level of anxiety. And beyond his autism, a further source of anxiety for Student is his atypicality with odd or unusual behaviors. For Student, such atypical behaviors result from his obsessive compulsive disorder which was intensifying as Student got older. For example, Student exhibited excessive hand washing, excessive erasing when writing, and preoccupation with miniscule tasks such as pencil sharpening. Student's awareness of being unable to control these and other behaviors is a source of increased anxiety in the school setting.

26. As part of his assessment, Lough also observed Student in his current educational placement at Summit View. Lough described his impressions of Student from one classroom observation of Student which lasted for just less than an hour. From this observation of a reading lesson, Lough first noted that Student did not volunteer, even though it was a small classroom setting with about eight students in a casual atmosphere. Student needed frequent prompting even to just look at his book and the teacher had to come over and put her finger in the book to show him where he needed to look. Lough also noted Student tended to be off task, he needed a lot of extra prompting, was fidgeting with things under his desk, and he was staring away and not at his book. In later conversation with Student's teacher, Lough learned that this was fairly typical of Student, who usually needed more extra prompting than other students.

27. Lough continued his observations of Student after the reading lesson was finished. The next activity was a social studies lesson, again in a small group setting with about four students, involving independent work where the students had to provide answers on a worksheet with a map. Lough noted Student was the last to get started on the worksheet. In fact, even though Student had helped to pass out the worksheet, he did not begin working until the teacher noticed he was not on task, came over to sit beside him, and went through each problem with him. Lough listened as the teacher had to explain and re-explain each question as she went along with him, giving Student options on how to respond, and guiding his responses by working together. He explained Student was able to provide independent answers to only three of the 10 questions on the worksheet. Lough also noted

the teacher spent the majority of time working with Student rather than the other students in the class. At one point the teacher asked Student to find the answer to a question on a map in the back of the classroom. When Student went to the back of the classroom, he walked over to a classroom aide rather than to the map. In later conversation with the teacher, Lough learned that Student did need more prompting and guidance than other students and what Lough saw in the class was typical for Student's performance. He also had difficulty with his memory, even having difficulty remembering the names of other students in his class and his teacher.

28. The multi-disciplinary psycho-educational report contained a number of recommendations for Student including auditory instructions and information should be given in small, more manageable steps, to ask Student to repeat instructions given to him to confirm understanding, to pair visual cues with auditory information, to encourage the use of pre-writing to help Student organize his thoughts, and to teach reading comprehension strategies, among others.

29. At the hearing Lough explained that Student has great difficulty recalling verbal information with deficits in long-term storage of information. He also concluded Student's memory deficits are severe.

#### *Testimony of Van Fleet Regarding Student's Needs*

30. Van Fleet was first employed by District for the 2001-2002 school year. She was hired as the special day teacher at Bay Laurel Elementary School. She was responsible for provided services for students who required special education services, academically, behaviorally, and socially. She was responsible for helping to create and implement IEPs for students in her class. At the time of her hire, she had a B.A. in liberal studies, was working on her M.A. in special education at California Lutheran University, and held in intern credential as an educational specialist. After teaching the Bay Laurel special day class for two and a half years, Van Fleet completed her masters program in December 2003.

31. At the beginning of the 2004-2005 school year, Van Fleet became a Teacher on Special Assignment for District and she currently holds that position. In this position, Van Fleet mentors other special education teachers employed throughout District, not just at Bay Laurel. She is part of team that trains District employees on designing educationally appropriate programs for children with a diagnosis of autism. She also provides direct behavioral support services for two students in District schools.

32. Van Fleet spoke about Student's needs from her firsthand knowledge obtained from being his first grade teacher and from tutoring him for about three years. She noted Student had many of the same significant learning issues when she was his first grade teacher during the 2002-2003 school year as when she tutored him through December 2006. She described Student's memory problems and explained he has difficulty with processing information for the first time and with recalling information at a later time. She noted Student has difficulty getting his thoughts organized in clear sentences. He has difficulty

creating sentences in a logical manner. He has challenges with focus, attention, comprehension, and is easily distracted. She noted he also has difficulties with pragmatics.

33. In addition to these academic learning challenges, Student was also socially extremely shy in the first grade and remained so during the time she tutored him. He is still a sweet child and would not cause a disruption if he is unhappy. He does not bring attention to himself. Student also has challenging issues with obsessiveness, sameness, and rigidity. For example, he will not use certain types of pencils and must have a full eraser before beginning to work. She had worked on Student's ability to handle a different pencil, a separate eraser, and the feel of his clothing. She also worked on speech and language with Student noting he has challenges with receptive and expressive speech.

34. Van Fleet concluded Student was a complicated learner. As he became older, additional issues came up that made it more difficult to work with him, including his obsessive compulsive issues. During the time after Van Fleet was his teacher in first grade, Student's life became more complicated due to the obsessive-compulsive issues he was dealing with. She noted that the obsessive compulsive behaviors that were only apparent in first grade were becoming major problems for Student as he got older and was approaching the 2005-2006 school year. As a result, Van Fleet noted she continually was changing Student's tutoring program along the way to meet his needs.

35. The setting for Van Fleet's tutoring was at Student's desk in his room because this was the quietest place in the house. He performed best in this quiet setting. If they were out in the noisy living room in the house with more commotion, Van Fleet would have to continually keep prompting him to keep him focused on the task.

36. Van Fleet stated that in order to implement District's proposed IEP it was important for the instructional aide to have extensive training in dealing with autistic children, including being able to work with his language, focus, concentration, and memory deficits. The instructional aide would play an important role in Student's understanding of the material being presented, in explaining directions to Student, in helping him remember questions to be answered, in helping him remain focused, and to have the experience to do these things with autistic children.

*The October 23, 2006, IEP Proposed by District*

37. On October 23, 2006, the IEP team convened to review the assessment results and to determine Student's eligibility, goals, and educational placement. Parents attended this meeting. The District representatives who conducted Student's recent assessments including Gold, speech language specialist, Lough, school psychologist, and Sobczyk, special education teacher, also attended the meeting. Among other required members present at this IEP team meeting were Anita Brkic (Brkic), a general education teacher at Bay Laurel, Michele Harding, a program specialist for District, and Sheila Grady, principal of Bay Laurel.

38. At this meeting, the IEP team reviewed the assessment results and discussed input from all team members. The team again found Student eligible for special education under the primary eligibility category of autism. From their discussion, the team discussed proposed goals and objectives for Student's areas of need including reading comprehension and decoding; math computation and basic multiplication and division facts; word problems; written expression including pre-writing and the writing of single paragraphs; difficulty recalling personal information; classroom independence and task completion due to attention, focus and memory deficits; peer interactions; listening comprehension; inferences; verbal organization and self monitoring; and pragmatics.

39. The IEP team developed goals and objectives for Student's needs in a dozen areas including the following: In the academic area of reading, there were goals to address comprehension and decoding. In the academic area of math, there were goals to address multiplication and division facts and word problems. In the academic area of writing, there was a goal to address essay composition in paragraph form. In the vocational area, there were goals to address recalling personal information and to use at least two strategies to increase his independence in completing assignments. In the area of social/emotional, there was a goal to independently join a group of peers in unstructured social situations. In the area of communication, there were goals to address the retelling or paraphrasing of a listening selection with details; the use of semantics, word origin, derivations, synonyms, antonyms, and idioms; auditory processing and pragmatics to produce organized sentences; and responding to specific wh-? (who, what, why, where, when) questions based on curriculum to produce grammatically correct sentences.

40. To support Student with his educational program, District also offered a number of accommodations and modifications. For all subjects, District offered preferential seating, more frequent breaks, and extra classroom movement. Student would receive the chunking of information and tasks into smaller more manageable pieces, with repeat and review of information, as well as on-task reminders or teacher prompts. Directions would be given to Student in a variety of ways, including visual representations. Student would be allowed to use a highlighter on tests, there would be checks for understanding, and a visual schedule of his day. For language arts and math, Student would receive small group instruction. For language arts, math, and social studies, Student was to receive an adapted curriculum.

41. To effect this program, District proposed Student be placed in the special education setting with integration into the general education setting for science, portions of social studies, and non-academics, including lunch and recess. In particular, District offered to place Student in the fourth grade at Bay Laurel in the special day class taught by Sobczyk, and in the general education class taught by general education teacher Brkic. An instructional aide was proposed for Student during the time he was in the general education classroom. There is no mention in the IEP for the instructional aide assigned to Student to have any certain level of skill or experience.

42. The specialized instruction to be provided in Sobczyk's special day class included the following: specialized instruction in language arts for 90 minutes every day; specialized instruction in math for 60 minutes every day; specialized instruction in social studies for 30 minutes, three times per week; specialized instruction in social skills for 30 minutes, two times per week; and consultation/collaboration between the special and general education staff for 15 minutes per week. Based on this schedule, the amount of time Student would be in the general education setting would be 35 percent of Student's school day.

43. District's proposed IEP offered additional services to support Student. District offered speech and language services to include: individual services for 30 minutes, two times per week; small group services for 30 minutes one time per week; and an additional 15 minutes per week of consultation/collaboration. District also offered five sessions of designated instruction and services (DIS) counseling to be provided by the school psychologist. The DIS counseling sessions were offered with a view to support Student with his anxiety, self-advocacy, and transition back to the public school setting.

#### *Student's Unique Needs During the 2006-2007 School Year*

44. Under the IDEA and case law, District's proposed program must have met the following requirements in order to have constituted an appropriate educational program: (1) been designed to meet Student's unique needs, (2) been reasonably calculated to provide him with some educational benefit, (3) must comport with his IEP, and (4) be provided in the LRE.

45. Regarding the test for substantive appropriateness under the IDEA, the first prong requires that a student's IEP must be designed to meet the unique needs of the student. And based on the "snapshot rule" discussed below, it is therefore critical to have an understanding of the needs of Student from information available to the IEP team at the time of the October 23, 2006, program offer from District.

46. Student has complex unique needs which are complex and overlapping. These needs were identified for the IEP team by Parents and the District personnel who assessed Student in the fall of 2006. He has been diagnosed as autistic. He suffers from obsessive compulsive behaviors. He has many moderate to severe and severe deficits that impact his ability to learn in school. He has severe memory deficits, both short term and long term memory. He has severe weaknesses in comprehension and focus. He has a short attention span. He has severe deficits in auditory processing and severe receptive and expressive language deficits. He has also been diagnosed with Landau-Kleffner Syndrome with its attendant word retrieval problems. His deficits result in difficulty understanding speech in competing noise situations.

47. In the development of the proposed IEP, District team members relied in part on information obtained from Student's teacher at Summit View to establish his current levels of performance and in developing some goals and objectives. Some of those current levels of performance were not accurately identified in the IEP. For example, the current

level of performance for the writing goal in District's proposed IEP simply states: "At this time, Student is able to write a clear and coherent 1 paragraph essay. He is ready to increase this skill." In contrast, Lough's multi-disciplinary psycho-educational report included a direct quote from a written report on the daily academic performance of Student prepared by Studer, his current teacher at Summit View. Student's actual present level of performance relating to writing was described as:

Writing: Student has difficulty writing a paragraph independently as he has a lot of trouble with active working memory and proximal and distal planning. He often forgets where he is going or has been with topics. However, with prompting and one-on-one help, (he has very creative ideas), he can write a clean and coherent paragraph.

Based on the inaccurate baseline information, District proposed the following writing goal for Student:

By 10/07, following teacher pre-led writing activities, Student will produce a correctly indented multiple paragraph composition that includes an introductory paragraph with a topic sentence, supporting paragraphs with facts/details/explanations, and a concluding paragraph with a summary of key points independently, scoring at least 3 on the writing rubric in 3 out of 4 trials as measured by Student work sample.

The baseline information in the IEP omitted important information about Student's writing ability. It omitted that Student has difficulty writing a paragraph independently; that he has a lot of trouble with his working memory and with planning; and that he often forgets where he is going, or has been, with topics. Having omitted these facts about Student's true writing ability, the proposed IEP writing goal of Student producing an independently crafted multiple paragraph essay is not an appropriate goal for Student. Beyond such problems with baseline performance and goal development, the major concern was whether District's offer to place Student in the particular special and general education classrooms at Bay Laurel was reasonably calculated to provide Student with some educational benefit.

*Reasonably calculated to provide some educational benefit*

48. To be appropriate under the IDEA, a school district's proposed program must also have been reasonably calculated to provide Student with some educational benefit. As described above, District's proposed IEP placed Student in a special education setting for language arts, math, and a portion of social studies, as well as integration in a general education setting for science, portions of social studies, and non-academics.

49. The special education setting proposed by District was the special day class taught by Sobczyk. Sobczyk had been employed by District for a total of three years. She was first hired by District in 2004 as a special education teacher. At the time of hire, Sobczyk had received a B.A. in liberal studies. When hired she had not yet completed, but

was then going through, her qualifying education at California State University Northridge and had an intern credential. At the time of the hearing she held an education specialist credential for mild to moderate disabilities.

50. During the hearing, Sobczyk was asked about her knowledge of autism and applied behavior analysis (ABA). She explained she had taken courses while working on her credential and was currently in a Masters program, but could not recall any classes or programs on autism. She was not able to identify current research or expert positions on autism. And though she testified she received six days of training from District when she was first hired, which included autism and ABA, she could not provide clear testimony about implementing ABA.

51. The general education setting proposed by District was a classroom with 27 students taught by Brkic with an instructional aide for Student. Speech pathologist Gold determined that Student has difficulty understanding speech in competing noise situations, a condition that would exist in the proposed general education classroom with 27 fourth grade students. More importantly, school psychologist Lough found that Student has significant deficits in the areas of attention and memory. With such deficits, Student would not likely be able to keep pace on any day in the general education class, even with the assistance of an instructional aide. And though Brkic was proposed as Student's general education teacher for science and portions of social studies, the evidence showed that virtually all of the instruction would fall upon the shoulders of the instructional aide. With 27 other students in the class, including some with their own IEP requirements, it is difficult to see how Brkic would have the time to interact with Student, and to do all the many things that Student's unique needs required to be done, to teach Student.

52. Moreover, District witnesses described the general education classes for science as a hands-on program and for social studies as including hands-on activities. The hands-on projects and group activities would permit Brkic to move around the classroom and interact with students in groups in ways that would permit independent and group learning. But in a general education classroom with 27 other students, the teacher would also be expected to give directed lessons to the entire class at times, and move around the room and give assistance to other small groups during hands-on activities. When Brkic was doing these things away from Student's immediate presence, the meaningful interactions with Student would be left to the instructional aide. As a result, the instructional aide would be responsible for the prompting of Student to begin attending and the chunking of information to break down the instruction into smaller, more manageable pieces. The instructional aide would be responsible for the review of information and the checking-in with Student to make certain Student actually understood what the aide and the classroom teacher was saying. If the aide determined that Student did not understand the words the teacher or the aide were using, the instructional aide was responsible for giving directions in a variety of ways such as using different vocabulary and employing visual prompts to make sure Student understood what was being said. The instructional aide was also responsible for the repeat and review of information if the aide determined that Student had forgotten had was said, as well as on-task reminders and prompts throughout the instruction. The instructional aide was responsible for

determining if Student had lost track of his thoughts, had lost his focus, or had become distracted by something in the room or some internal concern. And based on Student's complex and overlapping needs, the instructional aide would have to repeat this intensive one-to-one direct interaction again and again, each time Student was unable to comprehend what the aide or teacher was saying, or lost his concentration due to internal or external distractions, or lost from memory what was being discussed, or could not find a word to express his thoughts, or any of the many other learning deficits Student worked through as each class was taught. This is far beyond what an instructional aide is qualified to do in a general education setting.

53. Several District employees described the minimum level of qualifications required of District's instructional aides. The basic requirements include a high school diploma, a passing score on a basic skills competency test, and some knowledge of disabilities demonstrated during an interview. In addition to these minimum requirements, all new District teachers and aides must take a six-day training course which includes a two-day didactic followed by a four-day hands on training covering autism and ABA. After hire, District also offers ongoing training for aides. In the absence of additional education, experience, and training, these qualifications are not sufficient for an instructional aide who would be charged with the intense level of support that District's proposed IEP placed on the aide for Student.

54. In this case, the evidence established that District's offered program was not in fact reasonably calculated to provide Student with educational benefit. As described above, Student has a complex array of unique needs. He has been diagnosed as autistic. He suffers from obsessive compulsive behaviors. He has severe memory deficits, both short term and long term memory. He has severe weaknesses in comprehension and focus. He has a short attention span. He has severe deficits in auditory processing and severe receptive and expressive language deficits. He has also been diagnosed with Landau-Kleffner Syndrome with its attendant word retrieval problems. His deficits result in difficulty understanding speech in competing noise situations.

55. Student has complex and overlapping needs for one-to-one teaching in a small group environment. He requires direct prompting to gain attention, to maintain focus, to repeat instructions, to confirm understanding, to teach and re-teach understanding with small, manageable bits of information, to re-focus and help manage atypical behaviors, prompting to remain on task, to promote communication, to offer options for Student to provide answers, to again re-focus and re-explain instructions and information presented. It is not credible that Student would obtain educational benefit by being in the special education setting for 65 percent and the general education setting for 35 percent at Bay Laurel.

#### *The Program at Summit View*

56. The program at Summit View was described by Anne Studer (Studer), who was Student's teacher at Summit View. She has a B.S. and an M.S. in education. She has a special education credential in mild to moderate disabilities. Studer has been a teacher since

1993 and has been employed at Summit View since 1997. She has gained expertise in teaching children with special needs in a number of different areas because Summit View specializes in teaching children with learning issues. Much of the training she has received and many of the programs she uses at the school are geared to help children with learning problems including language issues, processing problems, and reading and math.

57. With respect to autism, Studer's training and experience includes the classes she has taken during the last five years and her work experience over the past ten years. Her training includes a summit conference put on by her employer group every year where the latest research on autism is presented. This annual conference is generally a two to three day conference with educators and researchers from around the country who make presentations about the most current research and the best practices in the field of special education. The annual conference also includes presentations about students with learning disabilities, students with attention deficit disorder, and students with autism.

58. Studer described Summit View as a school designed to support children with learning differences. The programs used by Summit View are research based and correlate with state standards. Students are taught in small group settings, with class size typically limited to no more than 12 students. Since Studer taught the younger students in her classroom, she typically had fewer than 12 students in her class. She explained the education program at Summit View is language-based and focuses on language arts and the teaching of study skills and learning strategies to make students more independent learners.

59. Studer taught second, third, and fourth grade students at Summit View over the past ten years. She was Student's full time teacher for the entire third grade and his full time teacher from the beginning of the fourth grade until February 2007. Beginning at that time, Student was in her classroom for reading, writing, and a read aloud session. She described Student as a person to whom instructions cannot be given one time with the expectation that he is able to follow through. When teaching, she explained that based on Student's language and processing deficits she gives him processing time, she gives him wait time, and she gives him repetition of instructions. She also gives him clarification of directions, and clarification of words, such as a visual prompt with directions so Student will know what she is talking about. By way of example, she explained he has needed to be prompted regarding the difference between a binder, a folder, and a book.

60. With regard to class size, Student is more responsive in a very small group of two to three students. In a larger group, Student has a certain amount of anxiety and he shuts down. Because reading and writing is so challenging for Student, he needs the small group setting and directed instruction with only a handful of students. Studer constantly checks Student for understanding in the small group setting because he does not draw any attention to himself if he does not understand what is being taught. He appears to be well-behaved and following along, but the constant questioning and interaction between Studer and Student reveals when he has lost track of the class instruction or directions. As his teacher, Studer explained this includes a lot of checking-in with Student, a lot of clarifying what was said to

Student, and a lot of prompting to make sure the teacher knows that Student understands what he needs to do.

61. In the course of teaching Student, the teacher at Summit View makes certain that Student is attentive to take in information, that he knows something important is coming, and that the words being used are explained in the event he loses understanding of what is being said. This is to work around Student's receptive language needs. The teacher also follows up with whether Student can repeat back the directions that were given. This is to work around his short term memory deficits. The teacher also slows down the rate of information being given, gives instruction in smaller amounts, and engages in a direct instruction give-and-take with Student so the teacher understands if Student is comprehending what is being talked about. The teacher also models what students are expected to do to provide visual cues to support spoken directions.

62. The small group instruction, involving a handful of students with direct teacher interaction, provides an environment where Student's distractions are minimized. Student began the 2006-2007 school year in a combined third and fourth grade class with four fourth grade students. During the year one additional student was added for a total of five fourth grade students. The teacher at Summit View minimizes the external distractions with small class size, quiet environment, and constant direct interaction with Student. The teacher also minimizes internal distractions with assistance to overcome Student's obsessive behaviors directed at finding just the right lead tip on all Student's pencils before a writing assignment is started. Because Student is highly distractible, Summit View provides a setting where Student can access his curriculum.

63. Because of the very small class size at Summit View, students are not taught among nondisabled peers. Rather the teacher begins by teaching the students to become advocates for themselves by teaching them about their learning profile. The goal of this self advocacy is to be able to transition into a more mainstream environment at some point in their school career. There are also some students at Summit View, like Student, who have such complex needs and disabling conditions, that education with nondisabled peers cannot be achieved satisfactorily. These students must wait to join more mainstream education until they develop their skills further.

#### *Comport with Student's IEP*

64. This standard was designed to determine if a student's IEP was appropriately implemented by a district. Because Student did not accept the educational placement offered by District in this case, this standard not irrelevant in determining whether District offered Student a FAPE.

#### *Least Restrictive Environment*

65. A school district is also required to provide each special education student with a program in the least restrictive environment (LRE). This means a student should be

removed from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes, with the use of supplementary aids and services, could not be achieved satisfactorily. To the maximum extent appropriate, special education students should have opportunities to interact with their general education peers.

66. District urges that its offer of 35percent in the general education environment would be the appropriate setting as the least restrictive environment in which Student could be educated satisfactorily. That determination of the least restrictive environment requires a balancing of four factors: the academic benefits to Student of placement in a general education setting; the nonacademic benefits of that placement; the effects of that placement on the teacher and other students; and the cost of that placement.

#### *Academic benefits*

67. District offered placement in the general education setting for science, portions of social studies, and non-academics such as lunch and recess. As discussed in the section covering "educational benefit" above, Student would not receive educational benefit in the in the general education classroom proposed for Student.

68. The problem with the general education classroom setting for Student is based on his severe deficits in auditory processing, focus, memory, and language. With all the potential distractions in the classroom, Student would have a difficult time trying to focus on the material being taught. The difficulties Gold encountered during her assessment of Student are examples of why the placement will not provide educational benefit to Student. In spite of the quiet environment and Gold's one-to-one interaction with Student, he still required multiple repetitions of directions to understand what was required of him. And even after it appeared he understood her directions, a short time later the directions had to be repeated again when he lost them from his memory. District's proposed IEP actually relied on an instructional aide to perform the intensive interaction that a veteran speech language specialist or special education teacher found complex and overlapping. The nature and severity of Student's educational needs tip the balance against participation in the general education classroom for the 2006-2007 school year. This results in the finding that Student would not receive academic benefits in the general education environment.

69. The program at Summit View, on the other hand, provided intensive one-to-one interaction with an experienced teacher for all of Student' learning. This was not a luxury for Student, it was actually required for Student to receive academic benefit.

#### *Non-academic benefits*

70. Student's ability to interact socially with non-disabled peers is one of the important non-academic benefits of the general education environment. District correctly points out that its offer to place Student in general education for science and social studies would provide him with the non-academic benefit of being integrated with his nondisabled

peers. However, there was persuasive testimony that Student's inability to keep pace with his general education classmates would likely cause stress, anxiety and other social problems for him. Lough's assessment revealed anxiety symptoms related to Student's worry about school work and what other students thought of him. Van Fleet also testified that Student is self-conscious and anxious about his disabling conditions, including his speech impairments and his obsessive compulsive behaviors. As such it is doubtful there would be a net benefit to Student being schooled with nondisabled peers.

71. Moreover, Student's cognitive deficits, including severe memory and speech and language deficits, likely causes greater academic and social pressure in the larger general education setting. At this point in Student's life, such increases to Student's levels of anxiety, stress, and worry, cancel out the potential non-academic benefits of the general education setting.

*Effect on the regular education teacher and other students*

72. There was little dispute on the topic of Student's effect on the regular education teacher and other students. District witnesses noted that Student would have extra time to complete assignments and would be free to move around the classroom and take breaks when needed. This was not expected to be a serious disruption of the class in general education. In fact, it was likely that other students in the class had individualized education programs and may have the opportunity for additional break time and other accommodations. This part of the test was found to be neither a plus nor a minus in determining the least restrictive environment for Student.

73. On balance, the evidence showed that Student would not derive academic benefit from inclusion in a regular education classroom. And while there were certain benefits to being educated with nondisabled peers, there was a real concern that the severity of Student's deficits would add anxiety, stress, and worry for Student, a concern equal to the non-academic benefits. The evidence showed, therefore, that Student cannot be educated satisfactorily in a general education classroom, and that the District's offer of placement was not the least restrictive environment in which he could be educated satisfactorily.

74. In light of all the above, the weight of the evidence supports a finding that the District's offer of placement and services contained in Student's October 13, 2006, IEP would not have addressed all of Student's unique needs, and was not reasonably calculated to give him educational benefit in the LRE.

*Student's Request for Speech and Language Services*

75. Student requested speech and language services for three hours per week to address writing and working memory issues, comprehension, and auditory memory. However, Student provided no evidence from a speech and language specialist that Student needed three hours of services per week to address these needs.

76. In view of Student's failure to meet his burden to produce evidence on this issue, Student is not entitled to three hours of speech and language services.

#### *Reimbursement for Educational Expenses*

77. Parents provided credible evidence that on August 30, 2006, they paid \$28,728 for tuition and speech and language services for Student to attend Summit View. Parents did not provide any invoice for expenses for any social skills group or transportation. The Summit View invoice submitted by Parents shows they paid the tuition and speech language expenses in full, in advance, at the beginning of the school year. In view of Parents' unilateral private placement of Student for the three years before the 2006-2007 school year, and District's compliance with the procedural requirements for assessment and convening the October 23, 2006, IEP team meeting, District can only be responsible for reimbursement of educational expenses from October 23, 2006 to the end of the school year.

78. The Summit View invoice presented by Parents shows a monthly accounting of the tuition and the speech and language charges. All charges incurred prior to October 23, 2006, are to be deducted from the amount Parents paid to Summit View on August 30, 2006. The charges prior to October 23, 2006, include seven sessions of speech and language at \$93 per session amounting to \$671 for speech and language. Charges prior to October 23, 2006, also include the monthly tuition charge for September 2006 in the amount of \$2,679. After deducting such charges in the total amount of \$3,330, Parents are entitled to reimbursement from District in the amount of \$25,398.

## LEGAL CONCLUSIONS

### *Applicable Law*

1. Under the Individuals with Disabilities Education Act (IDEA) and state law, children with disabilities have the right to a free appropriate public education (FAPE). (20 U.S.C. § 1400(d); Ed. Code, § 56000, et seq.<sup>3</sup>) FAPE consists of special education and related services that are available to the child at no charge to the parent or guardian, meet the state educational standards, and conform to the child's individualized education program (IEP). (20 U.S.C. § 1401(9).)

2. "Special education" is defined as specially designed instruction, at no cost to the parents that is provided to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); Ed. Code, § 56031.) "Related services" means transportation and such developmental, corrective, and supportive services as may be required to assist the child to benefit from special education. (20 U.S.C. § 1401(26); Ed. Code, § 56363, subd. (a).)

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<sup>3</sup> All statutory citations to the Education Code are to California law.

3. There are two parts to the legal analysis of whether a school district has complied with the IDEA. The first examines whether the district has complied with the procedures set forth in the IDEA.<sup>4</sup> (*Board of Educ. v. Rowley* (1982) 458 U.S. 176, 206-07.) The second examines whether the IEP developed through those procedures was reasonably calculated to enable the child to receive educational benefit. (*Ibid.*) In *Rowley*, the United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the substantive requirements of the IDEA. (*Id.* at p. 200.) The Court determined that a student’s IEP must be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services to maximize a student’s abilities. (*Id.* at pp. 198-200.) The Court stated that school districts are required to provide only a “basic floor of opportunity” that consists of access to specialized instructional and related services which are individually designed to provide educational benefit to the student. (*Id.* at p. 201.) As long as a school district provides a FAPE, methodology is left to the district’s discretion. (*Id.* at p. 208.)

4. To determine whether a district offered a student a FAPE, the analysis must focus on the adequacy of the district’s proposed program. (*Gregory K. v. Longview Sch. Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314) If the district’s program was designed to address the student’s unique educational needs, was reasonably calculated to provide him some educational benefit, and comported with his IEP, then that district provided a FAPE, even if the student’s parents preferred another program which would have resulted in greater educational benefit. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56031.)

#### *The IEP is the Blueprint for Providing FAPE*

5. The IEP is the “centerpiece of the [IDEA’s] education delivery system for disabled children” and consists of a detailed written statement that must be developed, reviewed, and revised for each child with a disability. (Honig v. Doe (1988) 484 U.S. 305, 311 [108 S.Ct. 592, 98 L.Ed.2d 686]; 20 U.S.C. § 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345.) The Ninth Circuit Court of Appeals has endorsed the “snapshot” rule, explaining that the actions of the District cannot be “judged exclusively in hindsight...an IEP must take into account what was, and what was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted.” (*Adams v. State of Oregon* (9th Cir. 1999) 195 F. 3d 1141, 1149, citing *Fuhrmann v. East Hanover Bd. Of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1041.) The focus is on the placement offered by the school district, not on the alternative preferred by the parents. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987), 811 F.2d 1307, 1314.)

6. The IEP is a written document detailing, in relevant part, (1) the student’s current levels of academic and functional performance (for preschool children, how the disability affects the child’s participation in appropriate activities), (2) a statement of measurable academic and functional goals designed to meet the child’s educational needs

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<sup>4</sup> As noted in the Background section, there is no claim of any procedural violation in this case.

and enable the child to make progress, (3) a description of how the goals will be measured, (4) a statement of the special education and related services to be provided the Student based on peer-reviewed research to the extent practicable, (5) the beginning date along with the anticipated frequency, location and duration of the special education and related services, and (6) an explanation of the extent to which the child will not participate with nondisabled children in a regular class or other activities. (20 U.S.C. § 1414(d)(1)(A)(i); 34 C.F.R. § 300.320(a); Ed. Code, § 56345, subd. (a).) The statement of measurable annual goals must be designed to meet the individual's needs that result from the individual's disability to enable the preschool pupil to participate in appropriate activities. (Ed. Code, § 56345, subds. (a)(1)(B), (a)(2)(A); see also 34 C.F.R. § 300.320(a).)

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

8. Regarding substantive appropriateness under the IDEA, the Supreme Court's *Rowley* opinion determined that a student's IEP must be designed to meet the unique needs of the student, be reasonably calculated to provide the student with some educational benefit, and comport with the student's IEP. However, the Court determined that the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities. (*Rowley*, 458 U.S. at pp.198-200.) The Court stated that school districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instructional and related services which are individually designed to provide educational benefit to the student. (*Id.* at p. 200.)

9. Federal and state laws also require a school district to provide special education in the LRE. (20 U.S.C. § 1412(a)(5)(A); *Poolaw v. Bishop* (9th Cir. 1995) 67 F.3d 830, 834.) A special education student must be educated with nondisabled peers "to the maximum extent appropriate," and may be removed from the regular education environment only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services "cannot be achieved satisfactorily." (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114; Ed. Code, § 56364.2, subd. (a).)

10. The IDEA establishes a strong preference in favor of the placement of a special education student in the LRE. (20 U.S.C. § 1412 (a)(5)(A); *Rowley*, supra, 458 U.S. at 181 n.4; *Poolaw v. Bishop* (9th Cir. 1995) 67 F.3d 830, 834.) In light of this preference, and in order to measure whether a placement is in the LRE, the Ninth Circuit, in *Sacramento City Unified Sch. Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1403, has adopted a balancing test that requires the consideration of four factors:

(1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect [the student] had on the teacher and children in the regular class, and (4) the costs of mainstreaming the [student].

11. To determine whether the District offered Student a FAPE, the analysis must focus on the adequacy of the District's proposed program. (*Gregory K. v. Longview Sch. Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) If the school district's program was designed to address the pupil's unique educational needs, was reasonably calculated to provide him some educational benefit, and comported with his IEP, then that district offered a FAPE, even if the student's parents preferred another program.

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

13. An annual IEP shall contain a statement of the individual's present levels of academic achievement and functional performance, including the manner in which the disability of the individual affects his or her involvement and progress in the general education curriculum. (Ed. Code, § 56345, subd. (a)(1); 20 U.S.C. § 1414(d)(1)(A)(i).) An annual IEP must also contain a statement of measurable annual goals designed to: (1) meet the individual's needs that result from the individual's disability to enable the pupil to be involved in and make progress in the general curriculum; and (2) meet each of the pupil's other educational needs that result from the individual's disability. (Ed. Code, § 56345, subd. (a)(2); 20 U.S.C. § 1414(d)(1)(A)(iii).)

14. Under *Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 163 L.Ed.2d 387], Petitioner Student has the burden of proof in this case.

### *Reimbursement*

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

*County Sch. Dist., Four v. Carter* (1993) 114 S.Ct. 361; *Alamo Heights Independent Sch. Dist. v. State Bd. of Education* (5th Cir. 1986) 790 F.2d 1153, 1161.)

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

### *Determination of Issues*

#### *Issue 1.*

1. Pursuant to Factual Findings 1-7, 8-43, 45-63, and 67-74, and Legal Conclusions 1-14, District’s October 23, 2006, IEP did not provide an offer of FAPE to Student in the LRE.

2. The evidence presented at hearing showed Student has complex and overlapping needs requiring one-to-one teaching in a small group environment. In order to access his education he needs direct prompting for to gain attention, to maintain focus, to repeat instructions, to confirm understanding, to teach and re-teach understanding, to re-focus, to help manage atypical behaviors, to remain on task, to promote communication, to provide answers, to again re-focus and to re-explain instructions and information presented. It is not credible that Student would obtain educational benefit by being in the special education setting for 65percent and the general education setting for 35percent at Bay Laurel.

3. The evidence also demonstrated District’s proposed special education teacher for Student received education and training as a special education teacher for children with mild to moderate disabilities. There was no evidence she was trained to teach children with moderate to severe or severe disabling conditions. Student is, and was assessed by District as, a child with unique learning needs resulting from a wide range of overlapping intellectual, behavioral, emotional, communication, sensory, and social impairments. Among these overlapping deficits were numerous deficits in the severe and the moderate to severe ranges.

It would be unfair to expect Sobczyk, who had recently received her credential for mild to moderate disabilities, to teach a child like Student who had so many severe, and moderate to severe, deficits. It would be just as unfair to place Student in her class when she was not trained and educated for his complex level of disability.

*Issue 2.*

4. For the same reasons, and pursuant to Factual Findings 1-7, 8-43, 45-63, 67-74, and 77-78, and Legal Conclusions 14-16, Parents were entitled to place Student in the program selected by Parents at Summit View School, a certified nonpublic school. Parents are entitled to reimbursement from District in the amount of \$25,398, representing the educational expenses they incurred for Student from October 23, 2006, to the end of the 2006-2007 school year.

ORDER

1. District's offer of placement and services contained in Student's October 23, 2006, individualized education program did not constitute a free and appropriate public education designed to meet need Student's unique needs in the least restrictive environment for the 2006-2007 school year.

2. District shall pay to Parents the sum of \$25,398 to reimburse them for the educational expenses incurred for Student from October 23, 2006, to the end of the 2006-2007 school year.

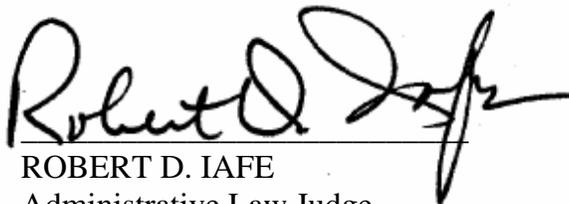
PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Student prevailed on the issues heard and decided in this case.

RIGHT TO APPEAL THIS DECISION

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

Dated: August 20, 2007



ROBERT D. IAFE  
Administrative Law Judge  
Office of Administrative Hearings