

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

In the Matter of:

STUDENT,

Petitioner,

v.

DUBLIN UNIFIED SCHOOL DISTRICT,

Respondent.

OAH CASE NO. N 2007100454

**DECISION**

Administrative Law Judge (ALJ) Deidre L. Johnson, Office of Administrative Hearings, Special Education Division (OAH), State of California, heard this matter on March 3, 4, 5, 6, 7, and 17, 2008, in Dublin, California.

Roberta S. Savage, Attorney at Law, represented Student. Student's mother and father (Parents) were present during the hearing. Student was not present.

Dora Dome, Attorney at Law, Miller Brown & Dannis, represented Dublin Unified School District (District). Dr. Blaine Cowick, Director of Special Education, was present on behalf of the District during the hearing.

On October 15, 2007, Student filed a request for a due process hearing (complaint). On November 29, 2007, OAH granted a continuance of the hearing.

At hearing, oral and documentary evidence were received. The record remained open until April 3, 2008, for the submission of written closing arguments, at which time the record was closed and the matter was submitted.

## ISSUES<sup>1</sup>

1. For the 2005-2006 school year, beginning on October 15, 2005, did the District deny Student a free appropriate public education (FAPE) by:
  - A. Inappropriately assessing Student;
  - B. Failing to conduct an occupational therapy (OT) assessment; and
  - C. Failing to find Student eligible for special education and related services?<sup>2</sup>
  
2. For the 2006-2007 school year, prior to June 11, 2007, did the District deny Student a FAPE by:
  - A. Failing to reassess Student;
  - B. Failing to conduct an OT assessment; and
  - C. Failing to find Student eligible for special education and related services?
  
3. For the 2007-2008 school year, did the District's June 11, 2007 and October 31, 2007 individualized education program (IEP) offers deny Student a FAPE by:
  - A. Inappropriately reassessing Student;
  - B. Failing to make a clear written offer of placement for social skills services and teacher training;
  - C. Failing to have a teacher from Student's private high school, Springstone Community High School (Springstone), present at the October 31, 2007 IEP team meeting, or to otherwise obtain accurate information from the school about Student's unique needs and present levels of performance;
  - D. Failing to offer appropriate annual goals;
  - E. Failing to offer an appropriate program, including a small classroom placement at a private nonpublic school (NPS), organizational skills training, social skills development, life skills development, adaptations to reduce stress and anxiety in school, transition supports, behavioral services, occupational therapy, and assistive technology;
  - F. Failing to conduct an OT assessment until August 16, 2007, and conducting an inappropriate OT assessment; and
  - G. Failing to make an offer for extended school year (ESY) services for the 2007 and the 2008 ESYs?

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<sup>1</sup> The ALJ has reframed and reorganized the issues for purposes of clarity in this decision.

<sup>2</sup> Student does not contend that he should have qualified for special education under the categories of Specific Learning Disability or Other Health Impaired, and they are not issues in this case.

## REQUESTED REMEDIES

Student requests compensatory reimbursement to the Parents for the costs that they have incurred for his private educational placement and services for the 2007-2008 school year at Springstone in Lafayette, including tuition and round trip transportation. Student acknowledges that Springstone is not a certified NPS and could not be ordered as a prospective placement under the California Education Code. He therefore requests an order for the District to develop an appropriate program “with components similar to those at Springstone.” In addition, Student requests an order for the District to reimburse Parents for an independent educational evaluation (IEE) by Dr. Diane Kusters, and an independent auditory processing assessment by Dimitra Loomos.

## CONTENTIONS OF THE PARTIES

Student contends that by August or September 2005, District had notice that he was diagnosed with Asperger’s Syndrome, and that when District conducted assessments in October 2005 for initial eligibility for special education, they were inappropriate. Student contends that he was eligible for special education and related services under the category of Autistic-Like Behaviors in October 2005. Student contends that he had deficits in organization, attention and memory, as well as a slow processing speed, that were not addressed by District’s 504 Plan.<sup>3</sup> He contends that District’s refusal to reassess him for the 2006-2007 school year, and subsequent reassessment of him in the spring of 2007 were both inappropriate. Student avers that the District members of the IEP team at failed to make a clear written offer for social skills services and teacher training in the area of Asperger’s Syndrome that Parents could understand. Student contends that District’s June 11, 2007 and October 31, 2007 IEP offers were inappropriate and denied Student a FAPE. Student claims that not all necessary members of the IEP team were present at the October 31, 2007 IEP meeting because no one from Springstone was there. Student claims that District had notice or should have known in 2005 that he needed an OT assessment, District failed to assess his OT needs until August 2007, and that the OT assessment was inappropriate.

District contends that Student was not eligible for special education and related services for the 2005-2006 and 2006-2007 school years because his high functioning Asperger’s Syndrome did not adversely affect his educational performance to the extent that his needs could not be addressed in the regular curriculum and he made appropriate academic progress in the general education curriculum with accommodations under a 504 Plan. District contends that there were no violations involved at either of the 2007 IEP meetings, and that, if there were, they did not deny Student a FAPE. District contends that the June 11,

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<sup>3</sup> Section 504 Plans are authorized by the federal Rehabilitation Act. (29 U.S.C. § 794 (1973).) A student is eligible for Section 504 protection if he or she has a physical or mental impairment that substantially limits one or more of life activities, or if he or she has a record of or is regarded as having such an impairment. (*Ibid.*; 34 C.F.R. § 104.3(j) (2004).) OAH does not have jurisdiction under the Education Code to hear disputes about 504 Plans, and the appropriateness of District’s 504 Plans for Student is not an issue in this case.

2007 and October 31, 2007 IEPs offered Student a FAPE for the 2007-2008 school year, and that the special education placement and related services offered were appropriate because they were based on valid assessments, considered Student's present levels of academic and functional performance, as well as his unique needs related to his disability, and that the proposed annual goals were appropriate to address his unique needs. District contends that it did not have notice, by virtue of a request from Parents, Student's educational performance and behavior, or District's assessments that there was any concern about OT needs that should have been assessed prior to August 2007. Finally, District contends that its October 2007 OT assessment was appropriate.

## FACTUAL FINDINGS

### *Background*

1. At the time of the hearing, Student was 14 years and 11 months old. He lives with Parents within the geographical boundaries of the District. At an IEP meeting on June 11, 2007, the IEP team determined that Student was eligible for special education and related services under the category of Autistic-Like Behaviors as he transitioned from middle school to high school for the 2007-2008 school year.

2. There is no evidence that Student had any diagnosed history of developmental delay prior to or by three years of age. When Student was in kindergarten (1998-1999 school year), he made satisfactory progress in most academic areas; however, a Student Study Team (SST) meeting was held to discuss concerns about limited attention, distractibility, social skills, and limited verbal development. During his first, second, and third grade years, Student made significant progress and worked at grade level, with SST meetings each year. In August 2001, a private psychologist, Dr. Shires, diagnosed Student with a Nonverbal Learning Disability (NLD). District provided classroom modifications in third grade to support Student's work habits and study skills, including the use of a "minder binder" as an organizational tool.

3. In March 2002, Parents consulted a behavioral pediatrician, Dr. Michael Levin, who privately evaluated Student and found Student to have attention deficit hyperactivity disorder (ADHD), predominantly inattentive type. Student began taking medication to treat the ADHD. District conducted assessments, including an OT assessment. On March 28, 2002, an IEP meeting was held and Student was found eligible for special education services under the category of other health impaired (OHI) due to attention deficit disorder. District provided resource specialist program (RSP) services, and OT services for 30 to 45 minutes per week to address Student's handwriting difficulties and poor sensory regulation.

4. In the spring of 2003, in his fourth grade school year, District exited Student from special education because he had made substantial progress in OT and no longer needed

services to assist him in achieving academic goals. Student made outstanding progress in fifth grade, performing in the proficient or advanced range in all academic areas.

5. Student transitioned to sixth grade at Wells Middle School (Wells) in the District for the 2004-2005 school year. The parties agreed that he had difficulties during the transition. In September 2004, a 504 Plan meeting was held and a 504 Plan was established to accommodate Student in the classroom by supporting organization and work completion. The Wells 504 Plan noted concerns about NLD and ADHD, and their adverse effect on Student's performance, including inattentiveness, poor organizational skills, and slow processing speed, especially in math. The 504 Plan team, including Parents, did not note any concerns about social or peer relationships.

*District's 2005 Assessments and IEP Meeting (Seventh Grade)*

6. Before any action is taken with respect to the initial placement of a student with exceptional needs in special education, an individual assessment of a student's educational needs shall be conducted. An individualized education program (IEP) meeting to review the assessment must occur within 60 days of the receipt of parental consent for the assessment.

7. Thereafter, special education students must be reassessed not more frequently than once a year, and shall be reassessed at least once every three years, unless the parent and the local educational agency (LEA) agree otherwise. A reassessment shall be conducted if the LEA determines that the educational or related services needs, including improved academic achievement and functional performance, of the pupil warrant a reassessment. The LEA shall conduct a reassessment if the pupil's parent or teacher requests a new assessment.

8. On August 29, 2005, when Student began seventh grade for the 2005-2006 school year, Parents wrote to the District enclosing a letter from Dr. Stephen Millman, a private child and adolescent psychiatrist. At some point between April and August 2005, Dr. Millman privately evaluated Student and diagnosed him to have "Pervasive Developmental Disorder, Asperger's Type – DSM IV 299.80, with Attention Deficit Disorder, Inattentive Type – DSM IV 314.00, some nonspecific learning disabilities, as well as some depression and anxiety."<sup>4</sup> Aside from the one-page letter by Dr. Millman, there is no detailed report from him in the record. Dr. Millman's letter described Student as "significantly disabled," with particular difficulty in organizational skills, and maturational and social reciprocity issues, and recommended an IEP. Parents requested the District to provide Student special education services under an IEP.

9. On September 8, 2005, District and Parents conducted a 504 Plan meeting to consider Parents' requests for 504 Plan accommodations pending the outcome of their request for an IEP. Thirteen items of reasonable accommodations were agreed upon,

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<sup>4</sup> Official notice is taken of the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV).

including a referral to District's school psychologist to arrange assessments "as the first step toward an IEP." Most of the accommodations involved organization and work skills, including preferential seating near the point of instruction, additional textbooks for home use, teacher and aide help in organizing class binders, transition time between classes, contact with Parents about homework assignments, possible limitation of homework, especially in math, and extended test taking time. One item referenced Student's peers, to provide him the names of classmates to be study buddies and exchange phone numbers. In addition, Student and Parents were referred to Holly Akli, a clinical social worker who was available at Wells to provide counseling services.

10. Student's mother signed District's Assessment Plan on September 13, 2005. It provided that a school psychologist would assess Student's social/adaptive behavior, psychomotor development, intellectual functioning, and processing areas as needed based on a review of records and the results of a psychoeducational evaluation. It provided that a resource specialist would assess academic achievement, and that vision/hearing would be assessed by a District nurse. No occupational therapy assessment was requested or listed on the Plan.

11. After District conducted the assessments, an IEP team meeting was held on October 25, 2005, to consider Student's eligibility for special education. The October 2005 IEP team, including Parents, considered District's psychological assessment by Dr. O'Donnell, and an academic achievement assessment by resource specialist Roberta Kreitz. The IEP team also considered the opinions of Student's psychologist, Dr. Millman, as contained in his August 2005 letter, along with the concerns of Parents. No single measure or assessment was used as the sole criterion for determining whether Student was eligible.

#### *2005 Psychological Assessment*

12. The student must be assessed in all areas related to his or her suspected disability. Tests and assessment materials must be administered by trained personnel in conformance with the instructions provided by the producers of the tests. No single procedure may be used as the sole criterion for determining whether the student has a disability or an appropriate educational program. If the evaluation procedures required by law are met, the selection of particular testing or evaluation instruments is at the discretion of the school district. If a parent disagrees with an assessment obtained by the public education agency, the parent has the right to obtain, at public expense, an IEE under certain circumstances. The parent must notify the school district that the parent disagrees with the assessment and request that the district conduct an IEE at public expense. Faced with that request, the school district, without undue delay must: (a) file a request for due process and prove at a hearing that its assessment is appropriate; (b) prove at a hearing that the IEE obtained by the parent did not meet the agency criteria; or (c) ensure that an IEE is provided at public expense.

13. District school psychologist Colleen O'Donnell, Ph.D., assessed Student on October 4, 2005, and issued a psychological report dated October 17, 2005. Dr. O'Donnell

obtained a Bachelor of Arts degree in psychology in 1997, a Master of Arts degree in clinical psychology in 1999, and a Doctorate in school psychology in 2006. She worked in various positions as a researcher, treatment specialist, and psychologist, and was a school psychologist with the District for one year, from August 2005 to June 2006. Dr. O'Donnell is now the Director of Counseling at a school in Colorado, and testified telephonically. She has conducted about 20 assessments of students on the autism spectrum.

14. Dr. O'Donnell reviewed the District's records and reports of Student's prior developmental, health and family history. There were no records of any concerns about Student's social skills in the school environment after third grade. She informally interviewed Student's teachers and District's 504 Plan facilitator Sue Cofer. None of Student's seventh grade teachers had any concerns about his academic and functional performance and were confused about why he was involved in a special education assessment. The teachers also did not report any concern about Student's social interactions at Wells. She interviewed and conducted observations of Student during the testing procedures at Wells, and interviewed Parents. Dr. O'Donnell did not contact Dr. Millman.

15. Dr. O'Donnell selected and administered the following assessment tools: the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV), the NEPSY – Neuropsychological Assessment – Visuospatial Scales, the NEPSY – Attention and Executive Functioning, and the Behavior Assessment Scale for Children – Second Edition (BASC-II) – Self Report. The assessment tools were standardized tests that were selected and administered so as not to be racially, culturally or sexually discriminatory, and were administered in English, Student's primary language. The tests were validated for the specific purposes for which they were used to assess Student and Dr. O'Donnell established that they were reliable indicators of his levels of functioning. Dr. O'Donnell was trained and knowledgeable in the administration of the assessment tests. Since the evaluation procedures required by law were met, the selection of particular testing or evaluation instruments was at the discretion of the District.

16. During the testing, Dr. O'Donnell found that Student displayed notable anxiety and concern to perform well, but became more comfortable as the sessions progressed. Throughout, he blinked, made "distressed faces," cleared his throat, and had difficulty maintaining eye contact. He was very verbal with a "rather sophisticated vocabulary." Student's ability to use oral language for appropriate communication was evaluated throughout. Student displayed some difficulty talking about common subjects in general terms, and described his parents literally (e.g., grey hair). Dr. O'Donnell established that Student's receptive and expressive language skills were nevertheless within the normal range. Dr. O'Donnell observed Student informally on the school grounds, including interacting normally with a peer. She did not conduct a formal classroom observation.

17. The WISC-IV is a comprehensive measurement of general intellectual functioning in four subcategories, each of which had various subtests. With a standardized score of 85 to 115 being in the average range, Student's verbal comprehension index score of 126 was in the superior range. His perceptual reasoning index score (the ability to analyze

and synthesize nonverbal information and utilize nonverbal reasoning skills) was 100. His working memory index score (the ability to actively maintain information in immediate memory and manipulate or reason using such memory) was 99. Student's processing speed index (the ability to quickly and accurately scan, sequence or discriminate between simple visual information) was an 85. While there was a discrepancy between the lower processing speed score and the other scores, it nevertheless was in the low average range. In the three processing speed subtests, Student obtained a deficient score in a timed cancellation subtest to measure visual attention. While there was a significant discrepancy between his verbal skills and other abilities, the other abilities were in the average range, except for the lower processing speed, including visual attention.

18. The NEPSY<sup>5</sup> is a comprehensive instrument to assess neuropsychological development in children, which is comprised of a wide variety of subtests. Because the results of the WISC-IV suggested that Student had minor deficits in the area of visual attention and processing speed, Dr. O'Donnell selected subtests from the NEPSY Attention and Executive Functioning Scale and the Visuospatial Processing Scale. Executive functioning involves the ability to approach tasks in a planned and organized manner, to monitor one's performance, and to maintain an awareness of and act on information relevant to the task but disregard irrelevant information. Student scored in the above average range with respect to planning, monitoring, self-regulation and problem solving. He obtained an average rating on the Visual Attention subtest, which was not timed, and thus obtained an average score of 110 on the Attention and Executive Functioning Scale. Visuospatial processing is the ability to synthesize parts into meaningful wholes, to represent objects mentally and understand relationships among objects in space, to manually reproduce or copy a visual model (visual motor coordination) and to interpret symbolic representations. Student scored a 115 on the Visuospatial Scale.

19. The BASC-II Self Report – Adolescent is designed to aid in the evaluation of emotional and behavioral disorders, and consists of rating scales by which the assessor may gather information from a variety of individuals. Dr. O'Donnell administered this scale with Student to determine his view of his social, emotional, and behavioral functioning in the areas of attitude, school problems, internalizing problems, inattention/hyperactivity, and personal adjustment. Overall, Student found himself to be within normal limits in most areas. However, Student reported that his attitude to school and his attention were both in the at-risk range; specifically, that he often forgot things and had trouble paying attention to the teacher, and that he hated school.

20. Student contends that the 2005 psychological assessment did not meet the legal requirements because Dr. O'Donnell did not administer the BASC-II with Parents or teachers to obtain a broader view. However, Dr. O'Donnell had reviewed Parents' numerous letters and requests listing their concerns in Student's records. She determined that she did not need further information from them, and was concerned that their responses might not

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<sup>5</sup> NEPSY appears to be a trademark name for this neuropsychological evaluation, and not an acronym.

have been objective. Dr. O'Donnell had already spoken to the teachers in determining the scope and course of her assessment, and no teachers had indicated any area of concern that would have necessitated further assessment with a formal survey. There was no indication of any disagreement among teachers that would suggest further inquiry would be prudent. Moreover, Student did not establish that administration of the survey only to him was not in accordance with the instructions provided by the publisher or author of the BASC-II.

21. Student contends that District's 2005 psychological assessment did not meet the legal requirements because Dr. O'Donnell did not assess his social/emotional or pragmatic language skills. As District's school psychologist, Dr. O'Donnell made informed, professional decisions to select the assessment tools used. Student had been evaluated by Dr. Millman and she did not want to overtest him. She persuasively testified that, based on information from the 504 Plan, Student's records, and his teachers, there was no record of significant social skills concerns after third grade, and that he would probably not meet the eligibility criteria under the categories of either Autistic-Like Behavior or Emotional Disturbance (ED). Nevertheless, she selected several standardized assessment tools that included measurements in the social/emotional domains, including the BASC-II. Student scored in the average to above average range on most of the subtests of both the WISC-IV and the NEPSY, including perceptual reasoning.<sup>6</sup> In addition, his expressive and receptive language skills, including pragmatics, were evaluated during the behavioral observations. Thus, the evidence established that the psychological assessment assessed Student's social/emotional and communicative functioning.

22. Student contends that Dr. O'Donnell failed to assess Student's organizational issues and failed to "uncover" his organizational deficits. Dr. O'Donnell found that Student had weaknesses in his comparative processing speed and visual attention, but did not find any marked deficit in executive functioning, where his scores were in the average range. Student's organizational difficulties were known to the District and represented the primary focus of his 504 Accommodation Plan. Student did not establish what assessment tests Dr. O'Donnell should have conducted in addition to the tests she used to assess his cognitive functioning, including organization and planning. For all of the foregoing reasons, District's 2005 psychological assessment was appropriate.

#### *2005 Academic Achievement Assessment*

23. Student completed his sixth grade year at Wells in June 2005 with a 3.333 grade point average, an A minus in physical education (PE) and Science, and Bs in Language Arts, Reading and Math, and a B minus in History. By October 2005, in the first quarter of his seventh grade year, Student had an A in PE (Quest), a B in Introduction to Cooking, a B minus in Math and Science, and a C in English and History.

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<sup>6</sup> In December 2006 and January 2007, Parents had Student privately evaluated by Dr. Diane Kusters. Among other tests, Dr. Kusters also administered the WISC-IV, with results similar to those of Dr. O'Donnell.

24. On October 3 and 19, 2005, resource specialist Roberta Kreitz conducted an academic achievement assessment in the Wells Learning Center. Ms. Kreitz obtained a Bachelor of Arts degree in political science in 1995, and a Mild Moderate Teaching Credential in 2002. She has been a resource specialist with the District since 1999, and a lead teacher in the special education department since 2001. She handles a resource caseload of about 25 to 30 special education students, teaches five classes a day, and conducts about 25 academic assessments per year, in all categories of disability including SLD, Autism, ED, and OHI. Ms. Kreitz was qualified to conduct the assessment.

25. Ms. Kreitz administered the Wechsler Individual Achievement Test (WIAT), a standardized academic achievement assessment with numerous subtests, and tested Student in the following areas: word reading, reading comprehension, pseudo word decoding, numerical operations, math reasoning, spelling, and written expression. She used both standardized scores (SS) and grade equivalents (GE) to measure Student's levels of performance. During the testing sessions, Student made different facial gestures when deep in thought. The results were as follows: word reading – SS 110 (high average), GE 9.8, reading comprehension – SS 112 (high average), GE 8.8, pseudo word decoding – SS 104 (average), GE 8.8, numerical operations – SS 127 (superior) GE 12.4, math reasoning – SS 114 (high average), spelling – SS 104 (average) GE 8.2, and written expression – SS 124 (superior), GE 12.9. Ms. Kreitz persuasively established that the results did not reveal any areas of weakness or deficit and the scores varied from the average to superior ranges.

26. Student contends that, while Ms. Kreitz “may have” accurately assessed Student's then-present levels of academic capability, she failed to assess Student's organizational issues and failed to “uncover” his organizational deficits. However, Student did not establish what assessment Ms. Kreitz should have conducted in addition to the WIAT or that organizational deficits were within the scope of an academic achievement assessment. Ms. Kreitz's assessment was appropriate to measure Student's academic performance as of the first quarter of seventh grade.

#### *Determination of Ineligibility for the 2005-2006 School Year*

27. At the October 25, 2005 IEP meeting, the team considered Student's possible eligibility under the categories of Specific Learning Disability (SLD) and Autistic-Like Behaviors. Dr. O'Donnell discussed the SLD criteria, and the differences between a medical diagnosis of Asperger's Syndrome and the legal requirements for the special education eligibility category of Autistic-Like Behaviors.

28. Pursuant to California law, a student meets the eligibility criteria for special education services under the category of Autistic-Like Behaviors if he or she exhibits any combination of the following autistic-like behaviors, including but not limited to: (a) documentation of evidence of developmental disability (generally, although not necessarily before, the age of three years); (b) any combination of the following autistic-like behaviors, to include but not limited to:

- (1) Inability to use oral language for appropriate communication.
- (2) History of extreme withdrawal or relating to people inappropriately and continued impairment in social interaction from infancy through early childhood.
- (3) Obsession to maintain sameness.
- (4) Extreme preoccupation with objects and/or inappropriate use of objects.
- (5) Extreme resistance to controls.
- (6) Peculiar motoric mannerisms and mobility patterns.
- (7) Self-stimulating, ritualistic behavior.

(c) these deficits adversely affect the student's educational performance; and (d) the student's needs cannot be met solely within the general education setting, with or without modifications.

Under the first prong of the above criteria, a child must therefore exhibit a history of developmental delay and any combination of the above or other autistic behaviors. Under the second prong of the test, the autistic-like behaviors must adversely affect a child's educational performance to the extent that special education is required. Only if both components of the criteria are met will the child meet the eligibility criteria under this category. If the child's needs can be met solely within the general education setting, with or without modifications, the child does not qualify for special education.

29. The medical diagnostic criteria for Asperger's Syndrome in the DSM-IV, 299.80, include: (a) qualitative impairment in social interaction, as manifested by at least two of the following: (1) marked impairment in the use of multiple nonverbal behaviors such as eye-to-eye gaze, facial expression, body postures, and gestures to regulate social interaction; (2) failure to develop peer relationships appropriate to developmental level; (3) a lack of spontaneous seeking to share enjoyment, interests or achievements with other people; or (4) lack of social or emotional reciprocity; and (b) restricted repetitive and stereotyped patterns of behavior, interests, and activities, as manifested by at least one of the following: (1) encompassing preoccupation with one or more stereotyped and restricted patterns of interest that is abnormal either in intensity or focus; (2) apparently inflexible adherence to specific, nonfunctional routines or rituals; (3) stereotyped and repetitive motor mannerisms...; or (4) persistent preoccupation with parts of objects. In addition, the disturbance must cause clinically significant impairment in social, occupational, or other important areas of functioning. There is no clinically significant general delay in language; and there is no clinically significant delay in cognitive development or in the development of age-appropriate self-help skills, adaptive behavior; and the criteria are not met for another specified disorder.

The medical diagnostic criteria for Asperger's Syndrome does not contain any component regarding the adverse effect of the disability on educational performance and also does not require that the adverse impact must be to the extent that the child's needs related to the disability cannot be met in the general education setting, with or without modifications.

30. The October 2005 IEP team included Parents, Dr. O'Donnell, Ms. Kreitz, general education teacher Hattie Lawrence, and Wells vice Principal Steve Martin. The consensus of the IEP team was that Student was not eligible for special education under either SLD or Autistic-Like Behaviors. The District's assessments did not reveal any significant discrepancy between his cognitive ability and his academic achievement to meet the statutory definition for SLD. Student does not contend otherwise. Dr. Millman's medical diagnosis of Asperger's Syndrome was not determinative of eligibility for special education because it did not address the educational criteria, nor were the Asperger's characteristics equivalent to the characteristics of Autistic-Like Behaviors.

31. Based on all information known to the District in October 2005, Student was able to use oral language to communicate appropriately with peers and teachers, and did not have a history of extreme withdrawal from infancy through early childhood. He did have a history of inappropriate relations with his peers in his early school years through third grade. There was no record of any further social skill concerns until Dr. Millman's letter in August 2005. Parents explained that Student had social deficits, including socially inappropriate comments. There was no record of extreme resistance to controls or self-stimulating, ritualistic behaviors, nor any evidence of an obsession to maintain sameness. Some evidence from Parents established that Student was preoccupied with computers, but there was no indication in October 2005 that his interest was "extreme." Dr. O'Donnell persuasively established that Student had mild deficits with respect to processing speed and visual attention, but that Student did not have a qualifying disability in 2005 that significantly impacted his academic or functional performance at Wells.<sup>7</sup> Dr. O'Donnell's testimony and assessments were persuasive in establishing that Student's disabilities of Asperger's Syndrome and ADHD, accompanied by unique needs in the areas of processing speed and visual attention, did not meet the first prong of the criteria for Autistic-Like Behaviors.

32. Even if Student had a combination of two or more autistic-like behaviors, the evidence did not establish that his disability met the second prong of the criteria and adversely affected his educational performance, so that his needs could not be met in the general education classroom for the 2005-2006 school year. To the contrary, as set forth in Factual Findings 23 - 25, the evidence established that Student performed well academically and socially in the general education environment with the accommodations provided by his 504 Plan. The 504 Plan accommodated Student's mild deficits with respect to a slow processing speed. Dr. O'Donnell credibly established that the visual attention deficit may be addressed in the general education classroom by using a piece of paper to block out extraneous information if Student became distracted. As of the October 2005 IEP meeting, none of Student's seventh grade teachers had concerns, aside from organizational problems and homework completion. Those organizational and homework problems resulted in some missing or incomplete homework assignments and some reduced grades. Student did not meet his burden to establish that, as of the October 2005 IEP determination of ineligibility, his

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<sup>7</sup> Student was depressed and on medications. However, Student does not contend in this proceeding that he should have been found eligible for special education under the category of severe emotional disturbance (ED).

organizational, homework, or social deficits so adversely affected his performance that his needs could not be met in the general education environment.

33. Student contends that Dr. O'Donnell "predetermined" Student's ineligibility and her assessments should be disregarded. However, as set forth in Factual Findings 12 - 22, her assessments were in compliance with the requirements of the law, and she was entitled to use her professional judgment in the selection of assessment tools. Even if Dr. O'Donnell should have conducted BASC surveys with one or more teachers and included them in the report, it would be harmless error. All of Student's seventh grade teachers testified that they believed Student participated appropriately in their classes. Therefore, Student did not establish that the omission was significant. Even if Dr. O'Donnell should have assessed Student's social communication skills with more extensive tools, such a violation would be harmless error because Student did not establish that his deficits were so significant that they could not be met in the general education setting with accommodations.

34. The evidence did not establish that Student was eligible for special education under the category of Autistic-Like Behaviors for the 2005-2006 school year. Parents, who are well-educated and received advisement of their procedural rights, consented to the October 2005 IEP determination of ineligibility. Parents did not timely provide the District with notice that they disagreed with the assessments or the ineligibility determination, or that they wanted an independent evaluation at public expense. Had they done so, the District would have been obligated, without unnecessary delay, to offer to fund an IEE or to file a request for a due process hearing. Accordingly, because Student was not eligible for special education in the 2005-2006 school year, District did not deny Student a FAPE.

#### *2005-2006 Occupational Therapy Needs*

35. A child with a disability has the right to a free appropriate public education (FAPE), which is defined as special education, and related services, that are available to the student at no cost to the parent, that meet the state educational standards, and that conform to the student's IEP. The term "related services" in federal law is referred to in California as "designated instructional services," and includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from education.

36. Student contends that, for the 2005-2006 school year, the District should have assessed his OT sensory processing needs "to develop strategies to maintain focus and attention, decrease anxiety and enhance social interaction," because District knew or should have known that OT was a suspected area related to his disability.

37. As set forth in Factual Findings 3 and 4, Student received special education and OT services in his third grade year and was exited after making significant progress. As set forth in Factual Findings 27 - 34, Student was not eligible for special education and related services for the 2005-2006 school year, and therefore was not entitled to receive related services such as OT. Even if Student had been qualified to receive related service for

the 2005-2006 school year, the evidence did not establish that District had notice of sensory deficits that called for a new assessment in seventh grade. In addition, Parents made no request to the District for an OT assessment for his seventh grade year.

38. The evidence did not establish that, in the absence of a request from Parents, the District should have assessed OT needs regarding strategies to maintain focus and attention, decrease anxiety and enhance social interaction and sensory needs because District had no information that OT or sensory processing was a suspected area of disability adversely impacting Student's education for the 2005-2006 school year.

#### *2006-2007 School Year (Eighth Grade)*

39. Toward the end of Student's seventh grade year, on June 8, 2006, Parents sent a letter to the District expressing their concern that his Asperger's Syndrome negatively affected his ability to access education in the regular classroom environment. Parents described the areas of concern as "organization, memory and attention – accompanied by his emotional disinclination to seek help." They requested a review and a "reopening" of his "IEP assessment" for the upcoming 2006-2007 school year in eighth grade because his grades had fallen, and because Parents relied on Dr. Millman's medical advice that Student's "emotional disability," i.e., Asperger's and ADHD, required supports in a more protective environment. Parents' communication did not describe any disagreement with the District's 2005 assessments, but only that they wanted the issue of eligibility revisited in a new reassessment based on Student's subsequent performance during the school year and recent medical advice. Hence, Parents' June 2006 letter was not a request for an IEE at public expense.

40. Dr. O'Donnell and Ms. Kreitz immediately conducted a review of Student's performance during the 2005-2006 school year, including his file and his grades. Dr. O'Donnell spoke with his teachers and the classroom aide. Student's general education classes had about 27 to 30 students in each class.

41. Ms. Lawrence has many years of teaching experience, and has taught general education at Wells for eighteen years, including special education resource students mainstreamed into her classroom. Student was in her seventh grade English and History classes (core class), which included general education students, about nine to ten resource students, and a classroom aide. Ms. Lawrence was aware of his 504 Accommodation Plan. Student sat in the front row, and she checked his minder binder for assignments and helped with his history notebook before he left class each day. Student's handwriting was not more difficult to read than that of other seventh graders and his written expression was good. If Student did not understand an instruction, she or the aide would check for understanding and ask him to repeat it. Student was not isolated and was not a loner. He participated appropriately in small group discussions in History and she did not have any concerns that his comments were not appropriate. Ms. Lawrence did not see any social reciprocity problems or issues in her classes. Two or three times a week, Student would lose focus and need to be redirected to a task. He had some problems completing homework assignments.

Over the course of the year, approximately 20 percent of his work was turned in late, and accommodated. If he was absent, his mother would come or contact Ms. Lawrence to get the homework assignment. Ms. Lawrence persuasively established that Student performed well academically and socially in her classes. Ms. Lawrence credibly established that Student's written expression and work quality were at grade level.

42. Student's seventh grade science teacher, Gishloma Dickey, persuasively testified that Student was very bright in her class, raised his hand to answer questions, and interacted appropriately with peers, including laughing. He needed prompting only two or three times a week to get back on task when he mentally lost focus, and he had problems getting homework in on time. Heidi Evans, the seventh grade Math teacher, established that Student participated actively in her class, volunteered, and was respected by his peers as he did well in math, although there were not many opportunities for social interaction. Student had difficulties consistent with his 504 Plan, such as needing transition time and extra time to take tests, as well as accommodation for late homework. He also had problems learning to show the calculation steps in math problems. The teachers reported, and Student's attendance records showed that he had periods of significant absence during the year due primarily to illness. In addition to the modifications in the 504 Plan, District provided other general education interventions such as placement in Ms. Lawrence's modified class. He participated in the PE Quest program that taught responsibility, self-discipline, and self-confidence in workshops every eighth day instead of the PE class.<sup>8</sup>

43. Based on all information gathered, Dr. O'Donnell and Ms. Kreitz concluded that there was no new or different information that would obligate the District to reassess Student's eligibility. Accordingly, on June 12, 2006, they prepared a letter of prior written notice to Parents refusing their request for reassessment because there was no new information and he therefore continued not to meet the eligibility criteria for special education.

*Fall 2006-2007 504 Plan Meeting*

44. On July 31, 2006, Parents sent another letter to the District, requesting a meeting to discuss the "504/IEP issues." On September 12, 2006, Parents met with Dr. Kathy Mayo, District's program specialist, Dr. Sari Leivant, school psychologist, and Ms. Kreitz to discuss District's June 2006 refusal to reassess and Parents' concerns. Parents were frustrated with the 504 Plan and felt it relied too much on them as the parents to "enforce" the accommodations by making sure the teachers were aware, and reminding them of their responsibilities. Parents believed the District placed too much emphasis on Student's good grades in denying eligibility and had overlooked the emotional and stress-related issues. Parents do not recall if they discussed social skills needs at that meeting. Parents did not specifically request a reassessment for special education at this meeting; however, overall, it

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<sup>8</sup> In addition, Student was invited to participate in Friendship Club, a lunch social group open to all to help with friendships and peer interactions. It is not clear whether he ever attended.

was clear that they wanted Student to be found eligible for special education. District took no action, having already issued its refusal letter in June.

45. On September 27, 2006, the Wells 504 Plan team meeting took place. Parents and Student attended. Ms. Cofer arranged to have the seventh grade teachers in each subject meet the eighth grade teachers and Parents to share information and ideas about Student and ensure that the new teachers would receive information and training about Student's needs. Prior to the meeting, Parents sent all teachers information about Asperger's, and a list of about 20 proposed accommodations. Two of Parents' proposals reflected concern about social skills, one for a mentor and one for social skills training. The team created 15 core class accommodations, seven math accommodations, and 11 science accommodations. These accommodations included giving Student preferred seating, extra time to write information from the board, and then to check for accuracy, making eye contact, checking to keep him focused, help putting titles on papers, and organizing binders, having a study buddy, letting Parents know if assignments were missing, signing Student's minder binder, extra books for home use, a homework hotline and website for math class, email status reports to Parents, encouraging group work, putting new assignments in his binder, extra time for handwriting, and ensuring complete written directions for large science projects.

46. On November 1, 2006, Parents and the eighth grade 504 Plan team members held another meeting to determine if the accommodations were working. Parents had proposed reducing the accommodations to one list applicable to all classes. At that time, Student had a grade of an A in English, History, and Math, and a B in Science. The team revised the accommodations to one list of 12 items, plus parental and student responsibilities, one of which gave Parents the right to limit homework to not more than two hours a night or 30 minutes per subject. Parents expressed a concern that Student was "withdrawn" that was not shared by the rest of the team. Nevertheless, they added an accommodation for Student to improve peer social interactions through group activities, including meeting with Sheila Lau, a District counselor, once a week.

47. On December 22, 2006, Parents wrote a letter to Dr. Cowick, District's Director of Special Education, giving notice that, because District declined to give Student an IEP (including at the meeting on September 12, 2006), Parents decided to seek a private independent evaluation from Dr. Diane Kosters and, depending on the results of her evaluation, would seek reimbursement of their expenses. The letter did not directly state that Parents disagreed with District's October 2005 assessments, but did so implicitly by stating that if Dr. Kosters arrived at "substantially different conclusions" regarding Student's eligibility, they would ask for compensation. Parents' letter came approximately fourteen months after District's October 2005 assessments. It unilaterally announced their intent to proceed to have Student assessed privately by Dr. Kosters and did not provide the District the opportunity to participate in the selection of an independent assessor, or negotiate the cost or scope of the evaluation.

48. During Student's 2006-2007 school year, prior to June 11, 2007, Student's academic grades declined from the previous year. Most of Student's lowered grades were

attributable to Student's problems getting his homework assignments turned in on time to be counted for grading. As the year went on, the problem increased. All of his teachers accommodated his late assignments, but they did not modify his grade to accommodate him if the assignment was missing, and modification of grades was not on the 504 Plan. Student again was absent for a significant number of days. For the first quarter of the year, by October 2006, Student's GPA was a 3.0, and by the end of the year it was a 2.5, with grades ranging from As to Bs to Cs, with one D at the end of the year in Science. Student did not flunk any class, nor was his academic performance so poor that any teacher became alarmed. Overall, Student's grades were in the average range. His eighth grade general education teachers testified at hearing and persuasively established that Student's disabilities did not adversely affect his academic and functional performance at school, including social relations, such that his needs could not be met in their classes.

49. Mr. Belveal, the eighth grade core teacher, convincingly established that Student did well academically and socially in his classes, along with 30 other pupils. Student regularly participated in class discussions and did not engage in inappropriate conversation. Mr. Belveal had to prompt Student to get back on task not more than once a week. Mr. Belveal credibly described Student as smart, witty, using advanced vocabulary, and concerned to complete his work.

50. Ms. Theisen, the math teacher, established that Student performed above average on tests, and interacted with his classmates more as the year went on. His math grades ranged from an A to a C plus, and he ended the year with a B. Mr. Jackson, the science teacher, credibly testified that Student had a rich vocabulary, was attentive, and successful in the lab. Jan Cohen, the eighth grade graphic design teacher, established that Student was very computer savvy, and interacted appropriately with his peers, who appreciated his talent. Chuck Mercer, the eighth grade PE teacher, established that Student participated in all 12 sports in a class of 40 students throughout the year without accommodations. Student tried hard and got along with his peers. He also participated in a character building program called Soul Shoppe one day each month.

51. Testimony from Student's eighth teachers uniformly established that Student's challenges in his academic subjects were getting his homework done, getting it in on time, and keeping his binders and notebooks organized. He continued to have some problems with late or missing assignments. Student's mother came to school at various times during the year to assist with notebook organization in different classes. Student received a D for the fourth quarter in science, based primarily on his failure to turn in the final notebook, which was 25 percent of his grade.

52. Pursuant to Factual Findings 27 - 34, Student had not met the eligibility criteria in seventh grade. For eighth grade, even if Student had a combination of two or more autistic-like behaviors, the evidence did not establish that his disability adversely affected his educational performance so that his needs could not be met in the general education classroom for the 2006-2007 school year with accommodations. Despite the fact that his grades had declined somewhat, the evidence established that Student performed adequately

academically and socially in the general education environment with the accommodations provided by his 504 Plan. As determined above, there was no new material information or circumstances to require District to reassess Student and make him eligible in eighth grade.

53. Student contends that Dr. Koster's independent evaluation report, delivered to the District in April 2007, constituted material new information that should have made him eligible for special education. As set forth in Factual Findings 59 - 65, Dr. Cowick and Dr. Leivant persuasively established that Dr. Koster's report did not contain material new information and, overall, was consistent with District's 2005 assessment. Dr. Koster concluded that Student had an executive functioning deficit, which appeared to conflict with District's 2005 findings. However, the actual test results showed that Student's executive functioning was in the average range and were similar in both assessments. Dr. Koster's analysis of Student's communication deficits regarding pragmatic language and literal interpretations emphasized Student's Asperger's language deficits, but also was not new information since the District was aware of his medical diagnosis.

54. Assuming that Dr. Koster's report contained materially new information, District would have been obligated to reevaluate his eligibility for special education. Assuming that Student's declining grades and increased assignment completion problems constituted a material change in circumstances that could not have been accommodated within the 504 Plan, District would have been obligated to reevaluate. In fact, District offered to reassess and an assessment plan was signed by Parents on May 9, 2007. District was thereafter not required to hold an IEP or make another offer until the assessments were completed and the IEP meeting was held on June 11, 2007. District therefore did not deny Student a FAPE during the reassessment period prior to the June 2007 IEP meeting.

55. The evidence did not establish that Student was eligible for special education under the category of Autistic-Like Behaviors for the 2006-2007 school year prior to June 11, 2007. There is no evidentiary basis to find that District should have reassessed Student or found him eligible and provided him with special education services in eighth grade prior to the May 2007 assessment plan. Accordingly, District did not deny Student a FAPE for the 2006-2007 school year prior to the June 11, 2007 IEP meeting.

#### *2006-2007 Occupational Therapy Needs*

56. Student contends that, for the 2006-2007 school year, the District should have assessed his OT needs "to develop strategies to maintain focus and attention, decrease anxiety and enhance social interaction," because District knew or should have known that OT was a suspected area related to his disability.

57. As set forth in Factual Finding 55, Student was not eligible for special education and related services for the 2006-2007 school year prior to June 11, 2007, and consequently was not eligible to receive related services such as OT. Even if he had been qualified to receive related services, District did not have notice of an OT concern from Student, Parents, or teachers. Parents made no request to the District during the 2006-2007

school year for an OT assessment, even as they consented to the May 9, 2007 assessment plan related to Dr. Kusters' report. In addition, Dr. Kusters' report did not provide District with notice of an OT concern.

58. The evidence did not establish that the District should have assessed Student's OT needs for the 2006-2007 school year prior to June 11, 2007, and its failure to conduct an OT assessment did not deny Student a FAPE.

*2007 Independent Evaluation and May 2007 504 Plan Meeting*

59. Parents sent Dr. Kusters' neuropsychological assessment to the District on April 7, 2007. Dr. Kusters assessed Student over eight sessions in late December 2006, and January and February 2007. In their letter, Parents requested an IEP based on Dr. Kusters' recommendations of eligibility and interventions, including both a 504 Plan and an IEP, and a small classroom placement at a private school "to allow Student to satisfactorily access the social aspects of the educational process during the critical high school years, and to develop the basic skills necessary for independent living as an adult." Parents indicated that Student had already been accepted for admission by two private schools, Orion Academy and Springstone, and that they intended to enroll him at Springstone for the 2007-2008 school year. Parents' letter requested reimbursement for Dr. Kusters' invoice, an audiological evaluation, eligibility for special education, and removal from the general education curriculum for placement at a private high school.

60. District convened a 504 Plan meeting on May 1, 2007, to review and respond to Parents' private evaluation and requests. Dr. Kusters was present with Parents and Karlin Merwin, an advocate associated with the Law Office of Roberta Savage. Student's eighth grade teachers were present along with Dr. Cowick and Dr. Sari Leivant, school psychologist, and other school personnel. Dr. Kusters discussed her evaluation. Parents emphasized that their concerns were organizational and social, not academic, because Student was going into high school the following fall, where increased academic and social demands were a concern.

61. Dr. Kusters obtained a Bachelor of Arts degree in psychology in 1972, her Doctorate in 1979 in clinical psychology, and Postdoctorate in 1980 in psychotherapy. She had seventeen years experience as a psychologist with Kaiser Permanente before starting a private practice in 1999. Dr. Kusters assessed Student over a period of eight sessions from late December 2006 through February 5, 2007, and thereafter issued a report detailing the results of some 17 separate assessment tools.<sup>9</sup> Dr. Kusters tested Student without his medications.<sup>10</sup> Dr. Kusters confirmed Dr. Millman's 2005 medical diagnosis of Asperger's

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<sup>9</sup> Dr. Kusters' report is undated and it is unknown how long Parents had it prior to disclosing it to the District on April 7, 2008. By that date, Parents had already decided to enroll Student at Springstone.

<sup>10</sup> Student was otherwise taking two medications prescribed by Dr. Millman on a daily basis, Zoloft for anxiety or depression and Concerta for ADHD management to help increase his level of attention.

Disorder. She established that the disability involved a “mild to moderate impairment in social interaction,” and a secondary diagnosis of ADHD – Predominantly Inattentive Type. She also found indications of Tourette’s Disorder, based on his history of occasional motor and vocal tics, including making “bug eyes,” clearing his throat, and making other sounds. Dr. Kusters ruled out NLD. She did not find Student to be depressed, but found that he had insomnia due to school anxiety, frequent colds and a sensitive stomach, and that his educational problems were psychosocial stressors. In addition to interviewing and assessing Student, she interviewed Parents and reviewed Student’s records and prior evaluations. Dr. Kusters did not observe Student in the Wells school or classroom environment or interview or survey any of his teachers as part of her evaluation.

62. Consistent with Dr. O’Donnell’s 2005 assessment, Dr. Kusters reported a large discrepancy between Student’s WISC-IV verbal comprehension index score of 128 in the superior range, and his perceptual reasoning index score of 94. However, in spite of the discrepancy, as noted previously by Dr. O’Donnell, the perceptual reasoning score was still within the average range. Dr. Kusters found his executive functioning to be an area of deficit because it also involved a discrepancy from the superior verbal comprehension score. However, again, it was still in the average range. Based on inconsistent results on several tests, Dr. Kusters surmised that he might have an auditory processing deficit, and recommended further assessment by a specialist in that area.

63. Dr. Kusters reported various social weaknesses or deficits. Based on the Adolescent Test of Problem Solving (TOPS), Student’s standard score of 88, while in the average range, was well below the WISC-IV verbal comprehension score of 128, indicating that he had a mild problem missing the main idea, inferences, or intent of stories or questions. He showed problems understanding figurative or implied language on both the TOPS and the Test of Language Competence – Expanded Edition. Dr. Kusters also administered the Asperger’s Syndrome Diagnostic Scale (ASDS) on Parents.<sup>11</sup> On the ASDS, Parents reported numerous areas of social weakness that were not observed or reported by his teachers at Wells, including having few friends, having difficulty beginning and continuing a conversation, not engaging with others much, limited interest in what others say, and difficulty understanding the feelings of others, along with an “obsessive” interest in computer gaming.

64. Dr. Kusters made many recommendations, among them that Student be allowed to type all written assignments due to a slow graphomotor processing speed, continue all 504 Plan accommodations already in place, access to a peer-note taker or teacher notes, warnings prior to tasks or activities, extra help to understand instructions, intent, main ideas, inferences, or figurative language, support to connect with peers, social skills development, and a small, well-structured class atmosphere. Dr. Kusters recommended that

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<sup>11</sup> Dr. Leivant was critical of the use of this assessment instrument based on a 2002 published review that questioned its reliability as a specific diagnostic tool for Asperger’s, among other criticisms.

he attend a private high school and specifically recommended Orion Academy or Springstone.

65. Both Dr. Cowick and Dr. Leivant were credible in their testimony that, overall, Dr. Kusters' evaluation was consistent with District's 2005 assessment and did not provide any new material information, except for conflicting information as to whether Student had executive functioning deficits. The District never disputed that Student has Asperger's pursuant to the DSM-IV, which by definition includes social deficits, but believed that his 504 Plan supported his access to educational benefit at Wells. As of the date of the May 2007 504 Plan meeting, Student had a grade of a B in History and a C plus in English. In all classes Student had friends, participated in class and volunteered to answer questions. No teachers had observed him to have any auditory processing issues in the school environment. While Student had areas of relative weakness, he did not display significant deficits that were not being dealt with in the general curriculum. However, by May 2007, Student's grades had declined somewhat due to absences and missing or late homework.

66. As a result of the May 2007 504 Plan meeting, the District agreed to conduct social/adaptive behavior assessments with a school psychologist and a behaviorist, including observation.<sup>12</sup> The purpose of the assessments was to evaluate Student's functioning during social settings in the school environment, to determine whether and what supports he might need in order to transition to high school for the coming year. Parents signed an Assessment Plan on May 9, 2007.<sup>13</sup>

#### *May 2007 Social/Adaptive Behavior Assessments*

67. Dr. Julie Schepis, the District's behavior analyst, conducted observations of Student during his classroom and lunch periods at Wells on May 21, and 24, 2007.<sup>14</sup> Dr. Schepis obtained a Bachelor of Science degree in psychology in 1995, a Master of Arts in psychology in 1997, and a Doctor of Philosophy degree in Special Education in 2002 with a dissertation in language for autistic children in the inclusive classroom. She has been a behavior therapist since 1995, a behavior intervention specialist since 2002, and with the District since February 2007. On May 24, Dr. Kusters also observed Student at Wells. The accepted protocol for observation of a student requires that the observer maintain a certain distance to avoid impacting or interfering with the observed student's routines and relationships. Given the distance, Dr. Schepis was not able to discern the content of Student's conversations. Dr. Schepis' observations were thorough. For example, on both

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<sup>12</sup> In addition, Parents arranged for Dr. Kusters to observe Student at school.

<sup>13</sup> By law, District had 60 days from May 9, 2007, within which to complete assessments and hold an IEP meeting, which would have gone beyond the school year and included an extension for the period of summer vacation. District acted expeditiously to complete the assessment process and convene the IEP meeting before the end of the school year.

<sup>14</sup> A third observation scheduled by Dr. Schepis on June 5, 2007, was cancelled due to Student's illness.

days, she observed that Student ate lunch alone, then joined a group of about 5 boys, and had reciprocal conversations with several of them. He stayed with the group each day until the bell rang. He was treated well, as a member of the group, engaged, laughing and talking. The classroom observations on both days were in the Science class, and included observing Student distracted and inattentive one day, and attentive and participating the next. Dr. Schepis was persuasive that Student had the skills to join in a group and actively participate in sustained positive interactions with his peers.

68. Dr. Leivant assessed Student on May 21 and June 8, 2007, based on Parents' concerns expressed at the May 2007 504 Plan meeting regarding social connectedness and organizational weaknesses. Dr. Leivant has been a school psychologist with the District since August 2006. She obtained a Bachelor of Science degree in psychology in 1998, and a Doctor of Philosophy in education in 2006. Dr. Leivant reviewed Student's past evaluations, including that of Dr. Kusters. She interviewed Parents and Student, observed him, and conducted some standardized tests. In addition, she contacted Dr. Millman and Ms. Lau, the Wells counselor that Student was seeing. Dr. Leivant persuasively established that the assessment was "forward thinking" to Student's needs in the high school setting. Student had been at Wells with a population of about 700 students, since sixth grade. Promotion to the ninth grade in the District would be to Dublin High School, with a student population of approximately 1400, an increased academic workload and more sophisticated peer relationships.

69. Dr. Leivant observed Student both inside and outside of class and her observations were thorough, including lunch and classroom interactions. She administered the Autism Diagnostic Observation Scale (ADOS), a standardized assessment in the areas of social behavior and communication often used in conjunction with other assessment information to diagnose Autism. She also administered the Thematic Apperception Test (TAT), a projective test used to indicate underlying feelings and emotions by having Student describe his story responses to picture cards, where he had difficulty identifying relationships or emotions. Dr. Leivant reviewed Student's school records, including academic performance levels. The results of her assessment persuasively established that Student's formal test scores revealed autistic-like behaviors, but that she did not observe such behaviors in the functional school setting.

70. Student contends the assessments were flawed because the assessors did not measure the content of Student's communications and because they were "superficial." However, both psychologists were well qualified to make inferences from the demeanor and tone of Student's interactions with his peers during their observational assessments. Their testimony was persuasive that distance from the child being observed was critical, and it was corroborated by Dr. Kusters, who also did not assess the content of Student's communications with his peers for the same reason. Both Dr. Schepis and Dr. Leivant were qualified to conduct their respective assessments, used observations and standardized tests, and did not rely on any one assessment tool. The standardized tests were validated for the purposes for which they were used. There was no claim or evidence that the tests were

discriminatory. For all of the above reasons, District's May 2007 assessments were appropriate.

*Offer of FAPE for the 2007-2008 School Year (Ninth Grade)*

71. A child with a disability has the right to a FAPE under the Individuals with Disabilities Education Improvement Act (IDEA). FAPE is defined as special education, and related services, that are available to the student at no cost to the parent, that meet the state educational standards, and that conform to the student's IEP. The term "related services" (designated instructional services in California) includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from education.

72. To determine whether the District offered Student a FAPE in the June 2007 IEP, the IEP must meet both the procedural and substantive requirements of IDEA. The first question is whether District complied with the procedural requirements of the law. Not every procedural violation is sufficient to support a finding that a student was denied a FAPE. To constitute a denial of FAPE, the procedural inadequacy must have (a) impeded the child's right to a FAPE, (b) significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of FAPE, or (c) caused a deprivation of educational benefits.

73. The second test in evaluating District's offer is whether the June 2007 IEP developed was substantively appropriate and reasonably calculated to provide Student with educational benefit. An IEP for each child with a disability must include a statement regarding the child's present levels of academic achievement and functional performance; measurable annual goals designed to meet the child's educational needs and enable the child to make progress; a statement of the special education and related or supplementary aids and services to be provided; an explanation of the extent to which the child will not participate with nondisabled children; any individual accommodations necessary to measure performance on state and district wide assessments; and other information, including the anticipated frequency, location, and duration of the services. Offers are to be evaluated as of the time the IEP team designed them, as part of the IEP, in light of the information available at the time the offers were made, and are not to be judged in hindsight.

*Student's Unique Needs*

74. A student who is eligible for special education and related services is entitled to receive specially-designed instruction and related services that meet his or her unique needs and are necessary to assist in benefiting from the education. To that end, a district must identify a student's unique educational needs.

75. On June 11, 2007, the IEP team convened. Parents were present along with their attorney, Roberta Savage. The District team members who were present at the meeting were Special Education Director Dr. Cowick, school psychologists Drs. Leivant and Mayo,

behavior specialist Dr. Schepis, Wells general education teachers Mr. Belveal and Ms. Theisen, RSP teacher Ms. Kreitz, Dublin High general education teacher Terry Kalashian, and Dublin High administrator Kathleen Rosselle.

76. The IEP team reviewed all of the assessments, staff observations, and school records. The consensus was that, looking forward to high school for the 2007-2008 school year, Student was eligible for special education under the category of Autistic-Like Behaviors.<sup>15</sup> The team was concerned that a 504 Plan would not provide sufficient support at Dublin High to avoid his social, organizational and attention deficits from adversely impacting his access to educational benefit, given the new campus, needs to create new peer relationships and associations, increased sophistication of those relationships, increased academic workload, and consequent increased needs for organizational supports. This determination of eligibility was made at the end of the eighth grade year and thus had no impact on Student's general education placement to complete eighth grade at Wells.

77. As a result of the above assessments and identification of Student's deficits, including Asperger's Syndrome, ADHD, slow processing speed, Student's unique needs for the 2007-2008 school year in ninth grade were in the areas of attention, organization, pragmatic language, and social skills (including social reciprocity).

#### *Annual Goals*

78. When developing an IEP, the team must consider the strengths of the student, the concerns of the parents, the results of the most recent assessments, and the academic developmental and functional needs of the child. An IEP must include measurable academic and functional goals and special education and related services designed to meet all of the child's unique needs that result from his or her disability so that the child may progress in the general curriculum.

79. At the June 2007 IEP, the District IEP members proposed annual goals to address Student's unique needs in the areas of social behavior and organization. The proposals discussed included an annual goal in the area of topic sharing, both to expand Student's topics of conversation from computers to other areas and to support meeting new peers in a small group social skills class; and a goal in the area of organization to be supported in an RSP tutorial class. During the IEP meeting, the goals were expanded based on Parents' and Dr. Kosters' concerns to include a pragmatic language goal to address Student's tendency to interpret things too literally and miss the point or intention. District's goals were for a one-year period from June 11, 2007, to June 10, 2008, and included descriptions of Student's then-present levels of performance (PLOPs).

80. Student contends that the proposed annual goals denied him a FAPE because they did not address his "true needs," they did not include many specific goal areas identified by Parents and Springstone, including goals that should have been prerequisites to District's

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<sup>15</sup> The June 2007 determination of eligibility is not at issue in this proceeding.

goals, and because the PLOPs lacked sufficient information from which to determine each goal's appropriateness.

81. District's proposed annual Behavior Goal regarding conversation topics was for Student to be able to identify a variety of topics of interest to his peers and be able to carry on at least a five-minute conversation about a topic chosen by a peer 80 percent of the time. The goal noted Student's PLOP as a level of strength in having matured during middle school and having made friends both in and out of class, and a level of need for social skills in this area to help adjust to the high school transition addressing his need for connecting with a peer group at the high school level. In addition, based on Dr. Koster's assessment, the team added as an express area of need that it was important to address Student's literal interpretation of academic and social pragmatics, including literal interpretation of written and verbal communication. This general level is factually supported by the assessments.

82. As indicated in Factual Findings 67 - 73, neither District's nor Student's assessors measured the content of Student's conversations during the observational portions of the assessments because it would have been contrary to accepted observation methodology. Parents asked District for a goal to increase Student's range of conversational topics based on Parents' perception that Student perseverated on computer topics. In addition, the assessments noted areas where Student had difficulty sustaining communication beyond basic facts. District proposed to measure this goal in the RSP class and in a small group social skills setting and the goal is measurable.

83. Student's criticism that the "baseline" PLOP for this goal was insufficiently assessed is not supported by the evidence. As set forth in Factual Findings 67 - 70, District's social/adaptive behavior assessments in May 2007 were appropriate. In order for Student to carry on at least a five-minute conversation with a peer, on a topic chosen by the peer, 80 percent of the time, as measured over time, Student would have to attend and focus on the peer and the topic, and interpret nonverbal cues and implied or figurative communication in order to stay on topic and not divert to other topics or interests, which Student was unable to do during the May 2007 assessments. Dr. Schepis credibly established that this goal would be implemented in conjunction with the Asperger's social communication curriculum of Michelle Garcia Winner, who was to provide training to District's staff. Accordingly, this goal was appropriate to address Student's needs in the areas of attention, pragmatic language, and social skills, including social reciprocity, and would help support Student's access to more sophisticated peer communication at the high school level.

84. District's proposed annual Study Goal regarding organization was for Student to keep track of assignments with 80 percent accuracy, 80 percent of the time. The PLOPs noted Student's needs regarding organizing his academic subjects, and referred to the 504 Plan. As of June 2007, District was aware of Student's grades in each of his classes, including the extent to which he had missing or late homework. The goal does not contain any description of the methods or strategies by which the goal would be accomplished. However, the 504 Plan contains a list of them, and the Dublin High RSP special education teacher would be responsible to work with Student to develop them.

85. Student contends that there should have been goals specifically setting forth all the “pre-skills” that he would need to accomplish the goal. However, this contention is not supported by credible evidence. The District persuasively established that the RSP tutorial class offered in the June 2007 IEP has a primary focus on organization and homework, and that this goal would be implemented daily in that class using numerous methods and strategies. Student’s argument would result in limiting a wide range of methods and strategies at the high school level to only selected written steps to be slowly implemented and measured over months before moving on to the next stage or step of mastering schoolwork organization (since each goal modification requires the consensus of an IEP team). For example, the evidence established that during middle school Student and the District used the minder binder, notebooks, different colored paper for different classes, copying assignments from the board, daily or weekly checks by teachers, a homework hotline, a website with homework assignments, and a study buddy, among other strategies. While District’s goal may be generalized, Student would have the daily support of the RSP teacher and class, and constant oversight and monitoring to ensure his success, without which he would face difficulty accessing the general education curriculum in high school. District has the discretion to choose the methods and strategies to support Student’s organizational success in a general goal without being limited to narrower, short-sighted goals. Based on all of the above, the goal is measurable and appropriate to address Student’s needs in the areas of attention and organization.

86. For the foregoing reasons, the above proposed annual goals addressed Student’s unique needs arising from his disability as of June 2007 and were appropriate.

*June 2007 IEP and Offer of Placement and Services*

87. A school district is required to provide instruction and related services that are designed to meet the student’s unique needs and are reasonably calculated to provide the student some educational benefit. The IEP must contain a statement regarding the student’s present levels of academic achievement and functional performance, and a statement of the special education and related or supplementary aids and services to be provided.

88. To the maximum extent appropriate, children with disabilities should be educated with children who are not disabled, unless due to either the nature of the disability, or its severity, education in a regular class cannot be achieved satisfactorily even with the use of supplementary aids and services. When determining whether a placement is in the least restrictive environment, four factors must be evaluated and balanced, including the academic benefits of placement in a mainstream setting, with any supplementary supports and services that might be appropriate; the non-academic benefits of mainstream placement; the negative effects the student's presence may have on the teacher and other students; and the cost.

89. At the June 11, 2007 IEP meeting, District offered a special education placement and services for ninth grade at Dublin High, beginning August 27, 2007 and ending June 11, 2008, with participation in the general education curriculum for academic subjects, PE, lunch, recess, and passing periods. In addition, District offered a 55-minute

RSP class once a day, behavior management services for 55 minutes once a month, and individual/group social skills instruction for 30 minutes for 10 weeks during the first 12 to 14 weeks of the school year, to be followed by a review IEP meeting not later than October 30, 2007, at which time a determination would be made by the IEP team how the social skills services were working for Student and whether to continue them for an additional period of time. The social skills services would be provided in the resource classroom, with the training provided by a collaborative team consisting of a behaviorist, psychologist and speech therapist. The offer also provided that Student would be monitored on organizational goals related to writing.

90. District offered the following modifications, supplementary aids and accommodations (including effect on grading): “Extended time on tests as needed, preferential seating to enable teachers to monitor and provide assistance, resource assistance with classroom notes and assignments, word processing access when appropriate. Homework expectations to be coordinated between parent/student and resource teacher. Double sets of books (with exception of novels).” The offer provided that Student would be evaluated and promoted based on general education standards.

91. In addition, District offered the following supports to the Dublin High school personnel to enable Student to advance toward attaining his annual goals, making progress in general education and activities, and to be educated and participate with other children: “Asperger’s training provided by board certified behavior analysts to all appropriate DHS staff.” Specifically, it offered that the Dublin High special education staff team would be trained by Michelle Garcia Winner in September 2007.

92. Student contends that since District’s assessments were inappropriate, the offer of placement and services must be inappropriate as well. As set forth in Factual Findings 12 - 26, 43, and 67 - 70, District’s assessments were appropriate. Therefore, Student’s argument fails.

93. Student contends that District’s offer is inappropriate because he requires a small, structured classroom and school setting in order to obtain educational benefit. The contention was based on Dr. Kusters’ conclusory recommendation in her evaluation. There was no evidence that Student was lost or overwhelmed in his classrooms at Wells or that his presence had a negative impact on his classmates. Dr. Kusters recommended that all of Student’s mild medical disabilities should be addressed by the District without regard to whether addressing them was required by law to provide a FAPE in the least restrictive environment, and she did not appear to be familiar with those requirements. Dr. Kusters did not evaluate the effect of class size on Student’s educational performance and did not interview Student’s teachers at Wells. She never observed Student in any school setting, and never observed him at Wells until after she issued her report. She did not analyze the educational benefits to Student of being placed in a mainstream general education setting with typically developing peers, or the non-academic benefits such as self-esteem and appropriate modeling of communication and behavior. Nor did she analyze the negative effect a restrictive, isolated placement in a class (or school) consisting solely of other

children with disabilities could have on a boy who had spent his entire education to date in the general curriculum.

94. The evidence established that Student was functioning appropriately in his classes at Wells with an overall GPA of 3.11. He volunteered in class, often had the right answer to questions, was accepted by his peers, socialized over most of the lunch hour after eating lunch alone, and successfully participated in sports activities in a large general education PE class. While there was concern about supporting the quality of Student's organization, communication and relationships in high school, both Dr. Cowick and Dr. Leivant persuasively established that the nature of Student's disabilities was not severe and that his education in a regular class could be achieved satisfactorily, with the use of supplementary aids and services. Therefore, removal of Student from the general education environment to a more restrictive environment at an NPS devoted solely to children with Autism, Asperger's, and other disabilities was not required by law. Given the facts of this case, if the District had made an IEP offer to remove Student to an isolated special day class with other disabled pupils on campus, let alone a segregated nonpublic school off-campus, Parents could have claimed a denial of FAPE based on the District's obligation to offer placement in the least restrictive environment. Accordingly, Dr. Koster's opinion as to school placement is afforded little weight.

95. The District's offer included one special education class away from the general curriculum to aid and support his slower processing speed, attention, organization, and social skills deficits. The RSP class for 55 minutes a day was designed to provide active oversight and monitoring of Student's organization and completion of assignments and homework in all classes, as well as training in the area of organization according to his annual goal, and "program needs as they arise." In addition, the RSP class would support Student's social skills goal by facilitating the collaborative social skills services. Student contends that his deficits arising from his disabilities are so pervasive that he must be removed to an NPS like Springstone in order to obtain educational benefit. For all of the reasons discussed regarding placement above, Student's argument is not persuasive. The June 2007 placement offer addresses his unique needs and goals related to those needs in the least restrictive environment of the general education curriculum with appropriate special education supports.

*Social Skills Services and Clear Written Offer of Placement*

96. Student contends that District's offer for social skills services did not constitute a clear written offer of services, and that, even if it was clear, it was inappropriate.

97. The IEP must contain a clear written offer of placement. This must include a statement of the special education and related services, and supplementary aids and services, including program modifications or supports, and a statement of the anticipated frequency, location and duration, designed to address Student's unique needs. The offer should contain sufficient information so that the level of the district's commitment of resources is clear to

the parent, but may be stated in a range if the IEP team determines that a range of service meets the needs of the child.

98. The District's social skills offer in the written IEP, in and of itself, was not as clear as the description set forth in Factual Finding 89 above. Page 1 of the IEP stated that District would provide "individual instruction" for 30 minutes "10 every year." In addition, for every service District offered, the form provided the exact same language as to the mode of delivery and interaction: "Individual and Group; Direct and Collaboration; Monitor and Consult." There was no way to tell from page 1 that this had anything to do with social skills or whether it would be group or not. Page 8 of the IEP stated that the behavior services provided in the resource classroom would be social skills training provided by a behaviorist, psychologist and speech therapist but the frequency was not stated, nor was it tied to the first offer on page 1. The IEP also offered one 55-minute session of behavior management services in order to monitor Student's social skills goal and progress.

99. The evidence, including the testimony of District witnesses and the recording of the IEP meeting, established that at the June 2007 IEP meeting, the District offered group social skills instruction for 30 minutes for 10 weeks during the first 12 to 14 weeks of the school year. Following those services, there would be a review IEP meeting not later than October 30, 2007, at which time a determination would be made by the IEP team as to how the social skills services were working for Student, and whether to continue them for an additional period of time. Student's attorney was present at the IEP meeting where District staff, including Dublin High personnel, explained that there were concerns about starting out with a long term offer of social skills services. First, in the past District had offered social opportunities to Student in which he did not want to participate. Second, District was aware of this service as an important transition support for Student into a new environment and wanted to ease into any longer term service to make sure it would be useful to him in making peer connections and otherwise addressing his social skill needs. District's proposal was thus to start out with ten sessions right at the beginning of the new school year, and then review to make adjustments. Based on the verbal explanations at the meeting, and contrary to Parents' suspicions, it was highly likely that the IEP team would decide to continue the services based on the need to support the annual Behavior Goal, including both conversation topics and moving beyond literal interpretations of language.

100. Student's claim that the written offer was not a clear written offer required by law is valid. No reasonable person reading the June 2007 IEP offer, without other information, could understand what the offer consisted of. Thus, District's failure to make a clear written offer of social skills services constitutes a procedural violation. Student next claims that the violation constituted a denial of FAPE because Parents were confused and concerned, and it therefore significantly impeded their opportunity to participate in the decision making process regarding the provision of FAPE. This contention is not supported by the evidence. Parents asked many questions during the IEP meeting, and the full nature and scope of the offer was explained, as found above. Parents' attorney was also present at the meeting to explain the offer. Given the plan to monitor Student's progress with a review IEP meeting, District's reasons for only addressing the first quarter of high school, through

October, were reasonable. Parents did not like the offer compared to that which Springstone was offering. Parents have not established that their ability to participate in the IEP process was significantly impeded. Accordingly, District's procedural violation was harmless error and did not constitute a denial of FAPE.

101. As to the substance of the offer, the social skills services would be delivered in connection with Student's RSP classroom and would not therefore embarrass him as a pull-out from an academic class, nor would it deprive him of educational benefit by having to leave an academic lesson to receive the services. The proposed small group setting was appropriate as was the monthly monitoring, teacher consult and collaborative approach, including bringing in a speech and language therapist to work on pragmatic language. In addition, it worked in collaboration with District's offer to provide training to Student's teachers, which would emphasize common deficits associated with Asperger's and specific training by Michelle Garcia Winner, a certified speech and language specialist, on two dates in the fall. Dr. Schepis, who has experience running social skills groups, credibly established that the group would use lessons from Garcia Winner's curriculum, introduce concepts to the group, and then repeat and practice.

102. Student contends that his social skills deficits are so pervasive that he needs a program that incorporates social skills instruction "throughout the day" because that is what Springstone claims its program provides. As found above, Student's social skills services at Dublin High would include initial training for teachers and monthly behavioral monitoring along with daily social skills opportunities in the RSP class, and a weekly social skill training group, as well as oversight by all of his general education teachers in every class. District's offer provides appropriate services to meet Student's unique needs in the area of social skills even though the offer may not be what Parents prefer. For all of the above reasons, District's June 2007 IEP offer appropriately addressed Student's social skills deficits as he transitioned to high school.

#### *Teacher Training*

103. Student contends that District's June 2007 offer for teacher training did not constitute a clear written offer of services, and that, even if it was clear, it was inappropriate.

104. As set forth in Factual Finding 91, District's offer of placement and services, as verbally explained at the June 2007 IEP meeting, included an offer to provide training to Student's teachers, which would emphasize common deficits associated with Asperger's. Specifically, it would be training by Michelle Garcia Winner, a certified speech and language pathologist who specializes in the autistic spectrum, on two dates in the fall.

105. Student contends that the written offer did not specify the content of the training or the amount of training. The written offer in the IEP did not identify Ms. Garcia Winner by name but generally provided the training would be given by a board certified behavior analyst. The evidence did not establish that Ms. Garcia Winner is a behavior analyst. District had her in mind when they wrote the offer so the discrepancy was

unexplained. The general area of training was identified in the written offer as Asperger's, Student's specific disability. Finally, the offer expressly provided the training would be in September 2007, but failed to specify for how many hours. District was not required to identify the service provider or the specific training program or materials in the IEP and was entitled to retain flexibility. However, the duration of the training should have been set forth in the offer.

106. Student's claim that the offer for teacher training was not a clear written offer required by law is therefore valid. No reasonable person reading the June 2007 IEP offer, without other information, could understand how much training the District was obligated to provide. Thus, District's failure to make a clear written offer constitutes a procedural violation. Student claims that the violation constituted a denial of FAPE because Parents were confused and concerned, and it therefore significantly impeded their opportunity to participate in the decision making process regarding the provision of FAPE. This contention is not supported by the evidence. Parents asked many questions during the June 2007 IEP meeting, and the full nature and scope of the offer was explained. Parents' attorney was present at the meeting to explain the offer. Moreover, during the IEP meeting, District staff verbally explained that the training would be two half-day trainings on September 19 and October 24, 2007. They also explained that the training would be targeted training to focus specifically on Student's unique needs. In light of all evidence, Parents have not established that their ability to participate in the IEP process was significantly impeded. Accordingly, District's procedural violation was harmless error.

107. Substantively, the teacher training offer was appropriate to ensure that Student's general education teachers at Dublin High were aware of his unique needs arising from Asperger's Syndrome, including his social and pragmatic language deficits, so that they could support his progress. Hence, the June 2007 offer of teacher training constituted an appropriate component of a FAPE for Student.<sup>16</sup>

#### *Assistive Technology*

108. Student claims that District's June 2007 IEP offer denied him a FAPE because it failed to offer him assistive technology services in the form of a laptop computer. He contends that a laptop computer is required by law in order for him to obtain educational benefit. Optional use of a computer or word processor was offered to Student as part of the June 2007 IEP.

109. The evidence did not establish that Student needed assistive technology such as purchasing a laptop computer for his exclusive use in order to achieve educational progress. Student's slower processing speed and handwriting were accommodated in the

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<sup>16</sup> To the extent that Student's complaint or prehearing conference statement attempted to state a problem regarding District's failure to implement the training, it is not an issue in this proceeding because the offer was never accepted.

offer, including extended time on tests as needed, resource assistance with classroom notes and assignments, and word processing access when appropriate. Student's core teachers in seventh and eighth grade, Ms. Lawrence and Mr. Belveal, were persuasive in stating that Student's handwriting, while somewhat sloppy, was not any more difficult to read than that of other students. Qualitatively, Student wrote well by hand on in-class assignments, although quantitatively he wrote less than other students. While longer assignments, such as book reports, were more of a challenge for him, he was given extra time and often used a computer. While the evidence showed that Student often wrote somewhat slowly, or wrote less quantity in a given time period, it did not establish that using a computer did or would increase the pace of his production of written material. In addition, Parents never asked for an assistive technology assessment in order to assess his needs in this area. Based on the foregoing, District did not deny him a FAPE by not offering to fund an exclusive computer.

*Life Skills Development, Adaptations to Reduce Stress and Anxiety and Transition Supports*

110. Student claims that he had unique needs that District should have addressed by offering him services and supports for life skills development, adaptations to reduce stress and anxiety and transition supports. Student's complaint, evidence presented at hearing, and closing argument fail to shed light on these claims. There is no objective assessment data or other evidence to support a claim that these areas of the family's concerns constituted significant areas of deficit arising from Student's disabilities that adversely impacted his access to education.

111. At the June 2007 IEP meeting, the District explained that it was obligated to offer a transition plan to Student on or before his sixteenth birthday, and that ongoing support was offered beginning in ninth grade in terms of college planning and life after high school. At Wells, Student was on medication prescribed by his private physician for anxiety and depression and also saw a school counselor. As far as transition to high school, District's offer of eligibility, placement and services were all designed to support that transition. Student did not sustain his burden to establish any violation of law resulting in a denial of FAPE.

*2007 Occupational Therapy Assessment*

112. Student contends that, for the June 11, 2007 IEP meeting, the District should have assessed his OT sensory processing needs "to develop strategies to maintain focus and attention, decrease anxiety and enhance social interaction," because District knew or should have known OT was a suspected area related to his disability.

113. As set forth in Factual Findings 3 and 4, Student received special education and OT services in his third grade year and was exited after making significant progress. As set forth in Factual Findings 34 - 55, Student was not eligible for special education and related services for seventh or eighth grade prior to June 11, 2007, and therefore was not entitled to receive related services such as OT. In addition, District did not have notice from

Parents or teachers that OT or sensory processing was an area of concern. Parents made no request to the District for an OT assessment for his ninth grade year until August 7, 2007. Parents' request for an OT assessment made no mention of fine motor concerns regarding handwriting or graphomotor skills. Rather, they wanted the assessment to develop strategies to maintain focus and attention, decrease anxiety and enhance social interaction.

114. As of the June 11, 2007 IEP meeting, District did not have notice that OT or sensory processing was an area of concern related to Student's disability. Moreover, Dr. Kusters did not recommend OT as an area for further assessment. District's May 2007 assessments also did not reveal any new facts or information that would call for an OT assessment. Accordingly, District's failure to offer or conduct an OT assessment prior to, or in connection with the June 2007 IEP offer was not a denial of FAPE.

#### *October 2007 IEP Meeting and Amended Offer*

115. Parents agreed to take District's June 2007 IEP offer home, consult with their attorney and then respond. On July 17, 2007, Dr. Cowick sent a letter to Parent including a denial of Parents' request to fund an NPS placement and Dr. Kusters' evaluation, and inquired of their intentions regarding the offer. On August 7, 2007, Parents responded in writing, enclosed a detailed response to the IEP offer, including their concerns and a request for an OT assessment.

116. On August 16, 2007, Dr. Cowick wrote to Parents and offered to schedule an IEP meeting on August 27, 2007, two days before the start of the school year, to respond to their concerns. Since Student was being unilaterally placed at Springstone, he requested arrangements for District staff to observe Student at Springstone. In addition, he agreed that District would conduct an OT assessment and enclosed an assessment plan. Parents declined to attend an IEP meeting until the OT assessment was completed and requested a delay in the assessment. District staff observed Student at Springstone in September 2007. The OT assessment was conducted in October 2007, and the IEP meeting was held on October 31, 2007.

#### *Absence of Springstone Representative from October 2007 IEP Meeting*

117. A student's IEP team shall include specified participants, including not less than one regular education teacher of the pupil, if the pupil is, or may be, participating in the regular education, not less than one special education teacher, a knowledgeable representative of the school district who is qualified to supervise the provision of special education services, and an individual who can interpret the instructional implications of the assessment results. A parent has meaningfully participated in the development of an IEP when he or she is informed of the child's problems, attends the IEP meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP.

118. The IEP meeting on October 31, 2007, was held to respond to Parents' concerns about the June 2007 IEP offer, and to review District's OT assessment and

observations of Student at Springstone. Thirteen people were present at this meeting, including Dr. Kusters, Parents and their attorney, Ms. Savage; general education teacher John Olander from Dublin High; OT assessor Gina Wilburn; Dr. Schepis; Dr. Leivant; Dublin High RSP teacher Terry Kalashian; Wells RSP teacher Ms. Kreitz; Dr. Cowick; Ms. Mayo; and the attorney for the District, Ms. Dome.

119. Student contends that District was required by law to have someone from Springstone present at the October 2007 IEP meeting, and that failure to do so was a denial of FAPE. Student did not claim that a Springstone representative was a legally necessary member of the IEP team and that issue was not litigated. Rather, he claimed that the District failed to obtain “accurate information” from Springstone regarding Student’s levels of performance and progress in all areas related to his needs, and that, therefore, someone from Springstone had to be at the meeting to present accurate information.

120. This claim is not persuasive. Parents were represented by legal counsel. The law permits parents, at their discretion, to invite “other individuals who have knowledge or special expertise regarding the pupil, including related service personnel, as appropriate.” Parents and their attorney were fully capable of ensuring that Student’s private educational providers were present, as evidenced by the presence of Dr. Kusters at both the June and October 2007 IEP meetings. Student could have invited them or requested that District invite them but did not. Moreover, as set forth in Factual Findings 121, and 132 - 136, District’s staff, including Dr. Leivant, went to Springstone and observed Student there prior to the IEP meeting. Student had only been attending school there for two months and Springstone’s staff was still in the process of getting to know him. Accordingly, District did not commit a violation by not having a representative from Springstone at the meeting, and did not deny Student a FAPE.

#### *Fall 2007 Springstone Observations*

121. In September 2007, Dr. Leivant observed Student at Springstone. She observed Student in a class of about seven other students taking a quiz and engaging in other activities. She observed him benefit from being prompted and, at lunch, observed him eat by himself before joining a group of peers, similar to his conduct at Wells. Dr. Leivant saw nothing that caused her to change her May 2007 assessment of Student. She credibly established that there was no new information or facts that would cause the District to have to reassess in any area in order to meet with Parents and try to address their concerns.

#### *Revised Annual Goals*

122. As set forth in Factual Findings 78 - 86, District’s annual goals offered in the June 2007 IEP were appropriate. However, in response to Parents’ concerns as set out in their August 2007 letter, District offered to revise the goals. Student contends that District’s goals continued to be deficient because District failed to obtain updated information from Springstone, and because the goals failed to address all of Student’s weaknesses and areas needing improvement, including written assignments, anxiety, unpredictability, ambiguities,

complexity, initiating actions, accessing resources, asking for assistance, and navigating the school environment. However, the law does not require a public school district to establish annual goals to meet all areas needing improvement because the child has a disability. Rather, the law requires annual goals to address areas of unique needs arising out the disability that are necessary to provide educational benefit.

123. At the October 2007 IEP meeting, District offered to change the June 2007 Behavior Goal. The Behavior Goal addressed both social reciprocity and Student's literal interpretation of written and verbal communication. Instead, District proposed a separate goal in the area of social/emotional for interpreting language. The new annual Interpreting Language Goal proposed that Student would be able to identify four clues people use to interpret language in context during 80 percent of intervention sessions. The baseline pointed to the May 2007 TAT assessment results where Student had difficulty identifying and interpreting emotions, intentions and relationships of people depicted in pictures. The new goal is appropriate and consistent with the June 2007 goal.

124. The June 2007 Behavior Goal was renamed the Social Reciprocity Goal. It was revised to delete the "five minute" measurement for a conversation with a peer, and added a description of baseline information. District removed the time measurement because Parents objected to it and Dr. Schepis indicated candidly that it was an arbitrary starting point; the added baseline information that "Student had difficulty demonstrating social reciprocity around topics of the examiner's choice" during the May 2007 ADOS assessment did not make any material change to the goal. The goal was described differently, in having Student identify a variety of topics of interest to his friends or peers and then ask them questions and make comments on someone else's topics 80 percent of the time. This goal remained appropriate to address Student's social reciprocity needs.

125. In the October 2007 IEP District offered three new goals in response to Parents' criticisms that the June 2007 Study Goal was too generalized and needed to be broken down into different aspects: Organization, Homework Strategy, and Self Advocacy. The Study Goal was retained and remained appropriate.

126. The new annual Homework Strategy Goal proposed that, with instruction and monitoring from an RSP teacher, Student would use the "plan it, complete it, check it, turn it in" strategy to independently complete homework assignments 90 percent of the time. This goal expands upon the Study Goal and describes one of the primary functions of the proposed daily RSP tutorial class. The goal is consistent with the Study Goal, and is a specific method or strategy to assist Student's completion of homework. As such it is measurable and appropriate.

127. The new Organization Goal is for Student to organize a three-ring binder with dividers and keep all assignments in the binder, and that Student would keep assignments in the proper sections of the binder 90 percent of the time when checked by the teacher. Similar to the Homework Goal, this goal is consistent with the Study Goal as one particular strategy for keeping track of assignments. As such it is measurable and appropriate.

128. The new annual Self Advocacy Goal is for Student to advocate for himself by going to teachers and discussing any difficulties he is having, a minimum of four out of five trials. This goal was added to address Parents' concerns that Student was withdrawn and did not assert himself to seek guidance. Student will have the guidance and monitoring of the RSP teacher to help ensure that he learns to recognize and acknowledge when he should advocate for himself. Thus, Student's complaint that there should be a separate goal to address self-recognition fails because it is inherent in the operation of the goal. Therefore, the goal is appropriate.

*October 2007 Social Skills Offer*

129. For the June 2007 social skills offer, while District kept the language in the IEP broad enough to offer both individual and group services, District staff clearly explained to Parents at the June IEP meeting that their intent was to form a small group of two to three students.

130. At the October 2007 IEP meeting, District sought to address Parents' questions and concerns by reiterating the explanations as to the structure of the social skills offer. In so doing, Student and Parents learned that there was no existing small social skills group at Dublin High for them to observe. In addition, while District staff were confident that a small group could be established, they candidly conceded that there was a possibility of not getting other students to join. Parents became alarmed that the offer for group social skills training was illusory. Student thus contends that the District's social skills offer, as reconstituted in the October 2007 IEP, remained inappropriate because Student cannot learn social reciprocity by himself.

131. District's offer for social skills services was made at the June 2007 IEP meeting. As held in Factual Finding 100, District did not make a clear written offer for the services, but the violation did not constitute a denial of FAPE because the services were explained in that meeting. District did not make a new offer for social skills services in connection with the October 2007 IEP meeting. To the extent that the additional information could be held to constitute a new offer, the offer remained appropriate. Dr. Schepis credibly established that there was no reason to believe the group could not be formed should Student accept the offer. In addition, Parents' demand that they had to see how the group functioned was not feasible. While it is understandable that a parent would want to observe the dynamics of a classroom placement, this would be a small group of two to three students engaged in social skills training, which would require close proximity to hear the content of the exchanges, raising confidentiality concerns. District's staff of well-qualified professionals described the nature of the program to Parents at both meetings, and provided Garcia Winner curriculum information including the names of her textbooks at the October meeting. Based on the foregoing, District's offer of social skills services was appropriate.

*October 2007 Occupational Therapy Assessment*

132. Student contends that District's October 2007 OT assessment was inappropriate because it was delayed; it only included observations and information at Springstone, where Student was attending school; two of the assessments were referenced to children over two grades younger; and Student's ability to complete an age or grade appropriate writing task was not assessed.

133. In October 2007 prior to the IEP meeting on October 31, District's occupational therapist Gina Wilburn conducted an OT assessment at Parents' request. Ms. Wilburn obtained a Bachelor of Science degree in OT in 1984. She has extensive training, including training in PDD disorders and Autism, and experience as an occupational therapist with several school districts, hospitals, and regional centers, providing assessment and therapy services. Ms. Wilburn reviewed Student's records, including his third grade OT assessment and Dr. Kosters' assessment, interviewed Springstone staff, including Christine Wong, Student's teacher at Springstone, and conducted clinical observations, including classroom observation, and assessment of Student using the Sensory Profile School Companion, Sensory Profile Adolescent/Adult, and the School Function Assessment (SFA).

134. The School Companion Profile was developed for use for students from preschool through sixth grade. Ms. Wilburn nevertheless chose them as reliable indicators of a baseline of performance to assist her in gaining information as to how Student functioned within the school setting, looking at independence in school activities and appropriate sensory regulation and responses. The School Companion Profile was done by staff at Springstone to reveal situations where Student might be uncomfortable in the sensory groups of auditory, visual, movement, touch, and behavior. School staff rated him in the areas of auditory, touch and behavior. In addition, Ms. Wilburn administered the same Profile to Student. She clinically observed Student during two classes, English and Geometry.

135. Based on conflicting results between the staff ratings and Student's self-ratings, Ms. Wilburn chose an additional survey, the Sensory Profile for Adolescents/Adults, to obtain additional information. Student's responses on the Adolescent Profile, for Ages 11 through 17, showed that Student had more sensory avoiding than most people and less sensation seeking than most people. On the SFA, a standardized test to measure performance of functional tasks that support academics, Ms. Wilburn established that Student had average skill in motor performance, including computer use and self-help skills, and difficulty with written work, task completion, functional communication and related areas.

136. Ms. Wilburn was qualified to conduct the OT assessment and knowledgeable in the administration of them. She selected valid standardized tests and observations, and did not rely on only one test to assess Student. The tests were validated for the purposes for which they were used and there was no claim or evidence of discrimination. Since the evaluation met the legal requirements, the selection of particular testing instruments was at the discretion of the District. The evidence did not establish that it was inappropriate.

Therefore, the October 2007 OT assessment complied with the law, and did not result in a denial of FAPE.

*October 2007 Occupational Therapy Services*

137. On the School Companion Profile, the staff's ratings indicated that Student had definite sensory processing problems in the areas of auditory, touch and behavior, and questionable problems in the areas of visual and movement. In contrast, on the same Profile, Student rated himself to be within the typical range in all areas. The handwriting component of the SFA did not look at content but at motor control. Although Student was slow, it was not clinically significant. Ms. Wilburn persuasively established that Student had mild difficulty with social situations, including eye contact and social greetings and departure. Ms. Wilburn found that her clinical observations and her assessment results comported with Student's self report regarding his areas of deficit and contrasted significantly with that of the Springstone staff, who reported more problems and deficits.

138. Ms. Wilburn's assessment and testimony persuasively established that Student was able to appropriately perform in his academic setting without the support of therapeutic intervention "either in the form of direct service or a sensory diet as developed by the Springstone School." Ms. Wilburn established that Student did not need direct OT services.

139. Student's argument that he needs an OT sensory diet in his daily program is based primarily on the opinions and testimony of Ms. Wong, an occupational therapist and one of the founders and directors of Springstone. Ms. Wong obtained a Bachelor of Science degree in OT in 1990, and worked in hospitals and skilled nursing facilities before working for a private company that contracted with schools for OT services. She worked at Orion Academy, another NPS, prior to helping found Springstone. Aside from experience providing OT services to children with disabilities, including children on the autism spectrum, Ms. Wong had no particular education or training about Autism Spectrum Disorders or Asperger's and was not qualified as an expert in that field for purposes of her testimony. Springstone caters to children on the spectrum who are high functioning or have executive functioning deficits. OT is integrated into the daily educational program to encourage the students to use sensory tools to maintain attention and reduce anxiety, and the students work on what sensory strategy works for them, such as a therapy ball, balance stool, hand tools, orals, edibles, or nonedibles, like a toothpick.

140. After Student began to attend Springstone, Ms. Wong introduced him to the concept of seeking out sensory stimulation. At the time of Ms. Wilburn's OT assessment, Springstone had no idea what Student's sensory strategy was going to be as they were just getting to know him. Ms. Wong testified that she was still trying different tools to see what Student liked, and that he did not seek out sensory stimulation on his own. Ms. Wilburn was aware that Springstone was providing Student and his classmates with an OT sensory diet and therefore included it in her report as a recommendation only if Student chose to use it. Thus, Student's contention that District's assessment itself recommended a sensory diet is incorrect. Ms. Wong's testimony that Student needed a sensory diet to access his education

is accorded little weight. John Howard, another director and founder of Springstone, credibly testified that there is no peer reviewed research to support their OT-based methodologies for education of students on the spectrum.

141. Based on Ms. Wilburn's experience, training, and use of multiple assessment tools and techniques, she persuasively established that Student did not require OT services, including a sensory diet, to obtain educational benefit. Accordingly, Student did not require OT services for the 2007-2008 school year to benefit educationally, and District did not deny Student a FAPE.

#### *2007 and 2008 Extended School Year Services*

142. ESY services shall be provided to students who have handicaps which are likely to continue indefinitely or for a prolonged period, and where interruption of the student's educational programming may cause regression. The ESY offer must be comparable to the Student's school year IEP program.

143. Student contends that District was required by law to at least discuss ESY services for the summers of 2007 and 2008, if not offer Student ESY services. This claim is without merit and is unsubstantiated by any credible evidence. While Student's disabilities are likely to continue indefinitely, Student's disabilities are mild and he had made educational progress in eighth grade. Student did not sustain his burden to establish that interruption of his education over the summer would cause regression attributed to his limited capacities. There is no evidence that there was any historical concern regarding regression over the summer months.

144. In addition, Student's attorney was present at the June 2007 IEP meeting and could have requested ESY services to be discussed if not offered. Parents did not accept District's offer of eligibility and services and waited until August to decline to accept the offer, after any ESY summer program would have ended. Moreover, Student's claim that District should have made an offer for the 2008 ESY was premature. The October 2007 IEP was an addendum meeting and it was reasonable to wait until the annual IEP in June 2008 to have the IEP team evaluate any need for ESY services. Based on the foregoing, District did not deny Student a FAPE by failing to offer ESY services.

#### *Remedies and Reimbursement*

145. 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 and replaced services that the district failed to provide. A unilateral educational placement of a child is not required to meet all requirements of the IDEA. 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.

146. Student has not established that District denied Student a FAPE in the provision of assessment, eligibility and special education and related services as set forth in the Issues in this case. Therefore, Student is not entitled to an award of reimbursement or compensation for any denials of FAPE for the 2005-2006, 2006-2007, and 2007-2008 school years.

147. Since District did not fail to appropriately assess Student for the 2005-2006 school year, or reassess for the 2006-2007 school year prior to May 2007, District is not legally required to reimburse Student for the costs of Dr. Kusters' private evaluation. Moreover, Student's argument that District should have filed a request for due process or funded the private evaluation after receipt of an IEE demand from Parents in late December 2006 ignores the fact that Parents waited well over a year before they sought to challenge District's 2005 assessments. Parents did not give District timely notice after the October 2005 IEP that they disagreed with the assessments. District would then have been legally obligated to fund an IEE or file for due process "without unnecessary delay." Moreover, Parents' December 2006 demand did not request an IEE from the District, but unilaterally chose a private assessor, which they proceeded to pay for themselves. Thus, District had no opportunity to contract with the private assessor, have any choice in the selection of the private assessor, negotiate the price, or give directions on the course or scope of the assessment. As a result, Dr. Kusters conducted an extensive assessment over eight sessions, with invoices for \$3,000, during which she never observed Student in his school setting or interviewed any of his teachers. Accordingly, District is not required to reimburse Parents for the costs of Dr. Kusters' assessment or additional \$2,000 in invoices for her role in IEP meetings.

148. Since the District has not denied Student a FAPE, the question whether Parents' unilateral placement at Springstone was appropriate need not be reached. District is not required to reimburse Parents for the tuition and transportation costs of Student's unilateral placement at Springstone for the 2007-2008 school year.

149. Parents requested reimbursement for the costs of a private audiological assessment conducted by Dimitra Loomos, an audiologist, in the sum of \$525. As set forth in Factual Finding 62, Dr. Kusters was not sure in her evaluation whether Student had an audiological processing deficit and recommended an assessment by a specialist. Parents thereafter requested the District to fund or conduct such an assessment and the District declined. On June 6, 2007, prior to the June 11, 2007 IEP meeting, Parents sent District a copy of Ms. Loomos' report, dated May 29, 2007. Ms. Loomos found, contrary to Dr. Kusters' concern, that Student revealed strength within his auditory processing system. No teachers at Wells had reported any concern about Student's auditory processing and the assessment. Weakness was noted in his auditory attention. Overall, Ms. Loomos believed that any perceived problems were most likely related to his attention deficit and working memory issue. District had no information prior to Dr. Kusters' evaluation that auditory processing was a suspected concern. District disagreed with her recommendation for a further evaluation based on the educational experience with Student at Wells, and was

entitled to decline to fund the assessment. Hence, there is no legal or equitable basis upon which to order District to reimburse Parents for the audiological assessment.

## LEGAL CONCLUSIONS

### *Burden of Proof*

1. Student, as the petitioner, has the burden of proof in this proceeding. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528].)

### *The provision of FAPE*

2. A child with a disability has the right to a FAPE under the IDEA 2004. (Ed. Code, §§ 56000, 56026; 20 U.S.C. § 1412(a)(1)(A).) FAPE is defined as special education, and related services, that are available to the student at no cost to the parent, that meet the State educational standards, and that conform to the student's IEP. (Ed. Code, § 56031; Cal. Code Regs., tit. 5 § 3001, subd. (o); 20 U.S.C. § 1401(9).) The term "related services" (designated instructional services in California) includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from education. (Ed. Code, § 56363; 20 U.S.C. § 1401(26).)

3. There are two parts to the legal analysis of whether a local educational agency (LEA) such as a school district offered a pupil a FAPE. The first question is whether the LEA has complied with the procedures set forth in the IDEA. (*Board of Educ. of the Hendrick Hudson Cent. School Dist. v. Rowley* (1982) 458 U.S. 176, 206-07 [73 L.Ed.2d 690].) The second question is whether the IEP developed through those procedures was substantively appropriate. (*Ibid.* at p. 207.)

4. Procedural flaws do not automatically require a finding of a denial of FAPE. A procedural violation does not constitute a denial of FAPE unless the procedural inadequacy (a) impeded the child's right to a FAPE; (b) significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of FAPE; or (c) caused a deprivation of educational benefits. (Ed. Code, § 56505, subd. (j); 20 U.S.C. § 1415(f)(3)(E)(i) & (ii).) (See also *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1483-1484.)

### *Assessment*

5. Before any action is taken with respect to the initial placement of a child with special needs, an assessment of the pupil's educational needs shall be conducted. (Ed. Code, § 56320.) Thereafter, special education students must be reassessed not more frequently than once a year, and shall be reassessed at least once every three years, unless the parent and the LEA agree otherwise. A reassessment shall be conducted if the LEA determines "that the educational or related services needs, including improved academic achievement and

functional performance, of the pupil warrant a reassessment.” (20 U.S.C. § 1414(a)(2)(A); Ed. Code, § 56381, subd. (a).)

6. Tests and assessment materials must be administered by trained personnel in conformance with the instructions provided by the producers of the tests. (20 U.S. C. § 1414(a)(2), (3); Ed. Code, § 56320, subds. (a), (b).) Assessments must be conducted by individuals who are both “knowledgeable of the student’s disability” and “competent to perform the assessment, as determined by the school district, county office, or special education local plan area.” (20 U.S.C. § 1414(b)(3)(B)(ii); Ed. Code, §§ 56320, subd. (g), 56322.) The student must be assessed in all areas related to his or her suspected disability, and no single procedure may be used as the sole criterion for determining whether the student has a disability or an appropriate educational program. (20 U.S.C. § 1414(a)(2), (3); Ed. Code, § 56320, subds. (e), (f).) If the evaluation procedures required by law are met, the selection of particular testing or evaluation instruments is at the discretion of the school district. (Off. Of Special Education Programs (OSEP) interpretative letter (September 17, 1993), 20 IDELR 542.)

7. Under Education Code section 56329, subdivision (b), if a parent disagrees with an assessment obtained by the public education agency, the parent has the right to obtain, at public expense, an IEE under certain circumstances. The parent must notify the school district that the parent disagrees with the assessment (but does not need to state why the parent disagrees) and request that the district conduct an IEE at public expense. Faced with that request, the school district must: (a) file a due process complaint and prove at a hearing that its assessment is appropriate; (b) prove at a hearing that the IEE obtained by the parent did not meet the agency criteria; or (c) ensure that an IEE is provided at public expense.

*Did District deny Student a FAPE by inappropriately assessing him in October 2005?*

8. No. As set forth in Factual Findings 12 - 26, District’s October 2005 psychoeducational and academic assessments conducted by Dr. O’Donnell and Ms. Kreitz were appropriate in that the assessors were qualified to conduct the assessments, used multiple and validated assessment tools, assessed generally in all areas of suspected disability, were not discriminatory, and did not rely on one test or tool to make their determinations. Accordingly, the assessments met all of the legal requirements of the law.

*Did District deny Student a FAPE by failing to conduct an OT assessment in October 2005?*

9. No. As set forth in Factual Findings 35 - 38, Parents did not request an OT assessment and District did not have notice of any concerns from the teachers or Student’s behaviors in the areas of OT or sensory processing. Accordingly, the District had no obligation to conduct an OT assessment in October 2005.

## *Eligibility*

10. Under the IDEA and state law, only children with certain disabilities are eligible for special education. (20 U.S.C. § 1401(3)(A); Ed. Code, § 56026, subd. (a).) For purposes of special education eligibility, the term “child with a disability” means a child with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, require instruction, services, or both, which cannot be provided with modification of the regular school program. (20 U.S.C. § 1402(3)(A)(ii); 34 C.F.R. § 300.8(a).) Similarly, California law defines an “individual with exceptional needs” as a student who is identified by an IEP team as “a child with a disability” pursuant to 20 U.S.C. section 1402(3)(A)(ii), and who requires special education because of his or her disability. (Ed. Code, § 56026, subds. (a), (b).) California Code of Regulations, title 5, section 3030 includes a list of conditions that may qualify a pupil as an individual with exceptional needs and thereby entitle the pupil to special education if required by “the degree of the pupil’s impairment.” Thus, there are many children who have varying ranges of weaknesses, deficits, areas in need of improvement, and disability who do not qualify for special education because they do not meet the narrower categories specified by law for this federally funded program, including the requirement that the instruction or services cannot be provided with modification of the regular school program.

11. In *Hood v. Encinitas Union School District* (9th Cir. 2007) 486 F.3d 1099, 2007 U.S. App. LEXIS 11112, the dispute that centered on whether a child’s assessment scores met the mathematical formula for a Specific Learning Disability. The Ninth Circuit Court of Appeals held that it did not need to decide whether the child met the calculation, and stated: “Our decision hinges upon appellants’ failure to satisfy the second requirement of the ‘specific learning disability’ qualification for special education eligibility, that being whether any existing severe discrepancy between ability and achievement ‘[could] not be corrected through other regular or categorical services offered within the regular instructional program. Thus, even assuming the existence of a severe discrepancy, the law does not entitle [the child] to special education if we find that her discrepancy can be corrected in the regular classroom.” (*Ibid.* at p. 1106.)

### *Autistic-Like Behaviors*

12. Pursuant to California Code of Regulations, title 5, section 3030, subdivision (g), a child meets the first prong of the eligibility criteria for Autistic-Like Behaviors if he or she has a history of developmental delay and exhibits any combination of the following autistic-like behaviors, including but not limited to: (1) an inability to use oral language for appropriate communication, (2) a history of extreme withdrawal or relating to people inappropriately and continued impairment in social interaction from infancy through early childhood, (3) an obsession to maintain sameness, (4) extreme preoccupation with objects or

inappropriate use of objects or both, (5) extreme resistance to controls, (6) displays peculiar motoric mannerisms and motility patterns, and (7) self-stimulating, ritualistic behavior.

13. For the second prong of the criteria, a child must also establish that the autistic disorder adversely affects his or her educational performance to the extent that his or her needs cannot be met solely within the general education setting, with or without modifications. Only if both components are met does the pupil meet the eligibility criteria for Autistic-Like Behaviors. (20 U.S.C. § 1402; 34 C.F.R. § 300.8; Cal. Code Regs., tit. 5, § 3030, subd. (g).)

*Did District's determination at the October 2005 IEP meeting, that Student was not eligible for special education and related services, deny Student a FAPE?*

14. No. As set forth in Factual Findings 27 - 34, and Legal Conclusion 8, District's October 2005 assessments were appropriate. The IEP team considered the assessments, historical information, and information from Student's teachers. As in *Hood, supra*, Student was performing at or above grade level, and had organizational deficits which were addressed by accommodations in the regular classroom. While the accommodations did not cure his lapses of organization or missing or late homework assignments, and Parents actively monitored his organizational deficits, Student otherwise functioned well and made educational progress. Whether or not Student's Asperger's and ADHD disabilities met the criteria for Autistic-Like-Behaviors, Student's deficits could be corrected and accommodated within the regular education curriculum at Wells, with accommodations provided by his 504 Plan. District's determination that Student was not eligible for special education and related services was correct, and the denial of eligibility was therefore not a denial of FAPE.

*Did District's failure to reassess Student for eligibility prior to May 9, 2007 deny Student a FAPE?*

15. No. Pursuant to Legal Conclusion 14, the evidence established that Student was not eligible for special education and related services at the October 2005 IEP meeting. As set forth in Factual Findings 39 - 43, in June 2006, District diligently reviewed all information about Student's progress in order to respond to Parents' request for reconsideration. Based on the absence of information about any new or different facts, circumstances or information, District was not obligated to again assess Student for eligibility in June 2006.

16. Thereafter, during Student's eighth grade year for the 2006-2007 school year, prior to April 2007, District did not have any further notice of new information or circumstances except Parents' announcement in December 2006 that they were arranging a private IEE. As set forth in Factual Findings 59 - 65, Dr. Cowick and Dr. Leivant persuasively established that Dr. Kusters' report, received in April 2007, did not contain material new information that changed District's understanding of Student's disabilities, aside from more test results. Overall, the report was consistent with District's 2005 assessment. Thus, up until receipt of Dr. Kusters' report, the District's continued refusal to

reassess did not deny Student a FAPE because there was no new information. In any event, District offered to reassess and an assessment plan was signed on May 9, 2007. District was thereafter not required to hold an IEP or make another offer until the assessments were completed and the IEP meeting was held in June 2007. District therefore did not deny Student a FAPE during the assessment period prior to the June 2007 IEP meeting.

*Did District deny Student a FAPE by failing to conduct an OT assessment for the 2006-2007 school year?*

17. No. Pursuant to Factual Findings 56 - 58, Student was not eligible for special education and related services for the 2006-2007 school year prior to June 11, 2007. Consequently, he was not eligible to receive related services such as OT. Even if he had been qualified to receive related services, District had no information or notice from teachers, Parents or Student that OT was an area of concern regarding sensory processing or related needs. In addition, Parents made no request to the District during the 2006-2007 school year for an OT assessment.

*Did District deny Student a FAPE by failing to find him eligible for special education and related services for the 2006-2007 school year, prior to June 11, 2007?*

18. No. Pursuant to Legal Conclusion 14, Student had been found ineligible for special education for the 2005-2006 school year. Between then and Parents' execution of a new assessment plan on May 9, 2007, District had reviewed Student's records of educational performance and progress several times at Parents' request. As set forth in Legal Conclusion 16 above, District did not have any further notice of new material information or circumstances. Even if Dr. Kusters' report did contain material new information, District agreed to reassess Student's social/adaptive behavior domain. District was entitled to conduct its own assessment. Based on the foregoing, District had no cause to change Student's eligibility for special education prior to the June 11, 2007 IEP meeting, and thus, the failure to do so was not a denial of FAPE.

*Did District deny Student a FAPE by inappropriately reassessing him in May 2007?*

19. No. As set forth in Factual Findings 67 - 70, District's reassessment of Student in May 2007 focused on the domain of social/adaptive behavior in response to Dr. Kusters' assessments and Parents' concerns that Student was going to be transitioning to high school. Both psychologists were qualified to conduct the assessments and did not rely on only one test for their determinations. In particular, Dr. Leivant conducted multiple assessments including the ADOS and observed Student in his classroom and school environment, engaged in both academic and social interactions with his peers and teachers. The social/adaptive behavior assessments of Student by Dr. Leivant and Dr. Schepis in May 2007 were appropriate.

## *Contents of the IEP*

20. School districts receiving federal funds under the IDEA are required pursuant to title 20 of the United States Code section 414(d)(1)(A)(i), to establish an IEP for each child with a disability that includes: (1) a statement regarding the child's present levels of academic achievement and functional performance; (2) measurable annual goals, including academic and functional goals designed to meet the child's educational needs and enable the child to make progress; (3) a description of how the child's progress toward meeting the annual goals will be measured; (4) a statement of the special education and related or supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child; (5) an explanation of the extent to which the child will not participate with nondisabled children in the regular class; (6) a statement of any individual accommodations necessary to measure performance on state and districtwide assessments; and (7) other information, including the anticipated frequency, location, and duration of the services. (Ed. Code, § 56345.)

21. IDEA's procedural mandates also require that the parent be allowed to meaningfully participate in the development of the IEP. (*Rowley, supra*, at pp. 207-208.) A parent is a required and vital member of the IEP team. (20 U.S.C. § 1414(d)(1)(B)(i); Ed. Code, §§ 56341, subd. (b)(1), 56342.5.) The requirement that parents participate in the IEP process ensures that the best interests of the child will be protected, and acknowledges that parents have a unique perspective on their child's needs. (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 891.) Procedural violations that interfere with parental participation in the development of the IEP "undermine the very essence of the IDEA." (*Id.* at p. 892.)

22. A district must make a formal written offer in the IEP that clearly identifies the proposed program. (*Union Sch. Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526.) This must include a statement of the special education and related services, and supplementary aids and services, including program modifications or supports, a statement of the anticipated frequency, location and duration, designed to address Student's unique needs. The offer should contain sufficient information so that the level of the district's commitment of resources is clear, but may be stated in a range if the IEP team determines that a range of service meets the needs of the child. (Ed. Code, § 56345.)

*Did District deny Student a FAPE at the June and October IEP meetings by failing to make a clear written offer of placement regarding social skills services and teacher training?*

23. As set forth in Factual Findings 89 and 96 - 100, District did not make a clear written offer for social skills services at the June 2007 IEP meeting, and the failure to do so constitutes a procedural violation. However, the nature and scope of the offer was explained verbally during the IEP meeting and Parents were represented by an attorney. Parents were able to understand what was offered and participate in the IEP meeting with their attorney, and their ability to participate in the IEP process was not significantly impeded. District's reiteration and continued explanation to clarify the offer at the October 2007 IEP meeting

mitigated the error and did not constitute a new offer. Accordingly, District's procedural violation was harmless error and therefore did not constitute a denial of FAPE.

24. As set forth in Factual Findings 89, 90, and 103 - 107, District did not make a clear written offer for teacher training, and the failure to do so constitutes a procedural violation. However, the nature and scope of the offer was explained at the June 2007 IEP meeting, and the continued explanations at the October 2007 meeting mitigated the error and did not constitute a new offer. Parents were able to understand what was offered and participate in the IEP meeting with their attorney, and their ability to participate in the IEP process was not significantly impeded. Accordingly, District's procedural violation was harmless error and therefore did not constitute a denial of FAPE.

25. A student's IEP team shall include specified participants, including not less than one regular education teacher of the pupil, if the pupil is, or may be, participating in the regular education environment, not less than one special education teacher, a knowledgeable representative of the school district who is qualified to supervise the provision of special education services, and an individual who can interpret the instructional implications of the assessment results. (Ed. Code, § 56341, subd. (b); 20 U.S.C. § 1414(d)(1)(B).) The law permits parents, at their discretion, to invite "other individuals who have knowledge or special expertise regarding the pupil, including related service personnel, as appropriate." (Ed. Code, § 56341, subd. (b)(6).)

*Did District deny Student a FAPE at the October 2007 IEP meeting by failing to ensure the participation of a representative of Springstone?*

26. As set forth in Factual Findings 117 - 120, Student did not contend that a representative from Springstone was a necessary member of the IEP team. Rather, Student claimed attendance was necessary to provide the team with accurate information about Student's performance at Springstone. District was not required to have a representative of Springstone at the October 2007 IEP meeting in order to obtain accurate information. Dr. Leivant and Ms. Wilburn went to Springstone prior to the October 2007 IEP meeting and observed Student, who had only been attending there for two months. Ms. Wilburn interviewed staff in connection with her OT assessment. Finally, Student and his attorney could have ensured that a representative from Springstone was present. Therefore, Student did not establish any violation of law due to the absence of a representative, and there was no denial of FAPE.

*Substantive FAPE*

27. For a school district's IEP to offer a student a substantive FAPE, the proposed program must be specially designed to address the student's unique needs, and be reasonably calculated to provide the student with some educational benefit. (20 U.S.C. § 1401(9).) FAPE must provide a threshold "basic floor of opportunity" in public education that "consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to

benefit' from the instruction.” (*Rowley*, 458 U.S. at p. 189.) The *Rowley* court rejected the argument that school districts are required to provide services “sufficient to maximize each child’s potential commensurate with the opportunity provided other children.” (*Id.* at pp. 198-200.) The court determined that the IEP must be reasonably calculated to provide the student with some educational benefit.

28. The IDEA does not require school districts to provide special education students the best education available, or to provide instruction or services that maximize a student’s abilities. (*Rowley, supra*, at p. 198.) The Ninth Circuit refers to the “some educational benefit” standard of *Rowley* simply as “educational benefit.” (See, e.g., *M.L. v. Fed. Way School Dist.* (2004) 394 F.3d 634.) Other circuits have interpreted the standard to mean more than trivial or “de minimis” benefit, or at least “meaningful” benefit. (See, e.g., *Houston Indep. Sch. Dist. v. Bobby R.* (5th Cir. 2000) 200 F.3d 341; *L.E. v. Ramsey Bd. of Educ.* (3d Cir. 2006) 435 F.3d 384.)

29. An IEP is evaluated in light of information available at the time it was developed, and is not to be evaluated in hindsight. (*Adams etc. v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) The Ninth Circuit has endorsed the “snapshot rule,” explaining that “[a]n IEP is a snapshot, not a retrospective.” The IEP must be evaluated in terms of what was objectively reasonable when it was developed. (*Id.* at 1149). (See also *Christopher S. v. Stanislaus County Off. of Ed.* (9th Cir. 2004) 384 F.3d 1205, 1212; *Pitchford v. Salem-Kaiser School Dist. No. 24J* (D.Ore. 2001) 155 F.Supp.2d 1213, 1236.) To determine whether the District offered Student a FAPE, the focus is on the appropriateness of the placement offered by the District, and not on the alternative preferred by the parents. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.)

30. The *Rowley* opinion established that as long as a school district provides an appropriate education, methodology is left up to the district’s discretion. (*Rowley, supra*, at p. 209.) Subsequent case law has followed this holding in disputes regarding the choice among methodologies for educating children with autism. (See, e.g., *Adams v. State of Oregon*, 195 F.3d at p. 1149; *Pitchford v. Salem-Keizer Sch. Dist.* (D. Or. 2001) 155 F.Supp.2d 1213, 1230-32; *T.B. v. Warwick Sch. Comm.* (1st Cir. 2004) 361 F.3d 80, 84.) As the First Circuit Court of Appeal noted, the *Rowley* standard recognizes that courts are ill equipped to second-guess reasonable choices that school districts have made among appropriate instructional methods. (*T.B. v. Warwick Sch. Comm., supra*, at p. 84 (citing *Roland M.*, 910 F.2d at pp. 992-93).)

31. When developing an IEP, the team must consider the strengths of the student, the concerns of the parents, the results of the most recent assessments, and the academic developmental and functional needs of the child. An IEP must include academic and functional goals and special education and related services designed to meet all of the child’s unique needs that result from his or her disability so that the child may progress in the general curriculum and the goals must be measurable.

*Did District deny Student a FAPE by failing to offer appropriate annual goals at the June and October 2007 IEP meetings?*

32. No. As set forth in Factual Finding 77, Student's unique needs for the 2007-2008 school year in ninth grade were in the areas of attention, organization, pragmatic language, and social skills (including social reciprocity). As set forth in Factual Findings 78 - 86, and 122 - 128, District's annual goals were appropriate. The June 2007 Behavior Goal addressed Student's needs in the areas of attention, pragmatic language, and social skills, including social reciprocity, and would help support Student's access to more sophisticated peer communication at the high school level. The Study Goal appropriately left the specific methods, tools and strategies to support Student's organizational success to the District's discretion, and was appropriate to address Student's needs in the areas of attention and organization. Thus, both of the June 2007 goals addressed Student's unique needs.

33. In October 2007, District revised the June 2007 goals by renaming the Behavior Goal the Social Reciprocity Goal and separating out the literal interpretation issue as a separate goal. The October IEP added three new goals in response to Parents' criticisms that the June 2007 Study Goal was too generalized and needed to be broken down into different aspects: Organization, Homework Strategy, and Self Advocacy. The Study Goal was retained, and all goals were appropriate in that they addressed Student's unique needs.

#### *Least Restrictive Environment*

34. To the maximum extent appropriate, children with disabilities should be educated with children who are not disabled, unless due to either the nature of the disability, or its severity, education in a regular class cannot be achieved satisfactorily even with the use of supplementary aids and services. (Ed. Code, §§ 56001, subd. (g), 56345, subd. (a)(5); 20 U.S.C. § 1412(a)(5)(A).) When determining whether a placement is in the least restrictive environment (LRE), four factors must be evaluated and balanced: (1) the academic benefits of placement in a mainstream setting, with any supplementary aides and services that might be appropriate; (2) the non-academic benefits of mainstream placement, such as language and behavior models provided by non-disabled students; (3) the negative effects the student's presence may have on the teacher and other students; and (4) the cost of educating the student in a mainstream environment. (*Ms. S. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115; *Sacramento City Unified School District v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404.)

*Did District deny Student a FAPE for the 2007-2008 school by failing to offer a small classroom placement at a private NPS, organizational skills training, social skills development, life skills development, adaptations to reduce stress and anxiety in school, transition supports, behavioral services, occupational therapy, and assistive technology?*

35. No. As set forth in Factual Findings 88 - 111, District's June 2007 IEP offer was appropriate to address Student's unique needs and provide special education and services in the least restrictive environment. It included placement and services for ninth

grade at Dublin High, with participation in the general education curriculum for academic subjects, PE, lunch, recess, and passing periods, an RSP class once a day, behavior management services once a month, and individual/group social skills instruction once a week for 10 weeks during the first 12 to 14 weeks of the school year, to be followed by a review IEP meeting in October 2007, to determine whether to continue them for an additional period of time. The offer provided that Student would be monitored on organizational goals related to writing. District also offered numerous accommodations, and Asperger's training for Dublin High staff working with Student for two one-half day sessions of targeted training to enable Student's teachers to support his needs in their classrooms.

36. Pursuant to Factual Finding 94, both Dr. Cowick and Dr. Leivant persuasively established that the nature of Student's disabilities was not severe and that his education in a regular class was and could continue to be achieved satisfactorily, with the use of supplementary aids and services. Therefore, removal of Student from the general education environment to a more restrictive environment at an NPS devoted solely to children with disabilities was not required by law. Based on all of the above findings, District's offer of placement and services was appropriate.

37. Pursuant to Factual Findings 108 - 111, Student did not establish that the District was required by law to provide assistive technology, transition supports other than those already built into District's offer to help Student transition to the Dublin High campus environment, adaptations to reduce stress and anxiety in school other than those already offered, including the October 2007 self-advocacy goal; or life skills development as a special education service. Dublin High had services to assist students with planning for college and adult life in the general education curriculum, and if Student remains in special education, he would receive a detailed transition plan required by law on or before his 16th birthday. Pursuant to Factual Findings 137 - 141, Ms. Wilburn credibly established that Student did not require OT services in order to obtain educational benefit. Accordingly, District was not required to provide OT services to Student as a related service subsequent to his eligibility determination in June 2007.

*Did District deny Student a FAPE by failing to conduct an OT assessment for the 2007-2008 school year?*

38. No. As set forth in Factual Findings 112 - 115, District was not obligated to conduct an OT assessment until it agreed to do so in August 2007.

*Did District deny Student a FAPE by conducting an inappropriate OT assessment?*

39. No. As set forth in Factual Findings 132 - 136, Ms. Wilburn was qualified to conduct the OT assessment in October 2007, and the assessment met the legal requirements. Therefore, District's OT assessment in October 2007 was appropriate.

## *ESY Services*

40. In addition to special education instruction and services during the regular school year, ESY services must be provided if the IEP team determines, on an individual basis, that the services are necessary for a child to receive a FAPE. (Ed. Code, § 56345, subd. (b)(3).) Extended school year services shall be provided to students who have handicaps which are likely to continue indefinitely or for a prolonged period, and interruption of the student's educational programming may cause regression, when coupled with limited recoupment capacity, rendering it impossible or unlikely that the student will attain the level of self-sufficiency and independence that would otherwise be expected in view of his or her handicapping condition. (Cal. Code Regs., tit. 5, § 3043.) The ESY program should be comparable in standards, scope and quality to the school year IEP program. (Cal. Code Regs., tit. 5, § 3043(g)(2).)

*Did District deny Student a FAPE by failing to offer ESY services for either the 2007 or 2008 ESYs?*

41. No. As set forth in Factual Findings 142 - 144, the evidence did not establish that interruption of Student's education over the summer would cause regression attributed to his limited recoupment capacity. There is no evidence that Student had any prior concern regarding regression over the summer months. In addition, Student's claim that District should have made an offer for the 2008 ESY was premature. District was entitled to wait until the annual IEP in June 2008 to have the IEP team evaluate any need for ESY services. However, under the legal criteria, Student does not qualify for ESY. Based on the foregoing, District did not deny Student a FAPE by failing to offer ESY services.

## *Reimbursement and/or Compensatory Education*

42. When a LEA fails to provide FAPE to a student with a disability, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (*School Committee of Burlington v. Department of Educ.* (1996) 471 U.S. 359, 369-371; 20 U.S.C. § 1415(i)(2)(C)(3).) Based on the principle set forth in *Burlington*, federal courts have held that compensatory education is a form of equitable relief that may be granted for the denial of appropriate special education services to help overcome lost educational opportunity. (*Student W. v. Puyallup Sch. Dist.* (9th Cir. 1994) 31 F.3d 1489, 1496.) Compensatory education does not, however, necessarily involve an obligation to provide day-for-day or session-for-session replacement for opportunity or time missed. (*Id.* at p. 1497.) The purpose of compensatory education is to "ensure that the student is appropriately educated within the meaning of IDEA." (*Ibid.*)

43. 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 district failed to provide. (20 U.S.C. § 1412(a)(10)(C); *School Comm. of Burlington v. Department of Education* (1985) 471 U.S. 359, 369-71.) 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. (*Florence County Sch. Dist. Four v. Carter* (1993) 510 U.S. 7, 13-14.) 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.)

44. As set forth in Factual Findings 146 and 148, Student is not entitled to compensation for any denials of FAPE for the 2005-2006, 2006-2007, and 2007-2008 school years, and is not entitled to reimbursement for the tuition and transportation costs of his private educational placement and services at Springstone for the 2007-2008 school year.

45. As set forth in Factual Findings 147 and 149, Student is not entitled to reimbursement for the costs of his private neuropsychological assessment by Dr. Kusters. In addition, Parents are not entitled to reimbursement for the audiological assessment by Ms. Loomos. District's assessments were appropriate and did not deny Student a FAPE. Moreover, Parents did not follow the statutory IEE procedures. District had no information from Student or the teachers at Wells that Student had any audiological problem and reasonably declined to assess in that area. Parents unilaterally proceeded to obtain the audiological assessment from Ms. Loomos, and her assessment revealed strength within his auditory processing system.

#### ORDER

All of Student's requests for relief are denied.

#### PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that the hearing decision indicate the extent to which each party has prevailed on each issue heard and decided. District prevailed on all issues for hearing herein.

## NOTICE OF APPEAL RIGHTS

The parties are advised that they have the right to appeal this decision to a state court of competent jurisdiction. Appeals must be made within 90 days of receipt of this decision. A party may also bring a civil action in United States District Court. (Ed. Code, § 56505 subd. (k).)

DATED: May 5, 2008

A handwritten signature in black ink, appearing to read "Deidre L. Johnson", written over a horizontal line.

DEIDRE L. JOHNSON  
Administrative Law Judge  
Office of Administrative Hearings  
Special Education Division