

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS on behalf of STUDENT,

v.

BELLFLOWER UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. 2009080509

NOTICE: This decision has been
PARTIALLY UPHeld by the
United States District Court. Click
[here](#) to view the USDC's decision.

DECISION

Administrative Law Judge (ALJ) Peter Paul Castillo, Office of Administrative Hearings (OAH), State of California, heard this matter in Bellflower, California, on November 4, 5, 9, 10, 12 and 30, 2009.

Student was represented by Bruce Bothwell, Attorney at Law, who was assisted by Cecelia Chang. Student's father (Father), and mother (Mother), referred to as Parents, were present on all hearing days.

Bellflower Unified School District (District) was represented by Eric Bathen, Attorney at Law, who was assisted by Natalie Citro. Kristy Spear, District Special Education Program Administrator, attended all hearing days.

Student filed his due process request (complaint) on August 13, 2009. On August 31, 2009, the parties requested and received a continuance of the hearing dates. At the close of the hearing, the matter was continued to December 18, 2009, for the submission of closing briefs. The parties submitted their closing briefs on December 18, 2009, and the matter was submitted for decision.¹

¹ To maintain a clear record, the closing briefs have been marked as exhibits. Student's brief has been marked as Exhibit L5, and District's brief has been marked as Exhibit 42.

ISSUES²

1. Did the February 19, 2008 individualized educational program (IEP) fail to offer Student a Free Appropriate Public Education (FAPE) because:

- a. the District failed to assess Student in all areas related to his suspected disability?
- b. the District failed to designate Student as eligible for special education services under the category of autistic-like behaviors?
- c. the proposed placement was not appropriate to meet Student's unique needs?
- d. the proposed placement was not in the Least Restrictive Environment (LRE)?
- e. the IEP did not contain appropriate behavioral and social-emotional goals to meet Student's unique needs?
- f. the IEP did not offer sufficient speech and language therapy through the November 21, 2008 IEP?
- g. the IEP did not offer sufficient occupational therapy (OT) services?
- h. the offered program was not based on peer-reviewed research?
- i. District staff were not sufficiently trained and supervised to implement the IEP?

2. Did the February 13 and March 6, 2009 IEP (March 6, 2009 IEP) fail to offer Student a FAPE because:

- a. the District failed to assess Student in all areas related to his suspected disability?
- b. the District failed to designate Student as eligible for special education services under the category of autistic-like behaviors?
- c. the District did not consider Dr. Thompson Kelly's psychological evaluation?
- d. the proposed placement on March 6, 2009, and as amended on July 14, 2009, was not appropriate to meet Student's unique needs?
- e. the proposed placement was not in the LRE?
- f. the IEP did not contain appropriate behavioral and social-emotional goals to meet Student's unique needs?
- g. the offered program was not based on peer-reviewed research?
- h. District staff were not sufficiently trained and supervised to implement the IEP?

² These issues are those framed in the October 28, 2009 Order Following Prehearing Conference and as further clarified at hearing. The ALJ has reorganized the issues for this Decision.

3. During the 2008-2009 school year (SY), did the District deny Student a FAPE through the use of a “restraint” chair in violation of Education Code sections 49001 and 56520-56524?

4. Did the District’s May 1, 2009 and May 15, 2009 IEPs fail to offer Student a FAPE in the LRE because the IEP did not contain an appropriate behavioral support plan (BSP) and behavioral intervention services (BIS), and OT services?

5. Did the District’s July 14, 2009 IEP amendment fail to offer Student a FAPE in the LRE because the District refused to consider the results of the independent assessments from First Steps and from Dr. Robin Morris?

PROPOSED REMEDY

Parents seek reimbursement for privately obtained applied behavior analysis (ABA), speech and language and OT services that they have obtained for Student because the District purportedly did not provide him with a FAPE. Parents also request, as compensatory education and for his present educational program, that the District should be ordered to provide him with a home ABA program for 25 hours a week, with 10 hours a month program supervision and 10 hours a month consultation services with Parents, school staff and other service providers and 10 hours a week in a general education kindergarten with an ABA-trained one-to-one aide.

CONTENTIONS OF PARTIES

Student asserts that the District denied him a FAPE by failing to assess him in all areas of suspected disability, even after the District became aware in early 2008 that Student might be autistic. Because the District failed to assess Student regarding deficits associated with autism, the District did not offer him an adequate program to meet his unique needs. In particular, Student asserts that the District needed to provide him with an ABA program to address his autistic-like behaviors. Further, Student argues that the District failed to consider information presented at IEP meetings from private assessors regarding his unique needs related to his autism. Additionally, Student contends that the District failed to provide him with adequate speech and language and OT services. Finally, Student claims the District denied Student a FAPE by not having adequately trained staff to meet his needs, as shown by a substitute teacher physically restraining him in a chair.

The District asserts that its IEP offers beginning in February 2008 constituted offers of FAPE. The District argues that Parents limited its initial assessment of Student to only his speech and language deficits, and after Parents later requested a comprehensive assessment, they informed the District that they did not believe Student had autism. The District contends that Student made meaningful educational progress in the LRE in its preschool

special day class (SDC). Accordingly, the District contends that, even if it had assessed Student regarding deficits related to autism and found him eligible to receive special education services under the criteria of autistic-like behaviors before May 2009, its preschool program nevertheless addressed his unique needs and allowed him to make meaningful educational progress. District asserts that Student's request to receive ABA services in a home program is not a program in the LRE because District can address his needs in an SDC, which is a less restrictive environment. Finally, the District contends that it provided Student with adequate services to address his speech and language and OT deficits.

FACTUAL FINDINGS

Jurisdiction and Background

1. Student is a five-year-old boy who resides with Parents within the geographical boundaries of the District, and is kindergarten eligible for SY 2009-2010. On May 10, 2007, the District found Student eligible for special education services under the category of speech and language impairment, and subsequently provided him with special education services. On May 1, 2009, the District also found Student eligible for special education services under the category of autistic-like behaviors.

2. For the remainder of SY 2006-2007 and all of SY 2007-2008, Student attended Whitewood Early Intervention Preschool (Whitewood) in the SDC taught by Lori Alvarado, from 8:00 a.m. through 11:30 a.m., five days a week. For SY 2008-2009, Student attended the preschool SDC taught by Erendida Contreras, until she went on medical leave in early March 2009. Student did not attend a District program during the 2009 extended school year (ESY), nor during SY 2009-2010 to the date of the hearing, because Parents unilaterally placed Student in a home ABA program and private preschool after the conclusion of SY 2008-2009.

Assess in All Areas of Suspected Disability

3. Assessments for educational need must be done in all areas related to any suspected disability the student may have. Student contends that the District needed to assess Student in areas related to his suspected disability of autistic-like behaviors by the February 8, 2008 IEP meeting because Parents told the District that Student's doctor diagnosed Student with autism, and his classroom behavior was indicative of a child with autism. Additionally, Student asserts that the District failed to assess Student's fine motor deficits, despite classroom observations that he required hand-over-hand assistance to complete tasks such as drawing and cutting with scissors. The District contends that Parents informed the District that they did not believe that Student was autistic and that his classroom behaviors were more indicative of his cognitive delays and not autism. Additionally, the District asserts that Student's fine motor skills were commensurate with his cognitive abilities and did not require additional assessments.

Information Available to District at Time of February 2008 Assessment

4. Student received Early Start services from the Harbor Regional Center (HRC) before his third birthday, which focused on his speech and language impairment. HRC's March 25, 2006 assessment did not note any atypical behaviors by Student and recommended only speech and language services, including an OT component. Neither HRC nor Parents presented the District any information during the District's initial assessment of any other suspected disabilities beyond Student's speech and language deficits.

5. The District's initial assessment of Student in May 2007 consisted only of a speech and language assessment, conducted by Sandra Lex. Ms. Lex is a licensed speech and language pathologist, who worked for the District from 1990 through 2004, when she began private services. Ms. Lex was qualified to perform the speech and language assessment. Ms. Lex's assessment showed that Student had significant expressive and receptive language delays, along with speech production difficulties. Student had trouble following simple instructions and his spontaneous speech consisted primarily of one-syllable words. Student did not display significant deficits regarding pragmatic language. Ms. Lex recommended the continuation of the November 2006 goals developed by the HRC and the private speech and language provider.

6. During her assessment, Ms. Lex had concerns about the severity of Student's expressive and receptive language deficits. Ms. Lex raised her concerns with school psychologist, Nina Rezvani,³ about Student's developmental delays and suggested that the District conduct a comprehensive assessment. On April 26, 2007, Ms. Rezvani sent Parents an assessment plan to assess Student's academic performance, motor skills, self-help and social skills, and included cognitive testing. On April 30, 2007, Parents rejected the proposed assessment plan because they felt that Student did not require additional testing.

7. At the initial IEP meeting on May 10, 2007, the District explained to Parents why it wanted to conduct a more comprehensive assessment due to Student's significant delays. Parents stated at the IEP meeting that they felt Student had enough testing by HRC. At the IEP meeting, Parents did not indicate to the District that they thought Student displayed autistic-like behaviors.

8. The IEP placed Student in Ms. Alvarado's SDC preschool class soon after the IEP meeting, which focused on students with average cognitive abilities and speech and language impairments. Ms. Alvarado's SDC had up to 15 students and two to three aides. Student also received services during the 2007 ESY. Mid-way through the first semester in SY 2007-2008, Ms. Alvarado noticed that Student would slump in his chair during class or lay down on a bench during recess. Ms. Alvarado had concerns about Student's level of energy and raised these concerns with Parents, and asked if Student might have a medical issue. Student needed prompting to participate in non-preferred activities and to play with

³ Ms. Rezvani is assigned to Whitewood and is responsible for assessing all preschool children.

other classmates. Student required hand-over-hand prompting for fine motor tasks. Classroom staff could easily redirect Student and he did not have difficulty with transitioning, although he needed prompting through visual, verbal or physical cues.

District's February 2008 Psychoeducational Assessment

9. On October 29, 2007, Parents requested that the District conduct a comprehensive evaluation of Student due to his continued speech and language delays and slow classroom progress. On November 13, 2007, Ms. Rezvani drafted an assessment plan for a psychoeducational assessment to address Student's significant delays in Ms. Alvarado's class that were indicative of additional deficits beyond speech and language delays. Ms. Rezvani did not propose to assess Student to determine if he might also be eligible to receive special education services under the category of autistic-like behaviors because neither Ms. Alvarado, Parents nor Student's speech and language therapist, Maria Cedaña, expressed concerns that indicated to Ms. Rezvani that Student might engage in behaviors characteristic of autism. Parents agreed to the District's proposed psychoeducational assessment. Ms. Rezvani assessed Student's general learning and functional abilities, which included cognitive testing.

10. After Ms. Rezvani began her assessment, Parents informed her in February 2008 that Student's pediatrician at Kaiser diagnosed him with autism. However, Father informed Ms. Rezvani that he and his wife were not sure if they agreed with this diagnosis and were going to seek further testing. Parents did not provide the District with a copy of any report, and Ms. Rezvani did not attempt to obtain a copy. Despite receiving this information during the assessment process, Ms. Rezvani did not believe that she needed to conduct any additional assessments to examine possible deficits typically associated with autism. Ms. Rezvani based her opinion on her experience. Ms. Rezvani has worked with and assessed numerous autistic preschool children. She did not observe Student to display characteristics typically associated with autistic children, such as inability to make eye contact with others, self-stimulatory behaviors, echolalia, resistance to controls or withdrawal or relating to other people inappropriately.

11. In the District's February 2008 psychoeducational, Student's cognitive ability, according to the Wechsler Preschool and Primary Scales of Intelligence, 3rd Edition (WPPSI-III), was reflected by a composite score of 70, which is borderline mentally retarded. Ms. Rezvani noted that Student's score was depressed due to his inability to remain on task because of attention deficits. Ms. Rezvani's assessment also included the Vineland Adaptive Behavior Scales, 2nd Edition (VABS-II). According to Ms. Rezvani, information from the VABS-II may be used to identify a student with autism. Student's behaviors during the assessment, such as his noncompliant and aggressive behaviors, including kicking and hitting during her testing, lack of peer interaction, significant inability to communicate orally and his inability to participate with his class during group instruction without prompting, are indications of autistic-like behaviors. However, Ms. Rezvani found that the VABS-II results and her observations did not indicate that Student might have autism because his deficits were commensurate with his cognitive deficits. Ms. Rezvani was not

persuasive because Student's deficits are also indicative of autistic-like behaviors, especially after obtaining information that Student might be autistic. Therefore, Ms. Rezvani should have assessed Student further in areas related to Student's autistic-like behaviors based on information she possessed before and during her assessment.

12. At the February 19, 2008 IEP meeting, the District presented its psychoeducational report. IEP team members discussed Student's pediatrician's autism diagnosis and Father expressed that he did not agree with the diagnosis. The IEP team members discussed Student's behavioral problems, as described above, and added goals to address his behavioral deficits. The IEP team members did not discuss Student's possible eligibility for special education services under the category of autistic-like behaviors. Student's eligibility category for special education services remained speech and language impaired. However, based on information from Student's pediatrician, and Student's autistic-like behavior during the psychoeducational assessment, the District was required to assess Student for the suspected disability of autistic-like behaviors.

Assessments Prior to the March 2009 IEP Meeting

13. Student remained in Ms. Alvarado's class for the remainder of SY 2007-2008. Student's ability to follow classroom instructions and transition between activities improved, although he still required prompting to attend to tasks. Student's behavioral deficits continued as he continued to lie down in and out of class and minimally participated in group activities. Student did not display aggressive behaviors with his classmates. Although Ms. Alvarado believed that Student progressed in her class, she felt that another District preschool SDC could better meet Student's needs. Ms. Alvarado discussed her concerns with the District placement team at the end of the school year. She recommended that Student attend Ms. Contreras' preschool SDC for SY 2008-2009 because this class had fewer students, was designed for students with more significant needs, and included students with different disabilities, including children with autism. The District placement team agreed with Ms. Alvarado's request, and placed him in Ms Contreras' class.

14. In Ms. Contreras' class, Student continued to lie down in and out of class, participated minimally with his classmates during group instruction, and continued to require hand-over-hand prompting to complete fine motor tasks. While Student's speech and language skills had improved, he still displayed significant expressive and receptive language deficits, and rarely attempted to initiate conversation with adults and his peers.

15. The parties met at an IEP meeting on October 21, 2008, to discuss an independent speech and language evaluation that Parents obtained. The private assessment found that Student had extensive pragmatic language deficits and significant attention deficits. The IEP team members also discussed Parents' request for an OT assessment because of Student's fine motor deficits, which the District agreed to provide. At this IEP meeting, there was no discussion regarding whether Student might be autistic.

Psychological Evaluation by Dr. Thompson Kelly

16. Soon after the October 2008 IEP meeting, Parents met with the HRC to discuss Student's increasing behavioral problems that he was having at home and confirmation from another Kaiser doctor regarding Student's autism diagnosis. HRC retained Thompson Kelly, Ph.D., to assess Student regarding his eligibility for regional center services under the category of autism. While Dr. Kelly did not testify at the hearing, his reported clinic and classroom observations are admissible as hearsay and can be relied upon because they corroborate the observations of Ms. Rezvani, Ms. Lex and Ms. Alvarado, who did testify.⁴

17. Dr. Kelly assessed Student in December 2008 and January 2009. Dr. Kelly reviewed HRC records regarding the Early Start services and the District's February 2008 psychoeducational assessment. He obtained information from Parents regarding Student's strengths and weaknesses at home and school, and spoke to Ms. Contreras during his school observation of Student.

18. Dr. Kelly observed Student in his office and Student displayed similar lying down and inappropriate playing with toys as observed in Ms. Alvarado's and Ms. Contreras' SDCs. Student did not engage in actual play with the toys in Dr. Kelly's office. Instead, Student would lie on the ground with the toys and observe the items before getting bored and looking in the room for other items. Dr. Kelly attempted to administer the WPPSI-III, but could not because of Student's attention deficits and refusal to cooperate.

19. During the clinical observation, Dr. Kelly performed the Autistic Diagnostic Observation Schedule, Module 1 (ADOS-1), which examined different domains in communication, socialization and play skills to look at deficits commonly associated with children with autism. As with Ms. Rezvani's assessment and his conduct in Ms. Alvarado's SDC, Student displayed limited joint attention skills and Dr. Kelly or Mother had to repeatedly prompt Student to engage with them. Student lost interest in the activities and eventually laid on the ground with a toy truck and rolled it back and forth. Father was also present and played with Student in activities that had routines, such as pretend wrestling. Dr. Kelly attempted to have Student engage in pretend play, but Student did not attempt to imitate Dr. Kelly's pretend birthday party.

20. Dr. Kelly's school observations of Student confirmed his clinical observations. During group activities, Student showed little interest in attempting to participate with class songs or pointing out letters. However, Student was able to properly identify a color and shape when directly asked by his teacher during a group activity. Student did transition between activities, but needed prompting by his teacher. Also, Student engaged in limited eye contact with his teacher when she spoke to him.

⁴ Cal. Code Regs., tit. 5, § 3082, subd. (b).

21. Ms. Contreras informed Dr. Kelly that Student had recently begun to participate more in structured activities and not lie down on the ground as much. Student had shown more interest in playing with his peers during recess, especially chasing games, and did not isolate himself as much on the playground. However, Student's attention to task and behavior in class was still variable, and he still had problems with fine motor tasks. Additionally, Ms. Contreras observed Student liking to hold his head to one side and arch his body so that his head were almost upside down. During lunch recess, Dr. Kelly observed Student alternating between being by himself and engaging with his peers in play.

22. Based on his observations and scoring with the ADOS-1, Dr. Kelly's report found that Student just met the cut for autism in the communication and reciprocal social interaction domains because of his limited joint attention skills and inability to initiate social interactions. However, Dr. Kelly did not observe Student display repetitive or stereotypical language. Dr. Kelly's report determined that Student met the clinical or medical definition for autism in the Diagnostic and Statistical Manual, 4th Edition-Text Revision (DSM IV-TR). However, Dr. Kelly's report noted that Student's overall presentation was not entirely consistent with autism because he was socially aware, responded to social cues, and exhibited social awareness. Based on Dr. Kelly's assessment, HRC determined that he was eligible to receive regional center services under the category of autism.⁵

23. The District received Dr. Kelly's report before the March 6, 2009 IEP meeting. District took Dr. Kelly's report into consideration. As found below, although the District did not find Student eligible as autistic at this IEP meeting, the District agreed to conduct an independent evaluation of Student by the Los Angeles County Office of Education (LACOE) to examine whether Student qualified for special education services under the criteria of autistic-like behaviors.

Los Angeles County Office of Education Assessment

24. Subsequent to the March 2009 IEP meeting, LACOE assessed Student. Kathryn George conducted LACOE's speech and language assessment and Sarah Biggs conducted the psychoeducational assessment.⁶ Ms. George and Ms. Biggs assessed Student in March and April 2009. Ms. George worked as a speech and language pathologist with LACOE for the past eight years, and is also an autism specialist. Ms. George's duties include conducting speech and language assessments for students who have more complex issues than a speech and language specialist would typically encounter. Before working at LACOE, Ms. George was employed by the Diagnostic Center of Southern California

⁵ The Lanterman Act in the Welfare and Institutions Code provides that the regional centers of the state may provide specified services to children and adults with "developmental disabilities" as defined, including autism. (Welf. & Inst. Code, § 4512, subd. (a).) The definition for eligibility under the Lanterman Act for autism is not the same for eligibility for special education services under the category of autistic-like behaviors.

⁶ Ms. Biggs did not testify at hearing.

(DCSC) for 11 years.⁷ At the DCSC, Ms. George conducted speech and language assessments for nine years, before her promotion to assistant director. Ms. George has extensive experience assessing and working with autistic children.

25. Ms. George and Ms. Biggs reviewed Student's educational records, prior private speech and language assessment and Dr. Kelly's psychological evaluation. Ms. George also administered portions of tests developed by DCSC to measure a child's cognitive development. Ms. George only observed Student in class for 10 minutes, while Ms. Biggs conducted a lengthier observation. Ms. Biggs is a school psychologist and she administered the ABAS-II, Gilliam Autism Rating Scales, 2nd Edition (GARS-II) and BASC-II. Ms. George was primarily responsible for writing the report.

26. Ms. Biggs' observations of Student were consistent with past observations by District staff regarding attention, language, social-emotional, behavior and cognitive deficits. LACOE's report found that Student demonstrated social, communication and behavioral differences that were consistent with children with autism. Student's problems in maintaining attention and focus during class, with his language deficits, interfered with his ability to meaningfully participate in educational activities and gain new skills. According to the report, the District needed to develop Student's ability to interact more with his peers because Student typically liked to be by himself during class and recess.

27. The LACOE speech and language assessment established that Student's expressive and receptive language was an area of strength compared to other autistic children. Student could respond to questions and answer questions regarding size, shapes, and color, for example. In highly structured settings, Student could learn to imitate adults and ask for preferred items. However, Student did not initiate the use of language. Regarding Student's speech articulation, Ms. George found that Student had apraxia of speech, which is the difficulty in sequencing sounds in syllables and words. Ms. George recommended that, both at home and school, Student should work on learning the correct pronunciation of functional vocabulary to use on a daily basis to increase his vocabulary and to learn proper speech production that he could carry over to new words. Student spoke in a monotone voice, consistent with autistic children.

28. For the ABAS-II, Parents and Jonathan Pusey, a long-term substitute teacher during Ms. Contreras' absence, completed the survey form. Although Parents rated Student's abilities lower than Mr. Pusey, the differences were not significant, and reflected Student's greater ability to perform in the more structured setting at school. Both Parents and Mr. Pusey reported Student's general adaptive functioning to be extremely low. Student had significant deficits in communication, self-direction, functional academics and social skills. The main difference between Parents' and Mr. Pusey's ratings concerned practical

⁷ The DCSC is operated by the California Department of Education and provides assessment and educational planning services to assist school districts in determining the needs of special education students, including technical assistance and consultative services.

skills. Parents observed almost no practical skills, such as dressing, feeding and self-care at home, while Mr. Pusey observed much more at school, which again reflected the structured school environment and Student's ability to perform better in a more structured environment.

29. On the GARS-II, the scores from both Parents and Mr. Pusey indicated that it was very likely that Student met the medical DSM-IV criteria for autism. While both observed frequent stereotypical behavior and communication deficits common with autistic children, Student's social interaction at school was much better, which is atypical for autistic children. Finally, on the BASC-II, Student had clinically significant deficits across nearly all domains examined regarding his adaptive skills in behavior, social, emotional and learning. While Parents scored Student much lower than his teacher, both his teacher's and Parents' scores showed that Student's adaptive skills were significantly depressed compared to his typically developing peers.

The May 1 2009 IEP Meeting

30. The IEP team members met on May 1, 2009, to discuss the results of Autism Spectrum Therapies' (AST) functional behavior assessment (FBA) and LACOE's assessment. At the IEP meeting, the District agreed to change Student's primary eligibility for special education services to autistic-like behaviors, with a secondary eligibility of speech and language impairment.

31. While the District did not have the assessment information from Dr. Kelly, AST and LACOE at the time of the February 2008 IEP meeting, the information contained in these assessments regarding Student's deficits related to autistic-like behaviors is consistent with the deficits in the February 2008 assessment. From May 2007 through February 2008, Student had minimal social awareness of others and only occasionally engaged with his peers. While Student responded to social cues and did not resist to prompting to obtain his compliance, his ability to use oral communication to communicate with others was an area of significant deficit. Although Student transitioned between school activities, he required repeated prompting. Student displayed a preoccupation with toy cars and trucks as he enjoyed lying down and just rolling the toys back and forth.

32. Other than his increased aggression during SY 2008-2009, Student's deficits in areas typically associated with preschool children with autism, had not changed significantly from the District's initial May 2007 assessment through May 2009, after additional assessments were conducted. Therefore, the District should have suspected that autism was a possible area of disability that it needed to assess after Parents informed Ms. Rezvani of the medical autism diagnosis. While Ms. Rezvani's February 2008 assessment included testing in areas related to preschool children with autism, such as the VABS-II, Ms. Rezvani did not examine the testing information to determine if Student might be eligible for special education services under the category of autistic-like behaviors. Additionally, Ms. Rezvani did not explain why she did not administer any test instruments that specifically examined deficits related to autistic children. The fact that Parents initially disagreed with the autism diagnosis does not excuse the District's obligation to comply with

its legal requirement to assess Student in all areas of suspected disability. Therefore, the District failed to assess Student in all areas of suspected disability in February 2008 through March 2009, by not specifically assessing Student's possible autistic-like behaviors until the March 2009 IEP meeting when it agreed to the LACOE psychoeducational evaluation.

Occupational Therapy

33. Student asserts that the District needed to conduct an OT assessment regarding his fine motor skills by the time of the February 19, 2008 IEP meeting because his inability to copy or trace shapes and cut with scissors. The District asserts that Student's fine motor skills were commensurate with his cognitive ability and information developed in Ms. Rezvani's assessment did not indicate that further testing was required.

34. Student's May 10, 2007 IEP contained a fine motor goal for Student to hold a writing instrument with a proper grasp, with no more than one verbal prompt, and to be able to imitate a circle, and horizontal and vertical lines with 80 percent accuracy. At this time, Student held a writing instrument with a palmer grasp.⁸ As of February 19, 2008, Student required hand-over-hand prompting to complete writing tasks. Although Ms. Alvarado believed that Student was making adequate progress on this goal, Student still could not independently grasp the writing instrument and copy circles or lines without hand-over-hand prompting. Additionally, Ms. Alvarado observed Student having problems using a spoon to eat, and he needed help with closing buckles and fasteners on his clothes.

35. The District's adaptive physical education (APE) assessment for the February 2008 IEP did not examine Student's fine motor skills. Ms. Rezvani did have Student perform fine motor skills during her assessment and observed that Student had difficulty performing these tasks. Ms. Rezvani performed the Battelle Developmental Inventory, 2nd Edition (BDI-2) to assess his fine motor skills, which indicated that his ability was in the low range as he scored in the fifth percentile. However, Ms. Rezvani believed that Student's deficits regarding his fine motor skills were commensurate with his cognitive ability and delays, and that the District therefore did not need to conduct a complete OT assessment. Ms. Rezvani stated that she also did not believe that the District needed to assess Student's fine motor skills because she believed attempts to address his fine motor deficits should be made in the classroom before providing Student with OT services by an OT specialist. Ms. Rezvani's testimony on this issue was not persuasive because an assessment was required to identify Student's fine motor deficits prior to determining whether they could be addressed in a classroom or required specialized OT therapy services.

36. The fact that Student still required hand-over-hand prompting to perform fine motor skills after months of the District working on the May 2007 IEP fine motor goal established that Student had significant deficits that could not merely be explained by his

⁸ With a palmer grasp, the child holds the writing instrument in the palm with the fingers wrapped around the writing instrument in a fist.

cognitive delays. Student's expert, Michelle A. Kuwabara,⁹ assessed Student on October 26, 2009. She was able to give an opinion on whether the District should have assessed Student's fine motor skills in February 2008 after reviewing Ms. Rezvani's 2008 assessment report regarding his fine motor skills. Dr. Kuwabara persuasively testified that the District should have assessed Student regarding his fine motor deficits because of his continued need for hand-over-hand prompting from the May 2007 IEP through February 2008. Dr. Kuwabara's testimony has more weight than Ms. Rezvani's because of Ms. Kuwabara's experience and qualifications regarding OT.

37. Therefore, the District should have assessed Student's fine motor skills by the February 19, 2008 IEP because he demonstrated significant fine motor skill deficits, which required hand-over-hand assistance for him to perform such basic tasks as drawing lines and cutting with scissors, and demonstrated lack of progress on his May 2007 fine motor goal.

Eligibility Under Autistic-Like Behaviors

38. The determination of eligibility for special education is not made by a school administrator, medical doctor or psychologist. To be eligible for special education, the district must first assess the pupil. The IEP team, including the parents, must then review the assessment. First, the IEP team must determine that the pupil has a qualifying educational disability. Second, the IEP team must determine that the degree of the pupil's impairment is such that he requires instruction or services that cannot be provided with modification of the regular school program to enable the child to benefit fully from instruction.

39. The actions of the IEP team are to be evaluated in light of the information available at the time the IEP was developed, and are not to be evaluated in hindsight. Thus, in determining the issues, the District's actions must be considered in light of the information available to the District as of the February 2008 IEP meeting through May 2009, when the District found Student eligible under the category of autistic-like behaviors. The District's actions cannot be judged in hindsight.

40. California law provides that, for a child to be eligible for special education under the category of autistic-like behaviors, a pupil must exhibit any combination of the following autistic-like behaviors, including but not limited to:

- (a) An inability to use oral language for appropriate communication;
- (b) A history of extreme withdrawal or relating to people inappropriately and continued impairment in social interaction from infancy to early childhood;
- (c) An obsession to maintain sameness;
- (d) An extreme preoccupation with objects and/or inappropriate use of objects;
- (e) Extreme resistance to controls;

⁹ Ms. Kuwabara has a Bachelor of Science, Master of Arts and Ph.D. in OT, a California OT license, and extensive experience in working with young children with autism who require OT services.

- (f) A display of peculiar motoric mannerisms and motility patterns; and
- (g) Self-stimulating, ritualistic behaviors.

Eligibility at February 2008 IEP Meeting

41. Student asserts that, by the February 19, 2008 IEP meeting, he displayed deficits that should have additionally qualified him for special education services under the criteria of autistic-like behaviors. The District contends that Student's deficits were consistent with his cognitive delays, and not indicative of his eligibility under autistic-like behaviors. In analyzing whether Student qualified for special education services under the category of autistic-like behaviors, Student need not meet each qualifying condition, but his deficits in a particular area need to be pervasive based on observations and assessments.

An inability to use oral language

42. Ms. Lex's initial assessment of Student and her February 2008 assessment established that Student had significant expressive and receptive language deficits, and that he was not able to use oral communication for appropriate communication. Student's expressive communication was limited to single-syllable words and he could not express simple requests. Student did not display significant and pervasive pragmatic language deficits as he demonstrated joint attention skills in making eye contact and followed physical cues when in conversation. However, Student displayed significant and pervasive receptive language deficits in that he required repeated instructions and physical prompting to respond to oral requests. Therefore, Student exhibited an inability to use oral language for appropriate communication, an element for autistic-like behaviors.

A history of extreme withdrawal or relating to people inappropriately

43. Student displayed withdrawal by lying down in and out class, especially to avoid non-preferred activities. The District believed as of February 2008 that Student's lying down was indicative of lethargy and low energy. Staff could redirect Student if he was lying down or not participating in class instruction with verbal or physical prompting. Student had a tendency to wander away and Ms. Alvarado and Maria Teresa Cendaña, his speech and language therapist during SY 2007-2008, needed to verbally and physically prompt him to remain on task. Student's preference was to be by himself, but staff could prompt him to participate in group activities, such as circle time and singing songs. As noted in subsequent assessments, Student's behavior was consistent with a child eligible with autistic-like behaviors because of his extreme withdrawal.

An obsession to maintain sameness

44. Student did not display an obsession to maintain sameness in his classroom and his Parents did not describe this behavior at home.

An extreme preoccupation with objects and/or inappropriate use of objects

45. Student was preoccupied with toy cars and trucks and would lie down in class and just watch them as he rolled them back and forth. Student was fixated with the rolling motion of these toys and did not play with them in other age-appropriate activities. Student did not play with other objects in Ms. Alvarado's classroom when given the opportunity, and would 'play' with the toy cars and trucks by himself. As noted in subsequent assessments, Student's preoccupation with toy cars and trucks and watching them roll back and forth was extreme and consistent with a child eligible with autistic-like behaviors. Therefore, Student displayed an extreme preoccupation with objects and inappropriate use of objects.

Extreme resistance to controls

46. Student did not display extreme resistance to controls as he could easily be redirected with verbal and physical prompting. Additionally, District staff could place their hands over Student's during fine motor activities with no objection from Student.

A display of peculiar motoric mannerisms and motility patterns

47. Ms. Alvarado did not observe Student displaying peculiar motoric mannerisms. Even if Student displayed the hand-flapping that Dr. Kelly noted in his later assessment, these were not significantly peculiar and did not interfere with Student's ability to participate with his class. While Student did display holding his head to one side, and tilted almost upside down, this behavior was not extreme. Therefore, Student did not display significant peculiar motoric mannerisms and motility patterns.

Self-stimulating, ritualistic behaviors

48. Student's repeated rolling of the trucks and cars is indicative of self-stimulating and ritualistic behaviors, as he would continue this behavior until redirected. As noted in the subsequent assessments, this behavior was pervasive and indicative of a child eligible under the category of autistic-like behaviors. Therefore, Student displayed sufficient self-stimulating and ritualistic behaviors.

49. From February 2008 through May 2009, Student's behaviors of the six autistic-like behaviors did not increase as he displayed substantially the same behaviors, except for increased aggression towards his peers, which was not a key reason why the LACOE assessment recommended that the District find Student eligible for special education services under autistic-like behaviors. The District offered no credible explanation regarding why Student was not eligible under autistic-like behaviors as of the February 2008 IEP meeting based on his inability to use oral language to communicate, extreme preoccupation with objects, peculiar mannerisms and self-stimulating behaviors. The fact that Ms. Rezvani did not believe that Student displayed autistic-like behaviors based on her observations and her testing is not compelling because Ms. Rezvani did not assess Student to determine if he qualified under autistic-like behaviors. Therefore, the District should have qualified Student

for special education services under the category of autistic-like behaviors at the time of the February 19, 2008 IEP meeting.

February 19, 2008 IEP Offer of Placement and Services

50. A school district provides a FAPE to a student if its program or placement was designed to address the student's unique educational needs and was reasonably calculated to provide meaningful educational benefit in the LRE. A school district is also required to provide a student with special needs a program, including support services, designed to address the child's unique needs.

51. Student asserts that the February 19, 2008 IEP failed to provide him with a FAPE because the IEP failed to have annual goals to address his behavioral and social-emotional deficits related to his autism, and failed to provide him with sufficient speech and language and OT services. Student contends that Ms. Alvarado's SDC was not a proper placement because it was designed primarily for speech-and-language-impaired students, not autistic children, and did not address Student's behavioral, social-emotional and pre-academic deficits, was not in the LRE, and was not based on peer-reviewed research.

52. The District asserts that, while the primary focus of Ms. Alvarado's SDC was working with Student's speech and language impairments, the program, annual goals, and related services were reasonably calculated to permit Student to make meaningful education progress.

53. At the February 19, 2008 IEP meeting, Parents and District team members discussed the District's assessment results. The District offered to continue Student's placement in Ms. Alvarado's classroom, with speech and language and APE services. The IEP provided that 16 percent of Student's school day would be in the general education environment. In addition to speech and language, pre-academic and fine motor goals, the IEP included social-emotional and gross motor goals. The District also asserts that, regardless of whether it found Student eligible under a speech and language impairment, or autistic-like behaviors, the February 19, 2008 provided Student with a FAPE.

Appropriateness of SDC Placement

54. Student challenged the District's SDC at Whitewood because the District did not use a program based on peer-reviewed research for children with autism. An IEP must contain a statement of the special education and related services, and supplementary aids and services to be provided to the student. In addition to addressing the student's unique needs and being reasonably calculated to provide educational benefit, the education and services in the IEP should be based on peer-reviewed research "to the extent practicable."

55. The District does not have a preschool program specifically for autistic students. The District places these students in one of its non-categorical preschool SDCs at Whitewood. While the District consults with a non-public agency (NPA) to assist it in

developing educational programs for autistic students, it did not consult with an NPA in developing Student's February 19, 2008 IEP. The development of Student's IEP rested with the District's IEP members, especially Ms. Rezvani and Ms. Alvarado.

56. Ms. Rezvani's assessment noted that Student had attention deficits, as he needed physical prompting to orient towards Ms. Alvarado during class instructions, and difficulty participating in class activities, such as circle time. Student did not interact with his peers on the playground, did not engage in pretend play, and did not talk with fellow students in class. Additionally, Student had difficulty participating in routine class activities without prompting, such as counting aloud with his classmates. Finally, Student fixated on toy cars and trucks and played alone with these instead of interacting with his classmates.

57. Student contends that he required an intensive educational program that followed the recommendations of the 2001 National Resource Council (NRC), which recommended 20 to 45 hours of intervention a week, which utilized methodologies for children with autistic-like behaviors, on a full-year basis during the early childhood years.¹⁰

58. Ms. Rezvani had not read the 2001 NRC report, nor was she familiar with its recommendations. Even if Ms. Rezvani were familiar with the 2001 NRC report recommendations and Student had been found eligible under autistic-like behaviors, she would have recommended the same educational program contained in the February 19, 2008 IEP to address his unique needs. However, Ms. Rezvani did not adequately explain how the February 19, 2008 program addressed Student's deficits that she identified in her report related to autistic-like behaviors, especially, as discussed below, the IEP did not contain adequate goals to address his social-emotional, behavior and attention deficits. Additionally, the District has not analyzed how its program can meet the unique needs of children with autistic-like behaviors, based on peer-reviewed research "to the extent practicable."

59. Ms. Alvarado and her two classroom aides have attended District-provided training regarding educating children with autism, and have incorporated discrete trial training (DTT) techniques into the SDC instruction.¹¹ DTT instruction is commonly used with children with autism to teach them skills in isolation, with the intent that once a child masters a skill in isolation the child could then generalize the skill in the class and home environment. DTT is a recommended technique in the 2001 NRC report. While Ms. Alvarado and her aides had training regarding DTT, the use of DTT instruction in the SDC was on an informal basis, and did not include collecting data to track a student's progress or displays of desired or undesired behaviors. While Ms. Alvarado and her staff used DTT instruction to work on Student's fine motor skills with writing and cutting, and

¹⁰ *Educating Children with Autism* (Committee on Educational Interventions for Children with Autism, Division of Behavioral and Social Sciences and Education, National Research Council of the National Academy of Sciences, Washington D.C.; National Academy Press, 2001), p. 148, cited as the 2001 NRC report.

¹¹ DTT involves repetitive, one-to-one drills, in which the instructor attempts to teach the student a particular skill or behavior. DTT is commonly used and associated with ABA instruction.

pre-academic skills with letter identification and sorting, they did not use this method of instruction to work on Student's attention deficits or to teach him less dependency on prompts. As discussed below regarding the assessment conducted by First Steps, Student required DTT instruction.

60. While Ms. Alvarado has training and experience teaching children with autism, her classroom is not designed to meet the needs of children with autistic-like behaviors. The classroom did not address Student's self-stimulatory behaviors, nor provide instruction to lessen these behaviors. Student repeatedly lied down and played with the toy trucks and cars and did not pay attention to group instruction, and the classroom was not designed to address these behaviors. Indeed, Ms. Alvarado requested that the District change Student's classroom because his needs, which are symptomatic for a child with autistic-like behaviors, could not be adequately addressed in her classroom.

61. Ms. Alvarado's SDC was designed for pupils with speech and language impairments with average cognitive abilities. Ms. Alvarado's SDC was not designed to address deficits related to Student's autistic-like behaviors and borderline cognitive ability, and was not based on a peer-reviewed research "to the extent practicable." Therefore, the District's placement in Ms. Alvarado's SDC was not reasonably calculated to permit Student to make meaningful progress because it failed to address to his unique needs related to his autistic-like behaviors.

Least Restrict Environment as of February 2008

62. The IDEA requires that a student with a disability be placed in the LRE in which a FAPE can be provided. The environment is least restrictive when it balances factors including maximizing a student's opportunity to mix with typical peers to the extent appropriate, while providing academic and nonacademic benefit to the student and others in the class.

63. The February 19, 2008 IEP provided that 16 percent of Student's day would be in the general education environment because of the benefit Student would receive interacting with his typically developing peers in modeling appropriate speech and behavior. Student needed to spend the remainder of the school day in the SDC because of the intense specialized instruction he required in a smaller class. The mainstreaming opportunities consisted primarily of outdoor play with general education students in other preschool classes from about 25 to 40 minutes, with the remainder of Student's day in the SDC. Ms. Alvarado's classroom aides monitored the playground. Because of Student's social deficits, he did not engage with his classmates or general education peers. The District did not discuss at the IEP meeting how it would ensure that Student would be mainstreamed with his typical peers, especially with Student's social-emotional deficits, or that Student's deficits were so great that he could not obtain any benefit from mainstreaming. Additionally, Student either spent his time playing by himself or with a classmate, and there was no indication that any attempt was made for Student to interact with general education Students.

64. The February 2008 IEP failed to provide a placement offer in the LRE because Student's opportunities to be with typical peers were not maximized to the extent appropriate given his need to be in a small class environment during most of the school day. While Student required a small, structured classroom, he also required time with his typically developing peers to model appropriate behavior, and the District failed to develop an IEP that maximized his interactions with general education students during recess.

Proposed Annual Behavior and Social Goals

65. Ms. Rezvani asserted that the District's IEP addressed Student's social-emotional, behavior, and attention deficits that negatively impacted his ability to access the curriculum. However, the February 19, 2008 IEP did not contain goals to address these significant deficits, except for one goal that Student would play side-by-side with another student on the playground. The IEP did not contain goals to address Student's lack of attention in the classroom, his lying down in class, or his inability to participate in classroom activities. The IEP needed to include goals to address these deficits because they significantly impeded Student's ability to access classroom instruction as established by Ms. Rezvani's assessment and Ms. Alvarado's observations.

66. The District's February 19, 2008 IEP offer did not address Student's social-emotional, behavior and attention deficits identified in Ms. Rezvani's assessment and Ms. Alvarado's observations that prevented Student from accessing his classroom curriculum. Therefore, the District's February 19, 2008 IEP annual goals were not reasonably calculated to permit Student to make meaningful educational progress because they failed to adequately address Student's deficits that were related to his autistic-like behaviors and cognitive ability.

February 2008 Offer of Speech and Language Services

67. Student asserts that the District's February 19, 2008 IEP failed to provide Student with adequate speech and language services because he required additional individual therapy due to his significant pragmatic, expressive and receptive language deficits. The District asserts that its offer of 50 minutes a week of small group speech and language services was sufficient to meet Student's unique needs.

68. As set forth in Factual Findings 5 and 42, District's speech and language pathologist Ms. Lex conducted a speech and language assessment in May 2007 and again in connection with the February 2008 assessments. At the time of the 2008 assessment, Student received 30-minute speech and language sessions, two times a week, in a small group with two to three students. Ms. Cendaña had a station in Ms. Alvarado's classroom where she provided speech and language services.

69. For the 2008 assessment, Ms. Lex examined Student's receptive language and found that these skills continued to be significantly delayed for his chronological age. Student could only follow simple one-step directions. He could point to body parts, food

items and action pictures, such as washing and crying. On the Test of Early Language Development, 3rd Edition (TELD-3), regarding his receptive language, Student had a standard score of 68, which placed him in the second percentile. On the Preschool Language Scales, 4th Edition (PLS-4), on auditory comprehension, Student had a standard score of 77, which placed him in the seventh percentile. While Student had progressed since his initial assessment, his receptive language skills were still significantly delayed.

70. Student's expressive language deficits were more significant, and he progressed slower, than his receptive language. Student's expressive language skills were significantly delayed for his chronological age as his spontaneous speech consisted of one-syllable words, or simple approximations, such as 'wa' for 'water.' Student did attempt to imitate words without prompting, but needed assistance to blend vowel sounds together. Student did not exhibit any two-word combinations. On the PLS-4 for expressive communication, Student had a standard score of 67, which placed him in the first percentile. On the TELD-3 for expressive language, Student had a standard score of 61, first percentile. Due to Student's limited expressive language skills, Ms. Lex could not formally test his phonological skills. However, an informal assessment indicated that Student could produce speech sounds as expected for his chronological age, and Ms. Lex did not observe oral-motor problems in speech production.

71. Ms. Lex presented her assessment report at the February 2008 IEP meeting, and Ms. Cendaña discussed Student's progress in her speech and language sessions. Ms. Cendaña discussed that Student made progress regarding his receptive language skills, but made less progress regarding his expressive language, and that his delays were still significant. Despite Student's significant deficits, the District members of the IEP team proposed reducing Student's speech and language services to 50 minutes a week, in a small group session. The District's proposed goals were a continuation of the May 10, 2007 goals, with increased mastery levels, to improve Student's vocabulary, speech production and responding to 'wh' questions. Parents consented to the change of services and goals.

72. At hearing, neither Ms. Lex nor Ms. Cendaña could explain why the District reduced Student's speech and language by 10 minutes a week. Additionally, despite Ms. Cendaña's need to frequently redirect Student during the group speech and language sessions because he would wander away during small group sessions, neither Ms. Lex nor Ms. Cendaña could adequately explain why Student did not receive some of his speech and language services in individual sessions.

73. Student's expert, Yen Walter,¹² reviewed Student's records, including the initial HRC evaluation, Newport Language and Speech Centers (Newport), his early-start speech and language provider, Ms. Lex's evaluations and the District's February 19, 2008 IEP. Ms. Walter's opinion after reviewing these documents was that Student required two

¹² Ms. Walter is a licensed speech and language pathologist, with a Master of Arts in speech pathology. She has provided speech and language services to autistic children primarily since 2000.

30-minute individual speech and language sessions a week. Ms. Walter based her opinion on Student's lack of progress as shown by the PLS-4 and TELD-3 scores. However, Student's PLS-4 standard score for auditory comprehension increased from 71 in October 2006 to 77 in the February 2008 report. As explained by Ms. Lex, the PLS-4 scores are scaled in six-month intervals and take into consideration the progress a child should obtain in those six months, so that the scores show that Student made progress as he was catching up to his peers, albeit slowly. Student's expressive comprehension standard score fell from 69 to 67, which is in the margin of error, indicating that Student did not fall further behind his peers. Additionally, Student's numerous absences during the first half of SY 2007-2008 due to illness limited his progress. Moreover, he was typically 30 minutes late and missed table top play with peers in which students worked on their expressive, receptive and pragmatic language skills. Therefore, the weight of evidence established that Student made more progress than what Ms. Walter opined.

74. Ms. Walter also criticized the District's IEP for not addressing Student's pragmatic language deficits. However, Ms. Walter did not assess Student or have any firsthand knowledge of Student's pragmatic language deficits at the time of the February 19, 2008 IEP meeting. The HRC and Newport evaluations did not indicate significant pragmatic language deficits, and neither did Ms. Lex's assessments, as Student possessed slightly depressed joint attention skills. Instead, Ms. Walter relied on a September 18, 2008 assessment conducted by Expressions, a NPA. However, the NPA's assessor, Stacy DeRenard, did not testify, and no other evidence corroborated her findings. In contrast, Ms. Alvarado and Ms. Cendaña observed Student exhibiting pragmatic language skills once they got his attention.

75. Parents were concerned about Student's apparent lack of progress with his speech and language skills. In the summer of 2008, Parents obtained private services from California State University, Long Beach. Parents obtained a private evaluation by Expressions in September 2008, and private speech and language services from Expressions during SY 2008-2009. Parents provided Expressions' report to the District at the October 21, 2008 IEP meeting. The District reviewed the report and Parents' request for three individual sessions a week. On November 6, 2008, the District offered, three 25-minute sessions a week, with two small group sessions and one individual session. Parents did not consent to the District's offer. On November 21, 2008, the District subsequently offered two 25-minute individual sessions a week and one 25-minute small group session, for which the Parents provided consent.

76. The appropriateness of the February 2008 offer of speech and language services must be evaluated, however, as of the time the offer was made, and not with hindsight. Student established that by February 2008, he required individual speech and language sessions because of his attention deficits and need for repeated redirection, which limited his ability to participate in the small group sessions. However, Student also required interaction with his peers during speech and language sessions to work on expressive and receptive language skills, and any pragmatic language deficits he had. Student required a total of 60 minutes a week of speech and language services, 30 minutes in an individual

session and 30 minutes in a group session, to make meaningful educational progress. Therefore, the District's offer of 50 minutes per week of small group speech and language services in the February 2008 IEP was insufficient and denied Student a FAPE.

February 2008 Offer as to Student's Fine Motor Deficits

77. Student asserts that the February 19, 2008 IEP did not provide him with a FAPE because the IEP did not provide any OT services, especially pull-out OT, to address his fine motor deficits. The District asserts that it addressed Student's fine motor needs within the classroom, and the APE pull-out services. The February 19, 2008 IEP contains two fine motor skill goals for Student. The first goal was for Student to trace three simple shapes, a circle, a vertical line and a horizontal line, in eight out of ten opportunities within a two-week period. The second goal was for Student to fasten large buttons within a two-week period, eight out of ten times.

78. At the time of the February 19, 2008 IEP meeting, Student still required hand-over-hand prompting to perform fine motor tasks, such as tracing lines and cutting with scissors. In her psychoeducational assessment, Ms. Rezvani administered the VABS-II, which includes a Motor Skills Domain to measure a child's fine and gross motor skills. Student scored in the moderate low range with a combined standard score of 72 for fine and gross motors skills, which placed him in the third percentile. Ms. Rezvani also administered the Fine Motor domain of the BDI-2. Student received a subtest score of five, which placed him in the fifth percentile. During the assessment, Ms. Rezvani observed Student's limited skills in grasping a pencil, tracing lines, and fastening his clothes. Student continued to hold writing instruments with a palmer grasp, which he had at the time of the May 2007 IEP, and could not cut with scissors without hand-over-hand assistance. Student could not fasten his clothes without assistance, even though Student was nearly four years old.

79. At the IEP meeting, the team members discussed Student's fine motor deficits and whether to refer him for an OT evaluation. The District did not believe that it needed to conduct an OT assessment because Student's fine motor skills matched his functioning level because of his borderline verbal and non-verbal cognitive functioning. However, the District's psychoeducational report states that the results of the cognitive functioning tests may underestimate Student's ability due to problems in testing Student because of his attention deficits. Therefore, the District should not have automatically presumed that that Student's fine motor skills were commensurate with his cognitive abilities.

80. Additionally, the District asserted that Student did not require pull-out OT services because the District could meet Student's fine motor needs within the classroom. The District also contended that the gross motor goals and APE pull-out services also sufficiently addressed Student's fine motor deficits.

81. However, because it failed to assess Student's fine motor deficits, the District did not have sufficient information to develop a program to meet Student's fine motor deficits within his classroom. Additionally, Student's lack of meaningful progress on his

May 2007 fine motor goal, in Factual Finding 34, establishes the fact that the District had not developed an adequate classroom program to address Student's fine motor deficits because the District's February 2008 IEP was just a continuation of its previous in-class program.

82. Regarding the District's contention that the IEP's gross motor goals and APE services were sufficient to address Student's fine motor deficits, the testimony of the District's APE specialist, Ann-Marie Minton Sharp, was not convincing. The IEP goals were for Student to work on his balance by hopping, and his motor control by catching a large ball. While these gross motor goals worked on Student's hand-eye coordination, which he needed also for fine motor tasks, these goals did not address Student's need for hand-over-hand prompting to complete writing and cutting tasks. Therefore, the District's APE services and IEP gross motor goals did not adequately address Student's fine motor deficits.

83. Based on the foregoing, the February 19, 2008 IEP was not reasonably calculated to provide Student with a meaningful educational benefit because it did not adequately address Student's fine motor deficits. In addition, the District continued to offer the same level of classroom assistance that had not allowed Student to make meaningful progress in the area of his fine motor skills over the previous year.

Student's Progress from February 2008 through February 2009

84. Student continued in Ms. Alvarado's SDC through the end of SY 2007-2008. Student continued to be about 30 minutes late to class. Student continued to exhibit the same autistic-like behaviors as he continued to focus on playing with toy cars and trucks in the same manner as the previous year, did not play with other school children on the playground, and required prompting to pay attention to classroom instruction. At the end of the school year, Ms. Alvarado had concerns that Student had not made the level of progress that she expected and that he needed more attention in the classroom.

85. Although Student was still eligible to remain in Ms. Alvarado's classroom for SY 2008-2009, Ms. Alvarado discussed changing his class to Ms. Contreras' SDC with the District's placement team. Ms. Alvarado felt that Student's needs were greater than she could provide in her SDC because of his need for constant prompting to complete tasks, communicate and maintain attention. Ms. Alvarado believed that Ms. Contreras' SDC was more appropriate to meet Student's needs because it had fewer students, eight to ten, with one teacher and two aides. Ms. Rezvani did not recall if she participated in the discussion about whether Student should be moved to Ms. Contreras' SDC, but she agreed with the classroom change for the reasons Ms. Alvarado gave. Ms. Contreras' SDC had students with a variety of qualifying disabilities whose main area of need was not speech and language, including autistic-like behaviors.¹³ While students in Ms. Alvarado's SDC were typically in the average range as to their cognitive abilities and social skills, students in Ms. Contreras' SDC were more likely to have cognitive and social deficits. Parents found out about the

¹³ Ms. Contreras did not testify at hearing.

classroom change on the first day of school for SY 2008-2009 when they took Student to Ms. Alvarado's SDC.

86. Ms. Contreras and her aides had the same level of training as Ms. Alvarado and her aides in working with students with autism. Ms. Contreras' SDC was also for three-and-one-half hours a day, and the manner of instruction with small group tabletop instruction and group activities were similar to Ms. Alvarado's SDC.

87. The District's assertion that there was really no significant difference between Ms. Alvarado's and Ms. Contreras' classrooms is belied by the fact that the students in Ms. Contreras' SDC had needs that required a smaller class size and whose primary focus was not students with speech and language deficits. While the District's changing of Student's classroom is not at issue in this matter, it is relevant to evaluate Student's progress prior to the March 2009 IEP meeting. The evidence demonstrated that the District decided to change Student's classroom for SY 2008-2009 to meet his needs in light of his slow progress in Ms. Alvarado's SDC. That change was an indication that the District underestimated Student's deficits in the February 2008 psychoeducational assessment and IEP because the District did not address Student's deficits related to his autistic-like behaviors.

February 13 and March 6, 2009 IEP Meetings

Consideration of Dr. Kelly's Evaluation Report

88. Student contends that the District did not consider Dr. Kelly's January 2009 psychological evaluation, conducted for HRC, in connection with the February and March IEP 2009 meetings. A procedural violation of IDEA results in a denial of FAPE if it impedes the student's right to a FAPE, significantly impedes the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to their child, or causes a deprivation of educational benefits.

89. In developing an educational program for a special education student, a local educational agency (LEA) must comply with the procedures set forth in the Individuals with Disabilities in Education Improvement Act (IDEA). One of the key procedural components is the requirement that parents of a child with a disability be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. A LEA must fairly and honestly consider the views of parents expressed in an IEP meeting, including a privately obtained assessment. A LEA that does not consider the parents' requests or privately obtained assessments with an open mind has violated the parents' right to participate in the IEP process. However, a LEA is not obligated to conform to the requests or recommendations of the parents or private assessor.

90. The District scheduled Student's annual IEP meeting for February 13, 2009, to discuss Student's progress during the prior year, the recent OT assessment and to develop Student's educational program. Parents attended the IEP with an educational advocate. The parties did not complete the IEP on February 13, 2009, and resumed the meeting on March 6,

2009. Mother was not certain when she obtained a copy of Dr. Kelly's psychological evaluation and when she gave Ms. Contreras a copy. The IEP notes of the February 13, 2009 IEP meeting do not refer to Dr. Kelly's report. Ms. Rezvani recalled that Ms. Contreras gave her a copy of Dr. Kelly's report sometime after the February 13, 2009 IEP meeting, and that she read it before the March 6, 2009 IEP meeting.

91. Ms. Rezvani, Ms. Spear and Mother did not recall any discussion of Dr. Kelly's report at the March 6, 2009 IEP meeting. The District considered the report in deciding to have LACOE perform independent psychoeducational and speech and language assessments. Dr. Kelly's report did not recommend any specific changes to Student's educational program, only Student's eligibility for regional center services, not whether Student qualified for special education services under the category of autistic-like behaviors.

92. The District's decision to conduct a further assessment to examine Student's deficits related to his autistic-like behaviors and whether he qualified for special education services under the category of autistic-like behaviors shows that the District considered information that Student might be eligible under autistic-like behaviors. While the District may not have expressly discussed Dr. Kelly's report at the March 6, 2009 IEP, Student did not suffer a loss or educational benefit, nor were Parents prevented from participating in the IEP process because the District agreed to assess Student to obtain educational related information regarding Student's autistic-like behaviors because of Dr. Kelly's report. In addition, the parties discussed at the IEP meetings information regarding Student's deficits and present levels of performance that mirrored Dr. Kelly's report. Therefore, the District considered Dr. Kelly's report at the March 6, 2009 IEP meeting.

Appropriate March 2009 IEP Behavior and Social Goals

93. From the start of SY 2008-2009 through the February 13, 2009 IEP meeting, District personnel observed an increase of aggressive behavior by Student towards his classmates in and out of class. Student pushed classmates down on the playground, and hit classmates who got too close to him in circle time or standing in line. Additionally, Student continued to lie down in class and at recess, needed prompting to pay attention to class instruction and did not participate in group instruction with his peers. However, Student did interact more with his peers on the playground, especially one particular classmate, as Student met the prior goal to play side-by-side with his peers. Student and this other classmate played chasing games, rode bikes and climbed on play equipment.

94. The only social goal in the March 6, 2009 IEP was a continuation of the previous play goal. The District changed the play goal to require Student to play with more than one classmate for at least five minutes at a time in eight of ten opportunities in a two-week period. The District agreed on March 6, 2009 to conduct the functional behavioral assessment to examine Student's increased aggressive behaviors, and develop a behavior support plan and behavior goals based on the information in the FBA.

95. Regarding Student's behavior problems caused by his lack of attention in class, the District added a new goal for him to work independently for five to seven minutes, with only two verbal prompts, in eight of ten opportunities in a two-week period. The District added a goal in the area of self-care for Student to ask to use the restroom and care for all his personal needs with one verbal prompt, in eight of ten opportunities in a two-week period. However, the IEP did not contain any goals regarding Student's behavior deficits in group instruction, participating in group activities, or addressing his lying down in class, all longstanding deficits that prevented Student from making meaningful educational progress.

96. The District failed to develop any goals to work on Student's deficits regarding group instruction and activities and lying down, which he needed if Student was to be mainstreamed into a general education classroom in the future. Therefore, the District's March 2009 annual goals for Student denied Student a FAPE because they did not adequately address his behavior and social needs.

March 2009 Offer of Continued Placement in Ms. Contreras' SDC

97. The District's March 6, 2009 IEP continued to have Student attend Ms. Contreras' SDC, with 16 percent of his time in the general education environment, which consisted of playground interaction. As noted in Factual Findings 58 through 61, the design of the District's SDC was not adequate to meet Student's unique needs related to his autistic-like behaviors. By the time of the March 6, 2009 IEP meeting, the District knew that a psychologist had diagnosed Student with autism, and that Student had made minimal progress regarding his ability to participate in group instruction or to interact with his peers and adults without prompting, and the District's proposal was to continue Student in the same program. While the District appropriately proposed to conduct the FBA and then develop a BSP, the District needed to conduct the FBA by the time of March 6, 2009 IEP because of the intensity of Student's aggressive behaviors during the first half of SY 2008-2009. Finally, the District did not offer Student adequate mainstreaming opportunities because the District made the same offer as in the February 2008 IEP with no plan to ensure that Student actually interacted with general education students.

Physical Restraint of Student

98. School districts and certified NPAs cannot use aversive interventions to modify a student's behavior. Aversive interventions include seclusion rooms, corporal punishment, use of unpleasant odors, sensory deprivation, or an intervention that causes or subjects the child to humiliation or excessive trauma. Student asserts that Angela Gutierrez, a long-term substitute, used aversive interventions on April 30, 2009, when she restrained Student in a chair with soft ties due to Student's aggressive behaviors on the playground during recess. The District does not deny that Ms. Gutierrez restrained Student in the chair, but contends that the restraint was only for a brief period and did not harm Student.

99. Ms. Gutierrez removed Student from the playgroup on April 30, 2009, due to his aggressive behaviors in hitting his classmates, and because she believed that he posed a

threat to his classmates. Ms. Gutierrez sat Student in a corner chair in the classroom, and testified that she loosely tied Student in the chair because he would not remain seated. Mother entered the room after Ms. Gutierrez restrained Student. Ms. Gutierrez then returned to the playground, while Student was still restrained in the chair. Diane Fagen, who taught the morning preschool SDC, was in the classroom and observed this incident. Student did not struggle in the chair while restrained. After approximately five minutes, Mother released Student and left the school grounds with him. Mother and Ms. Gutierrez disputed how long Student was restrained. However, according to Ms. Fagen, who is more credible than Mother or Ms. Gutierrez because of her lack of interest on this issue, Student was in the chair for approximately five minutes. After Mother removed Student, Student did not attend school on the days in which Ms. Gutierrez taught.

100. The chair in the classroom was to be used only for postural support for students who had trouble sitting upright by themselves. However, the District did not train any of its special education staff of Whitewood regarding the proper use of the chair. Therefore, Ms. Gutierrez did not know that she could not use the chair to discipline Student. Because Ms. Gutierrez removed Student from the playground, he was not an imminent threat to hurt himself or others. Therefore, he should not have been restrained in the classroom. After becoming aware of the incident, Ms. Spear obtained training for the staff regarding the proper use of the chair, including that it was not to be used for disciplinary purposes.

101. Ms. Gutierrez's conduct denied Student a FAPE by using an aversive intervention. However, the harm suffered by Student was minimal as Ms. Gutierrez loosely tied him into the chair for five minutes, and he was not afraid to attend class on the days when he attended. However, the fact that Ms. Gutierrez did not know how to handle Student's continued aggressive behavior establishes that the District did not address Student's escalating aggressive behaviors in Student's IEPs, nor train the long-term substitutes while AST conducted the FBA and developed the BSP.

May 1, 2009 IEP Meeting and May 2009 IEPs

Functional Behavior Analysis

102. At the March 6, 2009 IEP meeting, Parents agreed to the District's request to perform a FBA to assess the causes of Student's increased aggressive behaviors, lack of attending in class, and lack of peer interaction. After completing the FBA, the District would then develop a behavior support plan (BSP). The District contracted with AST to conduct the FBA. Sarah Mayfield, then an AST program supervisor, performed the FBA, which her supervisor, Robert Haupt, AST's director of clinical programs, reviewed. Ms. Mayfield is a Board Certified Behavior Analyst (BCBA), which permits her to conduct FBAs. Ms. Mayfield has a Master of Science in counseling, with an emphasis in ABA.

103. Ms. Mayfield observed Student twice at home and in school in March and April 2009. Mr. Haupt accompanied Ms. Mayfield during her first observation. Ms. Mayfield interviewed Parents, and Mr. Pusey and Ms. Gutierrez, Student's long-term

substitute teachers. Ms. Mayfield conducted the Adaptive Behavior Assessment System, 2nd Edition (ABAS-II) and Functional Analysis Screening Tool (FAST) to obtain information regarding the triggers of Student's behaviors, his ability to perform certain tasks, social skills, and academic abilities. Ms. Mayfield also reviewed Student's most recent IEP, Dr. Kelly's assessment, District's February 2008 psychoeducational and speech and language assessments and September 2008 private speech and language assessment.

104. Ms. Mayfield's classroom observations were consistent with prior observations by his teachers and assessors. Student was able to follow simple one-step directions and communicate with basic one-word or two-word sentences. Student did not have a consistent method of communication that allowed him to get his daily needs met. Regarding Student's academic skills, he could answer questions regarding shapes, colors and letters, was able to read and spell his name on request, and follow classroom routines with little or no prompting. However, Student still required hand-over-hand prompting to complete tabletop tasks, wandered away during non-preferred activities, and did not participate in group instruction, such as singing songs. Student would lie his head on the table during lunchtime or class instruction if not engaged in an activity or instruction.

105. Regarding play, Student played with one peer on the playground and would observe students in and out of class, but not join with them. Student tended not to play appropriately with toys and would often lie on the ground to play with toys. Student could still not dress himself, but was able to use utensils to feed himself.

106. During LACOE's school observations in March and April 2009, Student hit or pulled the shirts of his classmates several times when they got too close to him during circle time or standing in line. Student pushed a classmate to the ground at recess to get a ball the other student had. In April 2009, Mr. Pusey and Ms. Gutierrez were keeping data regarding Student's aggressive behaviors, and the type of aggressive behaviors they observed. Their data corresponded to Ms. Mayfield's observations. During the home observation, Student displayed similar aggressive behaviors with his Mother and sisters when they did something he did not like. Ms. Mayfield observed 19 aggressive behaviors during her two school visits and four during a home observation.

107. In the FBA, Ms. Mayfield identified two areas of challenging behaviors: Student's aggression towards others and lying down. Regarding Student's aggressive behaviors, the FBA identified the causes of Student's behaviors to be when Student received instruction, was denied access to an item or activity, when others were in close proximity and when he saw a preferred item. Because of Student's communication deficits, he could not communicate his wishes and engaged in aggressive conduct to obtain the result that he wanted, such as getting the ball or avoiding non-preferred activities. Ms. Mayfield recommended that Student be instructed to express his needs through appropriate verbal gestures and non-verbal communication, such as the Picture Exchange Communication System (PECS). Also, Student needed to be taught waiting skills and coping skills to replace the aggressive behaviors.

108. Regarding lying down, the FBA found that Student engaged in this behavior when unengaged, playing alone and during non-preferred activities. Student engaged in this behavior because of automatic visual, self-stimulatory reinforcement and to escape non-preferred activities. Ms. Mayfield recommended the same communication strategies, as with Student's aggressive behaviors, to keep Student engaged to prevent him from lying down.

109. The FBA correctly determined that Student's aggressive behaviors and lying down were low-intensity behaviors and District staff could easily redirect Student. The FBA recommended that the District develop goals to decrease Student's escape behaviors and increase his functional communication as well as his ability to listen to adults and follow instructions. The FBA recommended that the District develop a BSP to teach Student new routines to handle situations that lead to his aggressive behaviors or lying down. Additionally, staff needs to be able to redirect Student when he engages in an inappropriate behavior and not reward Student when he engages in these challenging behaviors.

May 1, 2009 OT Offer

110. At the October 21, 2008 IEP meeting, the District agreed to perform an OT assessment to examine Student's fine and gross motor deficits, visual motor skills, lack of attention and sensory processing. Because the District does not employ any OT providers, it contracted with Gallagher Pediatric Therapy (Gallagher), a NPA, to conduct the assessment.

111. The assessment occurred on November 21, 2008, and included playground and classroom observations. Ms. Contreras and Parents completed surveys as to Student's strengths and weaknesses regarding his fine and gross motor, visual motor, and sensory processing skills. Allison Thomas, who conducted this assessment, did not testify at hearing.

112. The Gallagher assessment pointed out that Student continued to have difficulty with fine motor tasks, such as drawing, cutting with scissors and fastening buttons. Regarding Student's visual motor skills, which involve hand-eye coordination, Student could perform basic copying of vertical and horizontal lines and block stacking. However, Student had difficulty in performing more complex copying and stacking tasks, which Ms. Taylor could not discern were issues related to his inability to follow verbal instructions and attention deficits. Ms. Taylor did not observe significant deficits regarding Student's gross motor skills as he could properly use the school play equipment and was able to balance himself.

113. Regarding Student's sensory processing, which is often an area of major deficit for autistic children, Student did not display significant weakness. Student did not have any aversion to being touched or touching new items, was able to process sensory information properly and did not seek out or avoid sensory input, and was able to maintain adequate balance and posture. Parents' survey corroborated Ms. Taylor's observations.

114. Ms. Taylor recommended that Student receive OT consultation, one time a month, for 50 minutes, to work on Student's fine motor deficits. Ms. Taylor also

recommended developing a program for school and home to work on his fine motor skills. The Gallagher evaluation was presented at the February 13, 2009 IEP meeting. The District originally offered 50 minutes a month of OT in-class consultation services. Parents did not accept the District's offer. On March 27, 2009, the District agreed to provide, on a trial basis, 50 minutes a week, individual OT sessions in Student's classroom, and Ms. Pelayo would report on Student's progress at the May 1, 2009 IEP meeting.

115. Ms. Pelayo reviewed Student's OT progress at the May 1, 2009 IEP meeting. After the test period, Ms. Pelayo recommended that Student's OT services be 50 minutes a week of small group sessions because Student learned better in a group setting due to peer modeling, and because his fine motor deficits were commensurate with his developmental level. Parents consented to group OT services so that Student would receive OT, although they still felt that he required individual sessions.

116. Dr. Kuwabara reviewed the District's offer and the OT assessment and correctly noted that the Gallagher OT assessment downplayed Student's prompt dependence for fine motor tasks. Dr. Kuwabara also felt that the Gallagher OT underestimated Student's sensory seeking behaviors. However, while Student sought out sensory input, such as touching items, none of the in-class observations by any of the various assessors indicated that Student's sensory seeking significantly interfered with his classroom learning. Additionally, Dr. Kuwabara's recommendation that Student required three hours a week of individual OT, two hours in a clinic and one hour in a school setting, was designed to maximize Student's potential, not to provide meaningful education progress.

117. Based on Student's progress with the 50 minutes a week of individual OT and his need for role modeling, Student required 25 minutes of individual OT and 25 minutes of small group OT services to make meaningful educational progress. Therefore, the District's May 1, 2009 IEP offer for OT did not provide Student with a FAPE because he required individual OT sessions to work on his fine motor skills deficits and to reduce his need for hand-over-hand prompting.

May 2009 Offers Regarding Behavioral Needs

118. Less serious behaviors that impede a child's learning or that of others require the IEP team to consider and, if necessary, develop positive behavioral interventions, strategies and supports. More serious behavioral problems will require a school district to develop a behavior intervention plan. Behavior intervention is the implementation of procedures to produce lasting positive changes in the student's behavior, and includes the design, evaluation, implementation, and modification of the student's individual or group instruction or environment, including behavioral instruction, to produce significant improvement in the student's behavior. An IEP that does not appropriately address behavior that impedes a child's learning denies a student a FAPE. Student contends that District's May 2009 IEP failed to offer him a FAPE because the District did not offer a BSP to address his behaviors that significantly impeded his learning. The District contends that it offered Student sufficient behavioral support to meet his unique needs.

119. Ms. George and AST presented their assessment findings at the May 1, 2009 IEP meeting. Ms. George had not completed the written report and presented the findings orally. Based on the information presented at the IEP meeting, the IEP team agreed to change Student's eligibility to receive special education services to autistic-like behaviors, with speech and language impairment being a secondary eligibility category.

120. Ms. Mayfield and Mr. Haupt presented the FBA. They recommended providing support to Student in the classroom via a consultative training model whereby AST would provide consultation to school staff for one to two hours a week. They also recommended that AST develop a BSP for District staff to implement at school. The District agreed to have a BSP for the May 15, 2009 IEP meeting for the team members to discuss. The IEP team, including Parents, agreed to the recommendations.

121. At the conclusion of the May 1, 2009 IEP, the parties agreed to meet again on May 15, 2009, to discuss kindergarten placement options, and to create a transition plan. At the May 15, 2009 IEP meeting, the District proposed that Student be placed in a SDC kindergarten. In the District, all kindergarten classes, whether a general or special education class, are six hours a day to address the State's kindergarten curriculum requirements. The District agreed to continue to provide the one to two hours a week of in-class AST behavioral services on a consultation basis. Parents rejected the District's placement offer as they wanted Student to have a 35-hour a week education program with a home ABA program, and for Student to attend a general education kindergarten to learn appropriate behaviors and social communication from his typically developing peers.

122. The day before the May 15, 2009 IEP meeting, Parents took Student to First Steps, a NPA specializing in providing ABA services to children with autism for an initial intake meeting. Parents went to First Steps because of their concerns regarding Student's maladaptive behaviors and lack of educational progress, and desire to find a program to address Student's deficits. Parents informed the District at this IEP meeting that First Steps would be assessing Student.

123. Mr. Haupt attended the May 15, 2009 IEP meeting. Mr. Haupt is also a BCBA, with a Master of Science in counseling with a focus on ABA. Mr. Haupt has worked with autistic children since 2002 and has extensive training and experience in this area, including developing ABA programs, such as Parents requested. Mr. Haupt agreed with the District's recommendation for Student to attend a kindergarten SDC because Student did have substantial deficits, as noted in AST's FBA and Dr. Kelly's report. Also, he felt that Student's deficits were not so severe to require a home ABA program because the District could meet his needs in the SDC with appropriate goals and AST consultative services.

124. Although the District promised to present a BSP at the May 15, 2009 IEP meeting, it did not. Student needed a BSP to address his aggressive behaviors, which prevented him from making meaningful educational progress because it limited his ability to

participate in group instruction. Therefore, the District's failure to offer a BSP by the May 15, 2009 IEP meeting, without explanation, denied Student a FAPE.

July 14, 2009 IEP Meeting and Consideration of Parents' Reports

125. Student contends that the District did not consider the reports from Robin L. Morris and First Steps that Parents presented at the July 14, 2009 IEP meeting. The District asserts that it considered these reports, but that they did not provide the IEP team with any new educationally relevant information.

Psychological Evaluation by Robin Morris

126. Robin Morris is a licensed psychologist and a licensed marriage and family therapist. She received her doctorate in psychology in 1997, and has provided services to children with autism since that time, including conducting psychological assessments.

127. Dr. Morris assessed Student in June 2009. For her assessment, Dr. Morris reviewed Student's educational records, which included all the prior assessments and IEPs. Dr. Morris interviewed Parents and Kristen Carmi, who was conducting First Steps' assessment. Dr. Morris did not interview Student's teachers because the District felt that the two recent long-term substitute teachers were new to Student's SDC and getting used to the students. Dr. Morris observed Student in his preschool SDC and during a speech and language session, and observed the District's proposed SDC placement. AST began services after the May 15, 2009 IEP meeting and an AST employee was in the classroom when Dr. Morris observed Student's preschool class. Although Dr. Morris' psychological evaluation was very comprehensive, her evaluation did not uncover any new information regarding Student's attention, behavior, cognitive or social-emotional deficits.

128. As with Dr. Kelly's and the LACOE assessment, Dr. Morris found that Student had autism for the same reasons. On the Stanford-Binet Intelligence Scales, 5th Edition, Student had a full scale IQ of 70, and as with Ms. Rezvani, Dr. Morris cautioned that Student's score might be depressed due to his inattention. Student displayed strength in problem-solving with numbers, with a standard score of 81. Student's visual spatial standard score of 79 showed his strength in visual learning. Regarding Student's school readiness as measured by the Bracken School Readiness Assessment, 3rd Edition, Student had a standard score of 88, which placed Student in the average range.

129. Regarding Student's fine motor skills and visual processing, Dr. Morris administered the Beery Developmental Test of Motor Integration, in which children trace geometric shapes. Student had a standard score of 73, which placed him in the low average range.

130. During her 45-minute classroom observations, an aide from AST was present and there were nine students, the teacher and two aides. During circle time, Student and the two boys to either side of him pushed each other and did not participate in the group activity.

Student required physical prompting to transition to the next activity and during small group table-top instruction. Student required hand-over-hand assistance to perform the writing and tracing tasks, and one-to-one assistance to complete other activities and to stay on task. Student also did not respond when his teacher called his name on numerous occasions and did not display spontaneous speech.

131. In contrast to Student's lack of focus in his classroom, Dr. Morris observed the day before that Student was more interactive during his one-to-one speech and language session. Carissa Borland, Student's speech and language pathologist, engaged Student during the therapy session playing games to work on single-word labeling of objects. During the session, Student spontaneously said two-word sentences, and responded well to Ms. Boreland's instruction and was compliant.

132. Dr. Morris observed the District's proposed kindergarten SDC for 30 minutes. The SDC had 13 students with varying qualifying disabilities, including autistic-like behaviors, mental retardation, speech-and-language-impaired and medical disabilities. The SDC had one teacher and three aides, with one of the aides being a one-to-one aide for a student. The District provided push-in speech and language, OT and APE services in the SDC. Only three students spent time during the school day in a general education classroom. According to the District, four students were to attend general education first grade the next school year. The classroom composition and instructional methodology was not significantly different from Ms. Contreras' SDC.

133. Dr. Morris recommended in her report that Student have a combination home ABA program for 15 hours a week and 15 hours a week instruction in a general education kindergarten with a trained one-to-one aide, with no break in service greater than two weeks for the ABA instruction to prevent regression in learning and behaviors. Student required a home ABA program to obtain skills he lacked to learn with group instruction, such as replacement behaviors for his aggression, attending to the teacher and functional communication. In October 2009, Dr. Morris observed Student in his home ABA program, and changed her recommendation to 20 hours a week of home ABA and 10 hours a week in a general education classroom. Dr. Morris opined that the District's proposed kindergarten SDC would not address Student's unique needs because of his need for one-to-one instruction to keep him on task, and that the proposed SDC did not provide Student with typically developing peers from whom to model appropriate behavior and language because Student demonstrated the ability to learn from his peers.

First Steps' Assessment

134. Ms. Carmi conducted the First Steps initial evaluation on May 14, 2009. Ms. Carmi has a BCBA and a Master of Arts in psychology. Ms. Carmi is a program director with First Steps, responsible for developing behavioral interventions, including ABA programs, conducting formal assessments and training and supervising direct care instructors. Ms. Carmi has worked with autistic children for nine years, and has extensive training and experience in working with these children and in ABA programs.

135. For the evaluation, Ms. Carmi observed Student in her clinic, twice at Student's home and once at Whitewood. It was unclear from Ms. Carmi's report and testimony what educational records, if any, she reviewed as part of her evaluation and recommendations. Although the AST and LACOE reports both included ABAS-II results from Parents, Ms. Carmi readministered this test.

136. Ms. Carmi's observations and ABAS-II results regarding Student's behavioral, attention, language, fine motor and social-emotional deficits were consistent with the prior assessments discussed above. Ms. Carmi observed Student interacting with preferred classmates and engaging in non-verbal communication with his classmates. Student could follow simple instructions, such as to get his shoes and put them on, and was able to identify body parts, colors, shapes and letters. His language consisted of simple one- to three-word phrases, and he could respond to 'wh' questions. Student required hand-over-hand assistance cutting with scissors and still used primarily a palmer grasp when holding writing instruments. Student engaged in aggressive behaviors, such as taking a classmate's cookie or running into his peers. Student needed prompting to stay on task and follow rules during a kick ball game in his APE class.

137. As a result of the evaluation, Ms. Carmi recommended a 20-hour-a-week home ABA program, with 10 hours a month of program supervision and 10 hours a month of consultation services with Parents, school staff and other service providers. Ms. Carmi also recommended that Student attend a regular education kindergarten for 15 hours a week with a trained one-to-one aide. Ms. Carmi recommended that Student attend a general education classroom for appropriate role modeling.

138. Ms. Carmi also developed 25 goals for school, home and community. The goals focused on improving Student's ability to follow verbal instructions, functional and social communication, play skills, social interaction, self-care and reducing tantrums, aggression, elopement and ritualistic behaviors. The school goals were to improve Student's ability to participate in group classroom instruction and his peer interaction. The purpose of the goals was to extinguish behaviors that prevented Student from participating properly in group instruction and to teach him appropriate behaviors. Additionally, the goals addressed teaching Student basic pre-academic skills that all students need for kindergarten.

139. The District did not accept Dr. Morris' and First Steps' reports because it contended that neither provided new educational information. Dr. Morris and First Steps reiterated information presented in Dr. Kelly's, LACOE's and AST's prior reports regarding Student's deficits. However, there is new information in both reports. Dr. Morris' report addressed why the District's proposed kindergarten SDC would not meet Student's unique needs. The new information in First Steps' report were the specific goals and strategies to improve Student's behavior and to attend during group instruction. These were not in the District's prior IEPs. While the District rejected Dr. Morris' and First Steps' recommendation of a home ABA program and placement in a general education classroom, the District did consider the information in their reports and believed that Student's needs

could be appropriately met in a District kindergarten SDC. The fact that the District disagreed with the reports' recommendations did not mean that the District did not consider the information. Therefore, the District did consider information in Dr. Morris' and First Steps' reports.

July 14, 2009 IEP Placement Offer and BSP

140. The parties agreed to meet on June 5, 2009, to discuss additional goals for Student and for AST to develop a BSP. On May 22, 2009, Parents provided the District with written disagreement of LACOE's psychoeducational assessment and AST's FBA, and requested that the District fund an independent assessment by Robin Morris, which the District denied on June 9, 2009. Parents subsequently cancelled the June 5, 2009 IEP meeting and requested that the meeting be rescheduled after June 19, 2009. First Steps began providing Student with home ABA services on June 1, 2009. The District had Dr. Kelly's report and First Steps' initial evaluation before the July 14, 2009 IEP meeting. Mr. Haupt presented AST's BSP, and Ms. Pelayo reported on Student's OT progress. Parents presented Dr. Morris' and First Steps' reports and requested the combination ABA program and general education placement that First Steps recommended, and that the District adopt First Steps' goals 1 through 14 and 20 through 24 in Student's IEP.

141. At the July 14, 2009 IEP meeting, the District continued to recommend a District kindergarten SDC with opportunities for mainstreaming. In weighing the testimony and documentary evidence, Dr. Morris was more persuasive than the District's witnesses because the District continued to offer a substantially similar educational program for kindergarten that had not previously permitted Student to make meaningful educational progress. Dr. Morris established that the District's proposed kindergarten would not permit Student to make meaningful educational progress because the SDC was just a continuation of the previous non-categorical SDCs. Student required more individualized assistance and different educational strategies to address Student's long-standing attention, social-emotional and behavioral deficits. Based on Student's failure to make meaningful progress in the past two years with a substantially similar educational program, it would be expected that he would not make sufficient progress in the kindergarten SDC.

Student's Educational Program After SY 2008-2009

142. The District agreed to meeting at a subsequent IEP meeting to discuss changes and additions to Student's goals. No further IEP meeting was held because Parents did not agree to a District kindergarten SDC. Student did not attend the District's 2009 ESY program or obtain any related services from the District since the completion of SY 2008-2009. Parents enrolled Student in a private preschool with typically developing children for three hours a day, three days a week, with a one-to-one aide from First Steps. Because of Student's lack of interaction with his typically developing peers, Student's attendance at the private preschool provides him with the needed mainstreaming to model appropriate behaviors. In addition, Student only receives nine hours a week of home ABA services

because of the cost to Parents. Student also receives OT for 60 minutes a week and weekly speech and language services for 60 minutes a week.

143. Because of the limited home ABA program, First Steps has focused on communication skills, reducing aggressive behaviors, attending skills and reducing stereotypical behaviors. Student has made excellent progress as he can follow more complex instructions, is able to better express his wants, utilizes more spontaneous social communication, and remains more attentive during academic instruction. However, because the home ABA was only nine hours a week, Student had not made the level of progress Ms. Carmi would want and Student still displayed significant language, social-emotional, and behavioral deficits.

LEGAL CONCLUSIONS

1. As the petitioning party, Student has the burden of proof in this matter. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].)

Elements of a FAPE

2. Under the IDEA and state law, children with disabilities have the right to a FAPE. (20 U.S.C. § 1400(d); Ed. Code, § 56000.) A FAPE means special education and related services that are available to the child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(a)(9).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(a)(29).)

3. In *Board of Educ. v. Rowley* (1982) 458 U.S. 176 [73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that 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.) School districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instruction and related services individually designed to provide educational benefit to the student. (*Id.* at p. 201; *J.L. v. Mercer Island School Dist.* (9th Cir. 2009) 575 F.2d 1025, 1035-1038.) The Ninth Circuit has also referred to the educational benefit standard as "meaningful educational benefit." (*N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2007) 541 F.3d 1202, 1212-1213; *Adams v. State of Oregon* (9th Cir. 1999) 195 F.2d 1141, 1149. (*Adams*).)

4. There are two parts to the legal analysis of a school district's compliance with the IDEA. First, the tribunal must determine whether the district has complied with the procedures set forth in the IDEA. (*Rowley, supra*, at pp. 206-207.) Second, the tribunal must decide whether the IEP developed through those procedures was designed to meet the child's unique needs, and was reasonably calculated to enable the child to receive educational benefit. (*Ibid.*) An IEP is not judged in hindsight; its reasonableness is evaluated in light of

the information available at the time it was implemented. (*JG v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801; *Adams, supra*, 195 F.3d 1141, 1149.)

5. In *Rowley*, the Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA. (*Rowley, supra*, at pp. 205-06.) However, a procedural error does not automatically require a finding that a FAPE was denied. Since July 1, 2005, the IDEA has codified the pre-existing rule that a procedural violation results in a denial of FAPE only if it impedes the child's right to a FAPE, significantly impedes the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the parents' child, or causes a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see, *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

6. A school district violates the IDEA if it is shown to have materially failed to implement a child's IEP. A material failure occurs when there is more than a minor discrepancy between the services provided to a disabled child and those required by the IEP. (*Van Duyn v. Baker School Dist.* (9th Cir. 2007) 502 F.3d 811, 815.)

Assess in All Areas of Suspected Disability

7. Before any action is taken with respect to the initial placement of an individual with exceptional needs, an assessment of the pupil's educational needs shall be conducted. (Ed. Code, § 56320.) 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 determining an appropriate educational program for the student. (Ed. Code, § 56320, subs. (e), (f); 20 U.S.C. § 1414(b)(2); 34 C.F.R. § 300.304(b)(2), (c)(4)(2006).)

8. The threshold for suspecting that a child has a disability is relatively low. (*Dept. of Educ. v. Cari Rae S.* (D. Hawaii 2001) 158 F.Supp.2d. 1190, 1195. (*Cari Rae S.*)) A LEA's appropriate inquiry is whether the child should be referred for an evaluation, not whether the child actually qualifies for services. (*Ibid.*)

Issue 1(a): Did the District's February 19, 2008 IEP fail to offer Student a FAPE because the District failed to assess Student in all areas of suspected disability?

Issue 2(a): Did the District's March 6, 2009 IEP fail to offer Student a FAPE because the District failed to assess Student in all areas of suspected disability?

9. Pursuant to Factual Findings 8, 10, 11, 12 and 16 through 32 and Legal Conclusions 7 and 8, the District failed to assess Student in all areas of suspected disability related to autistic-like behaviors. The District knew at the time of the February 19, 2008 IEP meeting that Student's pediatrician had diagnosed Student with autism. The fact that Parents did not believe the diagnosis at the time of the February 2008 IEP meeting did not relieve the District's obligation to assess Student to analyze deficits commonly associated with autism.

In February 2008, Student was displaying deficits commonly associated with autistic children, such as extreme inability to communicate, lack of attention, not playing with his peers and engaging in self-stimulatory behaviors. Although Student's deficits were borderline for the subsequent determination that he qualified for special education services under the category of autistic-like behaviors, Student's behavioral, speech and language, social-emotional, and attention deficits at the time of the February 2008 and March 2009 IEP meetings were consistent with children with autism. Therefore, the District failed to assess Student in all areas of suspected disability because it did not assess Student regarding autistic-like behaviors until the May 2009 LACOE assessment. The failure to assess Student denied him a FAPE.

10. Pursuant to Factual Findings 33 through 37 and Legal Conclusions 7 and 8, the District failed to assess Student in all areas of suspected disability related to his fine motor deficits. Student had not made meaningful progress on his May 2007 fine motor goal. By the time of the February 19, 2008 IEP meeting, Student still required hand-over-hand prompting to perform fine motor tasks, despite Ms. Alvarado working on his fine motor goal since May 2007. The District needed to assess Student's fine motor deficits due to his significant deficits and failure to progress adequately in his fine motor goal. Therefore, the District's failure to assess Student denied him a FAPE.

Autistic-Like Behavior Eligibility

11. California Code of Regulations, title 5, section 3030, subdivision (g), describes the criteria for determining whether a child qualifies for special education under the category of autistic-like behaviors:

- (1) An inability to use oral language for appropriate communication.
- (2) An obsession to maintain sameness.
- (3) Extreme preoccupation with objects or inappropriate use of objects or both.
- (4) Displays peculiar motoric mannerisms and motility patterns.
- (5) Self-stimulating, ritualistic behavior.
- (6) A history of extreme withdrawal or relating to people inappropriately and continued impairment in social interaction from infancy through early childhood.

Issue 1(b): Did the District's February 19, 2008 IEP fail to offer Student a FAPE because the District failed to designate Student as eligible for special education services under the criteria of autistic-like behaviors?

Issue 2(b): Did the District's March 6, 2009 IEP fail to offer Student a FAPE because the District failed to designate Student as eligible for special education services under the criteria of autistic-like behaviors?

12. Pursuant to Factual Findings 8, 10, 11, 12, 16 through 32, and 42 through 49 and Legal Conclusion 10, Student would have been found to also qualify for special education services under the category of autistic-like behaviors if the District had assessed Student in all areas of suspected disability in February 2008. Student displayed an inability to use appropriate oral language for communication, an extreme preoccupation with objects and inappropriate use of objects, and self-stimulatory behaviors. Student's autistic-like behaviors were evident in February 2008 and continued through May 2009 when the District, based on the LACOE assessment, found that Student met the autistic-like behavior eligibility requirements. The District had information from its February 2008 psychoeducational assessment and observations from Parents and Ms. Alvarado, which, if explored properly with appropriate testing, would have found Student eligible under the category of autistic-like behaviors. Accordingly, District's failure to make Student eligible under the autistic criteria denied him a FAPE.

Issue 1(c): Did the District's February 19, 2008 IEP fail to offer Student a FAPE because the proposed placement was not appropriate to meet Student's unique needs?

Issue 2(d): Did the District's March 6, 2009 IEP fail to offer Student a FAPE because the proposed placement was not appropriate to meet Student's unique needs?

13. Pursuant to Factual Findings 51 through 61 and Legal Conclusions 2, 3, 4, 9 and 11, the District's proposed placement of Ms. Alvarado's SDC in the February 19, 2008 IEP was not reasonably calculated to provide Student with meaningful educational progress. Ms. Alvarado's SDC did not provide Student with a FAPE because it was not designed to meet Student's unique needs. Ms. Alvarado's SDC was designed primarily to work on speech and language deficits with children with average or slightly below average cognitive ability and who did not have significant behavioral and social-emotional deficits. The District's February 2008 psychoeducational assessment showed that Student had significant cognitive delays, and problems with attending to group instruction and requiring hand-over-hand prompting to complete tabletop instruction. The District should have known in February 2008 that Student would not be able to make meaningful educational progress in Ms. Alvarado's SDC based on the information that District had at the time regarding Student's deficits and unique needs. Therefore, the February 2008 offer of placement denied Student a FAPE.

14. For SY 2008-2009, the District's placement of Student in Ms. Contreras' SDC was not reasonably calculated to permit Student to make meaningful education progress,

pursuant to Factual Finding 97 and Legal Conclusions 2, 3, 4 and 12. Although Student was able to receive more attention in Ms. Contreras' class due to the smaller class size, the program design in Ms. Contreras' SDC was not much different from Ms. Alvarado's SDC regarding how the academic, pre-vocational and social-emotional skills were worked on with Student. Although Student made some progress in Ms. Contreras' SDC, especially in beginning to interact with his peers on the playground and in pre-academic skills regarding identifying colors, shapes and letters, he also regressed behaviorally with the increase of aggressive behaviors that he had not demonstrated to the same degree in Ms. Alvarado's SDC. Student also did not obtain the skills he needed to succeed with group instruction. He made minimal progress attending to group instruction and being able to work with his classmates in small group instruction and continued to lie down in class. Therefore, when the District offered Ms. Contreras' SDC again in the March 6, 2009 IEP, the District offered more of the same instruction that had not allowed Student to make meaningful educational progress because the District had failed to address Student's behavioral, attention, and social-emotional deficits. Therefore, the March 2009 offer of placement denied Student a FAPE.

Issue 1(e): Did the District's February 19, 2008 IEP fail to offer Student a FAPE because the IEP did not contain appropriate behavioral and social deficit goals to meet Student's unique needs?

Issue 2(f): Did the District's March 6, 2009 IEP fail to offer Student a FAPE because the IEP did not contain appropriate behavioral and social deficit goals to meet Student's unique needs?

15. Pursuant to Factual Findings 65 and 66 and Legal Conclusions 2, 3, 4, and 9, the District's February 19, 2008 IEP did not contain appropriate behavioral and social-emotional goals to address Student's unique needs in these areas. The only goal that the District developed was for Student to play side-by-side with a classmate. Based on the information in the District's February 2008 psychoeducational assessment and Ms. Alvarado's own observations, the District needed to have a goal to address Student's deficit in attending to group instruction because he constantly wandered off and needed to be prompted to return and did not participate in class songs or instruction without significant prompting. The District needed to have a goal to address this significant deficit for Student to obtain the skills needed to make meaningful educational progress in his classroom. Additionally, the District needed to have a goal to address Student's lying down, as this was a significant impediment for Student to make meaningful educational progress. Thus, the annual goals in the February 2008 IEP denied Student a FAPE.

16. Pursuant to Factual Findings 93 through 96 and Legal Conclusions 2, 3, 4, and 9, the District's March 6, 2009 IEP did not contain appropriate behavioral and social-emotional goals. Student made minimal progress in his ability to attend to group instruction and participate with his peers in the classroom during group instruction. Student continued to lie down in class instead of participating. Despite Student's lack of meaningful progress regarding his ability to participate and attend to group instruction, the District failed to develop goals in these areas for Student. Regarding Student's aggressive behaviors, the

District appropriately withheld developing a formal goal until AST could complete the FBA to develop a BSP and appropriate goal to reduce this behavior. Overall, the annual goals in the March 2009 IEP denied Student a FAPE.

Issue 1(f): Did the District's February 19, 2008 IEP fail to offer Student a FAPE because the IEP did not offer sufficient speech and language therapy through the November 21, 2008 IEP?

17. Pursuant to Factual Findings 68 through 76 and Legal Conclusions 2, 3, and 4, the District's February 19, 2008 IEP failed to provide Student with sufficient speech and language services to permit Student to make meaningful educational progress until the District increased these services on November 21, 2008. Student's pragmatic language deficits were not so significant that the District needed to provide speech and language services to address this deficit. Student's February 2008 present levels of performance and Ms. Lex's February 2008 speech and language assessment established that Student still had significant expressive and receptive language deficits. Despite Student's significant language deficits, the District reduced his speech and language services from 60 minutes a week in a small group session to 50 minutes a week in a small group, with no explanation at the IEP or hearing for the reason for the decrease in service. Ms. Kuwabara established that, based on her review of Student's progress and speech and language assessments that existed at the time of the February 2008 IEP meeting, Student required 60 minutes a week of speech and language services, 30 minutes in an individualized session and 30 minutes in a small group. Accordingly, the offer of speech and language services in the February 2008 IEP denied Student a FAPE.

Issue 1(g): Did the District's February 19, 2008 IEP fail to offer Student a FAPE because the IEP did not offer sufficient OT services regarding his fine motor skills?

18. Pursuant to Factual Findings 77 through 83 and Legal Conclusions 2, 3, 4 and 11, the District denied Student a FAPE by failing to adequately address Student's fine motor deficits. The District needed to assess Student's fine motor skills because of his lack of progress on his fine motor skills in Ms. Alvarado's class and his continued need for hand-over-hand prompting. Despite Student's lack of progress on his May 2007 IEP fine motor goal, the District continued to offer the same fine motor IEP goal in February 2008. The District did not seek the assistance of an OT therapist to consult with Ms. Alvarado to provide assistance in developing new strategies to improve Student's fine motor skills. While Student required additional OT services, Student did not establish that this service needed to be in individual clinic sessions, and that the District could not meet Student's fine motor needs with push-in OT services.

Issue 1(h): Did the District's February 19, 2008 IEP fail to offer Student a FAPE because District staff were not sufficiently trained and supervised to implement the IEP?

Issue 2(h): Did the District's March 6, 2009 IEP fail to offer Student a FAPE because District staff were not sufficiently trained and supervised to implement the IEP?

19. Pursuant to Factual Findings 60, 86 and 100, Student did not establish that Ms. Alvarado, Ms. Contreras and their aides were not properly trained and supervised to implement Student's IEP. They worked on Student's goals, properly prompted Student to get his participation in class instruction and had sufficient training and experience working with autistic children. Although the long-term substitutes were qualified to work in the classroom and implement Student's IEP, the District needed to provide additional oversight because of their lack of experience in handling Student's aggression. While Mr. Pusey properly handled Student's aggression and could redirect Student, Ms. Gutierrez could not, which led her to improperly restraining Student. While Ms. Fagen was available to answer any questions the substitutes had, she did not have the responsibility to monitor them. The District did not provide proper assistance for the long-term substitutes until AST began providing in-class consultative services.

Least Restrictive Environment

20. Federal and state law require a school district to provide special education in the LRE. A special education student must be educated with nondisabled peers "to the maximum extent appropriate", and may be removed from the general education environment only when the nature or severity of the student's disabilities is such that education in general classes with the use of supplementary aids and services "cannot be achieved satisfactorily." (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(ii)(2006).) In light of this preference, and in order to determine whether a child can be placed in a general education setting, the Ninth Circuit, in *Sacramento City Unified Sch. Dist. v. Rachel H.* (1994) 14 F.3d 1398, 1403, adopted a balancing test that requires the consideration of four factors: (1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect the student would have on the teacher and children in the regular class; and (4) the costs of mainstreaming the student.

Issue 1(d): Did the District's February 19, 2008 IEP fail to offer Student a FAPE because the proposed placement was not the LRE?

Issue 2(e): Did the District's March 6, 2009 IEP fail to offer Student a FAPE because the proposed placement was not the LRE?

21. Pursuant to Factual Findings 53, 63, 64 and 97 and Legal Conclusion 20, the District's February 19, 2008 and March 6, 2009 IEPs failed to offer Student with adequate mainstreaming opportunities with his typically developing peers. While the District offered mainstreaming opportunities during recess, the District did not provide a mechanism to ensure that Student interacted with general education students. Due to Student's social-

emotional deficits, Student played by himself and eventually with his classmates, but not with general education students. The District did not discuss at the IEP meetings how it would ensure that Student would interact with general education students, and the District did not ensure that this occurred. Therefore, the District's IEPs denied Student a FAPE because the proposed placement was not the LRE. The District did not provide the support necessary for Student to interact with his typically developing peers at recess.

Peer-Reviewed Program

22. Effective July 1, 2005, the IDEA provided that the special education and related services provided to a student under an IEP should be “based on peer-reviewed research to the extent practicable.” (20 U.S.C. § 1414(d)(1)(A)(4); 34 C.F.R. § 300.320 (2006); Ed. Code § 56345, subd. (a)(4).) However, prior to the implementation of this change in the IDEA, case law held that the choice regarding the methodology to be used to implement an IEP, even IEPs for children with autism, is left up to the school district's discretion so long as it meets a student's needs and is reasonably calculated to provide some educational benefit to the child. (See *Rowley*, 458 U.S. at p. 208; *Adams* 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.)

23. California administrative decisions that have applied the IDEA requirement that special education and related services should be “based on peer-reviewed research to the extent practicable” have determined that the lack of peer review for a particular methodology, or the fact that one methodology may have had more peer-review than others, is not determinative. (*Student v. Fremont Unified School Dist.* (2007) Cal.Ofc.Admin.Hrngs. Case No. N2006110101 [eclectic program including some ABA methods determined to have provided FAPE]; *Rocklin Unified School Dist. v. Student* (2007) Cal.Ofc.Admin.Hrngs. Case No. N2006110278, aff'd. *Joshua A. v. Rocklin Unified School Dist.* (E.D. Cal. 2008) 2008 WL 906243; *Joshua A. v. Rocklin Unified School Dist.* (9th Cir. 2009) 2009 WL 725157.) Instead, the ultimate test remains whether a particular methodology was reasonably calculated to meet the child's unique needs. (*Ibid.*)

24. The IDEA's requirement that an educational program be based on peer-reviewed research, to the extent practicable, does not mandate a specific program for autistic children, such as an ABA program. (*Deal v. Hamilton County Dept. of Educ.* (E.D.Tenn. 2006) 2006 U.S. Dist. LEXIS 27570, pp. 51-57 [comprehensive summary of decisions discussing this issue]; see also § 1414(d)(1)(IV); 34 C.F.R. § 300.320 (2006); Ed. Code, § 56345, subd. (a)(4).) A LEA may provide services to an autistic student at school if the LEA properly designs the educational program to meet the student's individual needs. (*Student v. Pajaro Valley Unified School Dist.* (2007) Cal.Ofc.Admin.Hrngs. Case No. N2006110472.)

Issue 1(g): Did the District's February 19, 2008 IEP fail to offer Student a FAPE because the offered program was not based on peer-reviewed research?

Issue 2(g): Did the District's March 6, 2009 IEP fail to offer Student a FAPE because the offered program was not based on peer-reviewed research?

25. Pursuant to Factual Findings 58, 59, and 60 and Legal Conclusions 22, 23, and 24, the District failed to provide Student with an education program based on peer-reviewed research, to the extent practicable. Even if the District found Student eligible for special education services at either the February 19, 2008 or March 6, 2009 IEP meeting under the category of autistic-like behaviors, the District would have offered the same educational program as it offered previously. While the District is not required to have an autistic-specific SDC, the District did not evaluate its non-categorical SDC programs regarding how the District can meet the unique needs of autistic children in its non-categorical SDCs. The District did not demonstrate that its program was adequately designed, based on peer-reviewed research, to the extent practicable, to meet the needs of autistic children. It would have been practicable to use existing peer-reviewed research to make educational decisions about Student's program. However, there was no evidence that the District considered or utilized peer-reviewed research. Therefore, the District's offered programs in the February 19, 2008 and March 6, 2009 IEPs were not based on peer-reviewed research, to the extent practicable.

Parents' Right to Participate in the Educational Decision-making Process

26. Federal and state law require that parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. (20 U.S.C. § 1414(d)(1)(B)(i); Ed. Code, §§ 56304, 56342.5.) A district must ensure that the parent of a student who is eligible for special education and related services is a member of any group that makes decisions on the educational placement of the student. (Ed. Code, § 56342.5.) Among the most important procedural safeguards are those that protect the parents' right to be involved in the development of their child's educational plan. (*Amanda J. v. Clark County Sch. Dist.* (9th Cir. 2001) 267 F.3d 877, 882.)

27. A school district has the right to select a program for a special education student, as long as the program is able to meet the student's needs; IDEA does not empower parents to make unilateral decisions about programs funded by the public. (See, *N.R. v. San Ramon Valley Unified Sch. Dist.* (N.D.Cal. 2007) 2007 U.S. Dist. Lexis 9135; *Slama ex rel. Slama v. Indep. Sch. Dist. No. 2580* (D. Minn. 2003) 259 F.Supp.2d 880, 885; *O'Dell v. Special Sch. Dist.* (E.D. Mo. 2007) 47 IDELR 216.) Nor must an IEP conform to a parent's wishes in order to be sufficient or appropriate. (*Shaw v. Dist. of Colombia* (D.D.C. 2002) 238 F.Supp.2d 127, 139 [IDEA does not provide for an "education...designed according to the parent's desires."], citing *Rowley, supra*, 458 U.S. at p. 207.)

28. A school district is required to consider the results of a privately procured assessment when developing an IEP. (Ed. Code, § 56341.1.) However, the school district is not required to adopt its recommendations. (Ed. Code, § 56329, subd. (c).)

Issue 2(c): Did the District's March 6, 2009 IEP fail to offer Student a FAPE because the District did not consider Dr. Kelly's psychological evaluation?

Issue 5: Did the District's July 14, 2009 IEP amendment fail to offer Student a FAPE because the District refused to consider the results of the independent assessments from First Steps and Dr. Morris?

29. Pursuant to Factual Findings 23, 90, 91 and 92 and Legal Conclusions 26, 27 and 28, the District did consider Dr. Kelly's report at the March 6, 2009 IEP meeting. Dr. Kelly's psychological evaluation provided the District information that Student qualified for regional center services due to autism, and that Student might be eligible for special education services under the category of autistic-like behaviors. With that information, the District appropriately offered to have LACOE conduct a psychoeducational assessment that was educationally based because the fact that Student was autistic did not mean that he automatically qualified under the educational criteria of autistic-like behaviors. (*Victor Elementary School Dist. v. Student* (2008) Cal.Ofc.Admin.Hrngs. Case No. 2008020162.)

30. Pursuant to Factual Finding 139 and Legal Conclusions 26, 27 and 28, the District did consider the reports from Dr. Morris and First Steps at the July 14, 2009 IEP meeting. Dr. Morris' psychological evaluation provided the District with little new educationally relevant information that was not already contained in AST's, Dr. Kelly's and LACOE's reports. The District did consider Dr. Kelly's program recommendations, and the fact that the District did not adopt his recommendations did not mean that the District did not consider his report. Regarding the First Step evaluation, the District did consider the information, but did not agree with it based on information from AST's report. Further, First Steps' observations mirrored those in other assessments. Additionally, the District did not reject the goals proposed by First Steps, but wanted to discuss those goals at a subsequent IEP meeting, which never occurred. Therefore, the District considered the reports and did not deny Student a FAPE.

Behavior Intervention

31. There are many behaviors that will impede a child's learning or that of others that do not meet the requirements for a serious behavior problem requiring a behavior intervention plan. These less serious behaviors require the IEP team to consider and, if necessary, develop positive behavioral interventions, strategies and supports. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i) (2006); Ed. Code, § 56341.1, subd. (b)(1).) In California, a behavior intervention is "the systematic implementation of procedures that result in lasting positive changes in the individual's behavior." (Cal. Code Regs, tit. 5, § 3001(d).) It includes the design, evaluation, implementation, and modification of the student's individual or group instruction or environment, including behavioral instruction, to

produce significant improvement in the student's behavior through skill acquisition and the reduction of problematic behavior. (*Ibid.*) Behavioral interventions should be designed to provide the student with access to a variety of settings and to ensure the student's right to placement in the least restrictive educational environment. (*Ibid.*) If a student's behavior impedes learning, but does not constitute a serious behavior problem, the IEP team must consider behavior interventions as defined by California law. An IEP that does not appropriately address behavior that impedes a child's learning denies a student a FAPE. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 444 F.3d 1149; *Neosho R-V School Dist. v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028; Cal. Codes Regs., tit. 5, § 3001, subd. (f).)

Issue 4: Did the District's May 1, 2009 and May 15, 2009 IEPs fail to offer Student a FAPE because the IEPs did not contain an appropriate BSP and BIS, and OT services?

32. The FBA conducted by AST established that Student required a BSP to address his aggressive behaviors because these behaviors prevented him from making adequate educational progress. The District did not ensure that AST timely developed a BSP by the May 15, 2009 IEP meeting. No explanation was provided by the District regarding why it took until the July 14, 2009 IEP meeting for the District to offer a BSP when the needed information existed in AST's report presented at the May 1, 2009 IEP meeting, nor was the BSP ready by the May 15, 2009 IEP meeting, as promised on May 1, 2009. Therefore, pursuant to Factual Findings 119 through 124 and Legal Conclusion 31, the District failed to have an adequate BSP or BIS until July 2009, and Student was denied a FAPE.

33. Pursuant to Factual Findings 110 through 117 and Legal Conclusions 2, 3, and 4, Student required individualized OT services because of his lack of progress with his fine motor skills during the two years in the District's SDCs. Student still required hand-over-hand prompting to perform fine motor tasks of writing and cutting with scissors and, due to his attention deficits, Student had problems attending even small group sessions. However, Student did not establish that he required OT services in an outside clinic session because Student made good progress in the short time he received individual sessions at school. Therefore, the District's May 1, 2009 IEP denied Student a FAPE by not offering Student individual OT sessions.

Physical Restraint

34. California Code of Regulations, title 5, section 3052, subdivision (l), provides:

No public education agency, or non-public school or agency serving individuals pursuant to Education Code Section 56365 et seq., may authorize, order, consent to, or pay for any of the following interventions, or any other interventions similar to or like the following:

- (1) Any intervention that is designed to, or likely to, cause physical pain;
- (2) Releasing noxious, toxic or otherwise unpleasant sprays, mists, or substances in proximity to the individual's face;
- (3) Any intervention which denies adequate sleep, food, water, shelter, bedding, physical comfort, or access to bathroom facilities;
- (4) Any intervention which is designed to subject, used to subject, or likely to subject the individual to verbal abuse, ridicule or humiliation, or which can be expected to cause excessive emotional trauma;
- (5) Restrictive interventions which employ a device or material or objects that simultaneously immobilize all four extremities, including the procedure known as prone containment, except that prone containment or similar techniques may be used by trained personnel as a limited emergency intervention pursuant to subsection (i);
- (6) Locked seclusion, except pursuant to subsection (i)(4)(A);
- (7) Any intervention that precludes adequate supervision of the individual; and
- (8) Any intervention which deprives the individual of one or more of his or her senses.

Issue 3: During SY 2008-2009, did the District deny Student a FAPE through the use of a “restraint” chair in violation of Education Code sections 49001 and 56520-56524?

35. Pursuant to Factual Findings 99 through 101 and Legal Conclusion 34, the District violated Regulation 3052 on April 30, 2009, when Ms. Gutierrez placed Student in a chair and loosely tied him to the chair with the soft ties designed for postural support, which denied Student a FAPE. Ms. Gutierrez tied Student to the chair because of his aggressive behaviors towards his classmates at recess, and because Ms. Gutierrez was not able to redirect Student. Student did not suffer significant harm from this incident because he was only restrained for five minutes, until released by his Mother, who entered the classroom right as Ms. Gutierrez restrained Student in the chair, and was able to attend school subsequently with no ill effects. However, Ms. Gutierrez’s use of physical restraint revealed the District’s failure to train the long-tem substitutes on how to properly handle Student’s aggressive behaviors until AST started to provide consultative services.

Relief

36. ALJs have broad latitude to fashion equitable remedies appropriate for the denial of a FAPE. (*School Comm. of Burlington v. Department of Educ.* (1985) 471 U.S. 359, 370 [85 L.Ed.2d 385]; *Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.)

Reimbursement

37. 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 proper 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. Dept. of Educ.* (1985) 471 U.S. 359, 369-371 [85 L.Ed.2d 385].)

38. Parents may receive reimbursement for the unilateral placement if it is appropriate. (34 C.F.R. § 300.148(c)(2006); *Florence County Sch. Dist. Four v. Carter* (1993) 510 U.S. 7, 15-16 [126 L.Ed.2d 284].) The appropriateness of the private placement is governed by equitable considerations. (*Carter, supra*, 510 U.S. at pp. 15-16.) The placement need not provide the specific educational programming necessitated by the IDEA. (*Alamo Heights Indep. Sch. Dist. v. State Board of Educ.* (5th Cir. 1986) 790 F.2d 1153, 1161.)

39. A unilateral placement does not have to offer every service needed to maximize a student's potential. However, the unilateral placement does have to provide specialized instruction designed to meet the student's needs as well as any support services the student needs to benefit from that instruction. (*Gagliardo v. Arlington Cent. Sch. Dist.* (2d Cir. 2007) 489 F.3d 105, 112.) In *Gagliardo*, the private school offered the intensive reading and writing instruction that the student required, but it was unable to meet the student's need for treatment of his anxiety disorder. The Second Circuit held that the alternative chosen by parents was inadequate and that reimbursement was not appropriate. (*Id.* at pp. 113-114; see also, *Teague Indep. Sch. Dist. v. Todd L.* (5th Cir. 1993) 999 F.2d 127, 132-133.) A claim for reimbursement may fail if the student makes limited to marginal academic progress in the private placement. (*Corpus Christi Indep. School Dist. v. Christopher N.* (S.D.Tex. 2006) 45 IDELR 221, 106 LRP 27898.)

40. Reimbursement may be reduced or denied in a variety of circumstances, including whether a parent acted reasonably with respect to the unilateral private placement. (20 U.S.C. § 1412(a)(10)(C)(iii); 34 C.F.R. § 300.148(d)(2006).)

41. Pursuant to Factual Findings 8, 10, 11, 12, 16 through 37, 51 through 61, 65, 66 and 93 through 97 and Legal Conclusions 36 through 40, Parents are entitled to reimbursement for the costs of the home ABA program. The District failed to develop an educational program for over one-and-a-half years that would permit Student to make meaningful educational progress. Because of this failure, Student still had significant behavior, attention, academic and social-emotional deficits, especially regarding his ability to participate in group instruction because of his lack of fundamental skills. Student's excellent progress in the home ABA program in just a few months established that Student has the ability to learn needed skills with intensive instruction, and with these skills will be prepared to participate in group instruction.

42. Pursuant to Factual Findings 68 through 76 and Legal Conclusions 36 through 40, Student is entitled to partial reimbursement for privately obtained speech and language services due to the District's failure to provide adequate services from February 19, 2008, through November 21, 2008. Because Student only required 30 minutes of individualized speech and language sessions a week, Student's reimbursement is limited to the number of individual sessions not provided during this time. Therefore, Parents are entitled for privately obtained speech and language services from California State University, Long Beach, for \$481, and for services from Expressions, \$1,680. Regarding Parents' request for reimbursement for privately obtained speech and language services after Parents removed Student from the District in June 2009, Student did not contend that the District's speech and language services were not appropriate or that the District was not willing to provide Student with speech and language services agreed upon by the Parents in the March 6, 2009 IEP. Therefore, Parents are not entitled to reimbursement for privately obtained speech and language services for Student beginning with the 2009 ESY.

43. Pursuant to Factual Findings 77 through 83 and 110 through 117 and Legal Conclusions 36 through 40, Student is entitled to privately obtained OT services to address Student's fine motor deficits. However, Student did not establish that he required two 60-minute individual clinic sessions and one 60-minute school-based session a week, either as compensatory education or to make meaningful educational progress. The evidence established that Student required a 25-minute weekly individual session and a weekly 25-minute small group session to address his fine motor deficits. Parents are entitled to reimbursement based on this level of OT services not provided from February 19, 2008, through March 27, 2009, for \$990 for OT services from Kids in Motion.

44. Regarding Student's request for reimbursement for the cost of the private preschool, pursuant to Factual Findings 53, 63, 64 and 97 and Legal Conclusions 36 through 40, Student established that the District failed to provide Student a FAPE in the LRE because the District did not provide adequate mainstreaming opportunities. The District offered mainstreaming opportunities during recess, but did not provide support to ensure that Student was able to benefit from it. While the private preschool program does not provide Student with appropriate academic skills for kindergarten, it does provide Student with needed mainstreaming opportunities. Student requires a one-to-one aide to attend the preschool. Therefore, Parents are entitled to reimbursement for the cost of the private preschool with the one-to-one aide. However, Parents failed to provide adequate documentation of payment for the private preschool. Parent's reimbursement for the First Steps' aide is included in Legal Conclusion 41.

Compensatory Education

45. Appropriate equitable relief, including compensatory education, can be awarded in a due process hearing. (*School Comm. of Burlington v. Department of Education* (1985) 471 U.S. 359, 374; *Student W. v. Puyallup Sch. Dist.* (9th Cir. 1994) 31 F.3d 1489, 1496.) The right to compensatory education does not create an obligation to automatically

provide day-for-day or session-for-session replacement for the opportunities missed. (*Park, supra*, 464 F.3d at p. 1033 (citing *Student W. v. Puyallup Sch. Dist.*, 31 F.3d at 1496).)

46. Pursuant to Factual Findings 8, 10, 11, 12, 16 through 37, 51 through 61, 65, 66 and 93 through 97 and Legal Conclusion 45, Student is entitled to an award of compensatory education in the form of the continuation of the home ABA program through the end of the 2010 calendar year because Parents have not been able to afford to provide Student with sufficient ABA services. Student requires compensatory education because the District failed to assess Student in all areas of suspected disability, designate Student as eligible for special education services pursuant to the category of autistic-like behaviors, and develop an IEP that addressed Student's unique needs and permitted him to make meaningful educational progress. Based on First Steps' initial evaluation, progress in his home ABA program and his present deficits, the home ABA program shall be 25 hours a week, with 10 hours a month of program supervision and 10 hours a month of consultation services with Parents, school staff and other service providers.

47. Pursuant to Factual Findings 77 through 83 and 110 through 117 and Legal Conclusion 45, the District failed to provide Student with sufficient services to address Student's fine motor deficits by not providing him with direct OT services until March 27, 2009, even though the District should have provided Student with these services at the time of February 19, 2008 IEP. Therefore, Student is entitled to an additional 30 minutes a week of individual OT services, which may be provided by the District through the end of 2010 ESY. Because Parents have provided Student with private OT services, for which they shall receive reimbursement, as provided in Legal Conclusion 43, Student does not require additional OT services as compensatory education.

48. Pursuant to Factual Findings 68 through 76 and Legal Conclusion 45, Student is not entitled to compensatory speech and language services because the private services for which Parents shall receive reimbursement, as provided in Legal Conclusion 42, are sufficient to make up for the District's failure to provide adequate individualized speech and language services. In addition, Student has not challenged the level or adequacy of the District's speech and language services after the November 21, 2008 IEP.

ORDER

1. The District shall reimburse Parents for speech and language services from California State University, Long Beach, in the amount of \$481, and for services from Expressions, in the amount of \$1,680.

2. The District shall reimburse Parents for OT services from Kids in Motion for services through October 19, 2009, in the amount of \$990.

3. The District shall reimburse Parents for ABA and one-to-one aide services provided by First Steps through September 2009, in the amount of \$13,023.64.

4. The District shall provide Student through the end of the 2010 calendar year with a home ABA program from First Steps for 25 hours a week, with 10 hours a month for program supervision and ten hours a month for consultation services with Parents, school staff and other service providers, with no more than a two-week break.

5. The District shall provide Student through the end of the 2010 calendar year with 10 hours a week of one-to-one aide services from First Steps for Student to attend a general education kindergarten, working on the goals 1 through 14 and 20 through 24 identified in First Steps' July 1, 2009 evaluation.

6. District shall provide Student with OT services for 50 minutes a week through the end of the 2010 calendar year, with 25-minute small group sessions and 25-minute individual sessions, with an additional 30 minutes a week of individual OT as compensatory education through the end of 2010 ESY.

7. The District shall provide Student with speech and language services as agreed upon in the March 6, 2009 IEP.

8. The District may implement its BSP when Student is attending a general education classroom.

9. The District shall convene an IEP meeting no later than November 15, 2010, to make a formal IEP offer for the remainder of SY 2010-2011.

10. All other requests for relief of the Parents 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. Student fully prevailed on Issue 1(a)-(e), (g) and (h), Issue 2(a), (b) and (d)-(g), Issue 3 and Issue 4 and partially prevailed on Issue 1(f) and Issue 2(h). The District prevailed fully on Issue 1(i), Issue 2(c) and Issue 5. The District partially prevailed on Issue 1(f) and Issue 2(h).

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by this Decision. The parties to this case have the right to appeal this decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this decision. A party may also bring a civil action in United States District Court. (Ed. Code, § 56505, subd. (k).)

Dated: January 26, 2010

/s/

PETER PAUL CASTILLO
Administrative Law Judge
Office of Administrative Hearings