

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Consolidated Matters of:

BURBANK UNIFIED SCHOOL DISTRICT,

v.

PARENT on behalf of STUDENT,

OAH CASE NO. 2009080713

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BURBANK UNIFIED SCHOOL DISTRICT.

v.

PARENTS on behalf of STUDENT.

OAH CASE NO. 2009040479

**DECISION**

Administrative Law Judge (ALJ) Glynda B. Gomez, Office of Administrative Hearings (OAH), heard the above-captioned matter in Burbank, California on November 2-5, 2009, and November 9, 2009.

Student was represented by his Father (Father). Mother was present for half of each day of the hearing. Student did not attend the hearing. Burbank Unified School District (District) was represented by Constance Taylor, attorney at law. Jessica Fullerton, District special education director, was present for each day of the hearing. A Spanish language interpreter was present each day of the hearing for Mother's use.

District filed its first Request for Due Process Hearing on April 10, 2009. The District filed a second Request for Due Process Hearing on August 21, 2009. The matters were consolidated on September 8, 2009, and the hearing was continued to October 13, 14, 15, 19 and 20, 2009. On October 12, 2009, Student was granted an additional continuance for good cause and the matter was continued to November 2-5, 2009, and November 9, 2009.

A subsequent request for continuance by Student was denied on October 30, 2009. On November 2, 2009, Student filed another continuance request based upon his grandfather's surgery taking place on that day in another country. Student also filed a challenge for cause against the ALJ on the basis that the ALJ was prejudiced against him because she had denied his prior request for continuance. The record was opened on November 2, 2009. At that time, the challenge for cause was denied for failure to state a basis for disqualification and the hearing was dark for the remainder of the day to accommodate Student's family situation. Testimony and documentary evidence were taken on November 3-5, 2009 and November 9, 2009. The record was closed on November 23, 2009, after receipt of closing briefs from the parties.

## ISSUES

1. Were the District's academic, psychoeducational, functional analysis, occupational therapy (OT), adapted physical education (APE) and speech/language assessments appropriate?

2. Did the IEP, drafted at IEP meetings held between November 14, 2008, and April 6, 2009, offer Student a free appropriate public education (FAPE) in the least restrictive environment (LRE)?

## FACTUAL FINDINGS

### *Background*

3. Student is a ten-year-old boy who resides with his parents (Parents) within the geographical boundaries of the District. Student is eligible for special education as a child with autistic-like behaviors. At the time of the hearing, Student attended a special day class for the learning handicapped at Miller Elementary School (Miller SDC-LH) for four hours per day with the assistance of a one-to-one Applied Behavioral Analysis (ABA) aide. The ABA aide was placed with Student in September of 2008 as a result of a July 14, 2008 settlement agreement between Parents and District (settlement agreement). Student also received speech and language therapy and OT services.

### *Assessments*

4. District conducted an academic assessment, OT assessment, APE assessment, psychoeducational assessment, FAA, and speech and language assessment in the fall of 2008 pursuant to the settlement agreement and a July 14, 2008 signed assessment plan. The assessment plan identified areas of assessment as follow: academic/pre-academic performance, self help, social and emotional status, motor ability, speech and language, health, development, vision and hearing, functional analysis, and assistive technology. The assessment plan provided an explanation of the purpose of each assessment and identified the personnel responsible for each assessment area. The assessment plan also indicated that

Student's language was English. The consent for assessment provision specifically provided that a child cannot be assessed or placed into special education without parental consent. Father signed the assessment plan on behalf of Parents indicating consent and agreement. Parents were provided with a copy of the parental rights when they signed the assessment plan. By agreement, the assessment plan identified November 14, 2008 as the IEP date for presentation of the assessment results.

### *Academic Assessment*

5. An academic assessment was conducted by Michael English (English) on September 15, 2008.<sup>1</sup> English was Student's classroom teacher in the Miller SDC-LH for three years. English has 19 years of experience as a special education teacher with District. English earned a Bachelor of Science degree from Black Hills State College. He holds both a multiple subject teaching credential and a special education learning handicapped credential.

6. The academic assessment consisted of classroom observations and the administration of the Brigance Diagnostic Comprehensive Inventory of Basic Skills-Revised (Brigance) to Student. English had been trained in the administration of the Brigance and had administered prior editions of the tests many times. This was the first time he administered the revised version of the test. English persuasively testified that the test was age appropriate and appropriate for special education students, including Student, who had limited expressive language. The test was administered according to the test manual instructions. On the Brigance, Student performed in the below average range in all academic areas. The Brigance revealed relative strengths in the areas of visual discrimination and the ability to name body parts. English felt that the results accurately reflected Student's performance and ability based upon his knowledge of Student's classroom performance.

### *Psychoeducational Assessment*

7. The psychoeducational assessment was conducted by licensed school psychologist Joanna Pelino (Pelino). Pelino has a Bachelor of Arts degree in Sociology and Business and a Master's degree in Psychology from Azusa Pacific University. She has a multiple subject teaching credential and a pupil services credential for school psychology. Pelino has ten years of experience as a school psychologist with District and is certified as a Behavior Intervention Case Manager (BICM) by the California Association of School Psychologists. Pelino's duties included assessing students, conducting IEP meetings, and counseling students at various sites including Miller Elementary School.

8. Pelino's assessment was conducted over the period of September 27, 2008, to November 3, 2008, and included a review of school records and outside assessment reports, including a behavioral assessment report prepared by Cara Doyle, M.A. of the Center for Autism and Related Disorders dated January 21, 2008. Pelino also reviewed a report from

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<sup>1</sup> English's colleague Lisa Loscos was also present for the administration of the Brigance.

Daniel Shabani, Ph.D. dated March 30, 2007. Pelino conducted multiple classroom observations, administered the Southern California Ordinal Scales of Development (Ordinal Scales), Visual Motor Integration Test (VMI), Vineland Adaptive Behavior Scales Teacher Rating Form, Second Edition and reviewed the Brigance test data.

9. Although Student is exposed to several languages including Spanish, Russian and Hungarian in the home, school records, teacher observations and parental input established that Student's dominant language was English. The tests were administered in English. Parents chose not to provide information for the Vineland Adaptive Scales or to the assessor about home behavior based upon their belief that what happens in the home is different from school and not relevant to school services. Father advised Pelino that he thought Student had regressed over the two years prior to the assessment. According to Pelino, Student's Father expressed that he believed Student needed a learning environment with fewer distractions.

10. Testing was conducted on two separate occasions. Initially, Pelino attempted to conduct testing without Student's one-to-one ABA aide. Without the aide, Student was only able to attend to tasks for a maximum of 15 minutes at a time. With help from the aide, and short, structured work sessions, Student, was able to attend to task for administration of all of the tests. Pelino noted that during a two-month evaluation period, she saw "a great deal of improvement" in Student's ability to pay attention and remain seated, and observed less frustration, fewer vocalizations and banging of hands, improved verbal ability, and improved fine motor ability.

11. Pelino used the Ordinal Scales of Development as an alternative measure of intellectual assessment because Student was not able to tolerate typical standardized assessments and had limited expressive language skills. The Ordinal Scales are a criterion-referenced instrument that use an objective standard to measure the examinee's performance in relation to the standard. Each scale is divided according to the levels and stages of typical development and milestones. According to Pelino, the measure indicated that Student had cognitive functioning at the early stage of preoperational thinking. This is a stage typically demonstrated in children from the ages of two to four years of age. Pelino noted that at this level, children can match, understand parts of a whole, sort by varying classifications, coordinate symbolic play sequences and discriminate degrees of big and little. She noted that Student demonstrated associative reasoning skills by easily discriminating size and quantity, matching by color, shape, and pictured objects, classifying objects by color and shape, recognizing part/whole relationships by attempting to fix a broken toy, and assembling a two-piece toy. Student did not engage in coordinated symbolic play. Student's use of receptive and expressive language was difficult for Pelino to assess because of poor intelligibility. His expressive language skills were not strong enough for him to consistently identify items by name or to describe a picture. He was at times able to identify objects by pointing.

12. Student's level of adaptive and independent behavior was measured through informal observation, standardized questionnaires completed by the ABA aide and classroom

teacher, and a teacher interview. Student's overall adaptive behavior fell within the moderately delayed range. His overall daily living skills were significantly below age level expectancy. Pelino noted that Student's ability to stay on task and his behavior had greatly improved in the few months immediately before the assessment. The improvement seemed to coincide with the provision of a one-to-one ABA aide in August of 2008.

13. Pelino opined that Student continued to meet the eligibility requirements for special education as a child with autistic-like behaviors. Pelino recommended that the IEP team consider a different placement, a longer school day, alternative means of communication such as the picture exchange communication system (PECS), use of a sensory diet, and behavior intervention.

### *Functional Analysis Assessment*

14. School Psychologist Pelino also conducted an FAA of Student. Behaviors of concern for Student were: noncompliance with adult instruction, loud and distracting screaming, running, and biting himself when frustrated. Pelino observed Student on five separate occasions for a total of 120 minutes of direct behavioral observation. Her assistant also observed Student for a total of 120 minutes. Observation occurred in the classroom, on the playground, in line for lunch, and during recess breaks.

15. Pelino and her assistant did not observe Student striking any other individual in the classroom. On one occasion, in leaving the room for a break, Student scratched a staff member when trying to grab her. According to Pelino's data, Student screamed approximately 10 times per hour and engaged in a humming type of sound. The humming did not appear to impede his ability to learn or complete tasks. Pelino did not consider the humming a maladaptive behavior. Pelino noted that Student bit and chewed on his hands at times. She noted that the behavior varied significantly from observation to observation and occurred most often when he was not engaged in an activity or task with a staff person.

16. According to Pelino, the consequence for banging or screaming was that the aide redirected Student by asking him what he was supposed to be doing. She distracted him with a preferred activity such as a puzzle piece or asked for "quiet hands" or said "ready to work." According to Pelino, the techniques seemed to work well. When Student appeared to be experiencing fatigue, the aide asked him if he needed a break. He was able to nod "yes" or "no" in response to the question and was able to independently ask for a break by using his break card. Breaks greatly reduced his anxiety and helped him settle down to work at tabletop activities. When Student bit his hands, the teacher or the aide responded with "quiet hands" and he immediately dropped his hands to his lap.

17. Pelino evaluated ecological factors including physical setting, social setting and interaction, nature of instruction, communication factors, scheduling factors, degree of independence, degree of participation, and degree of choice. Pelino concluded that Student demonstrated some minor aggression such as hitting his hands on his desk or legs, screaming

out and self-injurious behavior of biting his hands and fingers. The behaviors were seen as a method of escaping or avoiding an extended period of performance and a signal of a need for a break. Pelino opined that the behaviors were an aspect of Student's autism and difficulty regulating sensory information. As such, the behaviors were self-soothing techniques. According to Pelino, the amount of time that Student spent engaged in those behaviors had decreased significantly since the beginning of the school year when the aide was placed with Student. Student's ability to remain on task for additional time had helped him make progress in speech and OT. Pelino opined that Student was progressing in all areas and did not need a positive behavioral intervention plan to address the behaviors. Pelino recommended that Student be provided with an alternative means of communication such as PECs or signs until his speech was more intelligible.

### *Occupational Therapy*

18. The OT assessment was conducted by Tina Tran, a licensed OT therapist employed by District. At hearing, Greta Binkley, Tran's supervisor, testified about the appropriateness of the assessment. Tran did not testify. Tran assessed Student using observation, The Observation of Hand Skill of the "K&1" Child (K&1 Child), previous assessment data, teacher reports, Student work samples, and the Sensory Processing Measure (SPM).

19. Fine motor and hand skills were assessed using K&1 Child, which is a checklist of ten hand skills that should either be present or emerging in typically developing children by kindergarten or first grade. Student's overall dexterity and fine motor capability were fully functional but his participation in fine motor tasks was diminished due to his attention problems, related sensory processing deficits, and lack of motivation. Student demonstrated typical fine motor skills except as to the control and grasp of markers and pencils. Student demonstrated a poor grasp of the markers and pencils, which prevented him from fully controlling them.

20. Student needed hand-over-hand assistance for visual motor skills such as building a block tower and additional guidance and verbal cues to draw a square. In her assessment report, Tran opined that there were no standardized assessment tools appropriate for assessment of Student's visual motor skills. Student was compliant, but noticeably frustrated with pre-writing tasks such as drawing a square. His frustration manifested itself in vocalizations and hand tapping on the desk.

21. Tran opined that gross motor skills were an area of relative strength for Student. He was able to ascend and descend stairs with alternating feet, run, hop, and jump with good coordination. Student had more difficulty with crossing the midline. The inability to cross the midline is often associated with motor planning deficits. Motor planning is the ability to plan and sequence motor actions. Tran found it difficult to precisely assess Student's motor planning because he was not able to sustain attention or to follow her directions. During the assessment, she noted that Student had low muscle tone in his trunk area. However, he was able to sit up with good posture and was able to transition to various

tasks and postures without difficulty from a seated position. Accommodations had been made in the classroom for Student's low muscle tone. In the classroom, he used an adapted therapy ball chair to make him more comfortable sitting at a table for extended periods of time.

22. Tran opined that Student had made good progress in the area of self-organization since the last evaluation with the help of behavior intervention and sensory strategies. In the past, Student had not been able to remain seated long enough to engage in learning due to wandering and sensory seeking behaviors including jumping, hopping, and hand flapping. Tran observed that Student was able to sit and participate in individualized instruction for up to 15 minutes with brief intermittent breaks and was easily redirected back on task with verbal and/or physical cues. At the time of the assessment, Student was not able to remain seated and participate in classroom group lessons without his aide.

23. Student's sensory processing integration was evaluated using observation and the SPM. The SPM provides data on the neurobehavioral function of school-aged children five to twelve years of age. It is a rating scale which addresses a wide range of behaviors and characteristics related to sensory processing, social participation, and praxis. Each scale contains statements which are completed with an indication of how often the targeted behavior occurs (never, occasionally, frequently, always). Student's ABA aide completed the checklist because Parents did not want to complete rating scales or provide information about Student's performance at home. Tran reasoned that the ABA aide could complete the checklist because she worked closely with Student in the school and home, and was the most familiar with his behavior. Student scored in the typical range in the areas of vision, touch, body awareness and balance. Student's SPM scores revealed some problems in the area of hearing and a definite dysfunction in social participation where the ABA aide reported that he did not use or understand humor, did not shift conversation topics in accordance with peer interest, and only occasionally entered into play with peers, had friends or chose to be with friends. Student required adult prompts to engage with peers.

24. In clinical observations, Tran opined that Student had a high sensitivity to sound. In response to increased sound, Student would place his hands over his ears and either hum or make some type of noise to drown out environmental sounds. He presented with low registration and a high need for vestibular (movement through space) and proprioceptive (position in space) movement. These needs manifest in his need to sit on the edge of his chair or on his feet and his need to move around the room, turn his head, bounce or clap. Tran also opined that Student was not aware of force and had a diminished tactile sense, which manifest in a tolerance for biting himself when frustrated.

25. Tran found that Student had relative strengths in gross motor skills and fine motor ability with the exception of pencil grasp. She noted that he exhibited delays in prewriting skills as well as deficits in sensory processing and attention resulting in difficulties in organization of behavior. Tran recommended that Student be provided with OT to support his academic program.

### *Adapted Physical Education*

26. The APE assessment was completed by District APE teacher Emily Curran. Curran received a Bachelor of Science degree in Physical Education from Westfield State College and completed graduate level coursework in Adapted Physical Education at California State University at Northridge. She has a single subject clear credential in physical education and an APE credential. Curran has nine years of experience as a District APE teacher, three years of experience as an APE teacher in Massachusetts and three years of experience as a recreational therapist.

27. Curran used the Test of Gross Motor Development, edition II (TGMDII) and observation to conduct an assessment of Student on September 3, 2008, and October 23, 2008. The TGMDII is administered to children ages three years to ten years and 11 months to evaluate elementary school level physical education skills in locomotor skills and object control. According to Curran, Student was able to run with correct arm movement and foot placement, but was not able to hop or leap. His galloping and jumping skills were emerging. Based on the above, Student's locomotor skills were below the first percentile for his age group. She saw Student catch a four inch ball. She saw emerging kicking and "T" ball batting skills. When assisted hand-over-hand, Student was able to swing a bat. Student was able to drop and catch a basketball 20 consecutive times. He was not able to dribble with one hand, but was able to roll the ball and had beginning level throwing skills. Based on the above, Student's object control skills were below the first percentile for his age group.

28. Curran used one-step commands and demonstration during the assessment. Curran noted relative gross motor strengths in sliding sideways, kicking a ball, and catching a ball. She observed weaknesses in the skills of hopping, throwing and dribbling. Curran recommended Student be given APE once a week for 30 minutes with emphasis on locomotor skills and object control skills.

### *Speech and Language*

29. District speech and language pathologist Ilene Weinstein (Weinstein) conducted a speech and language assessment of Student on October 3, 2008, and October 10, 2008. Weinstein received a Bachelor of Arts in Communications from the University of Pittsburg and a Master of Arts degree from Northwestern University in Communications Disorders. She has a rehabilitative services credential with a special day class authorization. Weinstein is a licensed speech and language pathologist with 30 years of experience in school settings. She also has a certificate of clinical competence from the American Speech and Hearing Association (ASHA). Weinstein assessed Student using The Receptive One Word Picture Vocabulary Test, the Auditory Comprehension Subtest of Preschool Language Scale (PLS), observations and a review of progress notes from her three years of speech therapy sessions with Student.

30. Weinstein has administered the PLS approximately twice a week for four years and has administered the Receptive One Word Picture Vocabulary Test twice a month for nine years. Weinstein found Student to have needs in the areas of articulation, receptive language, expressive language, pragmatics, syntax, morphology and semantics. She noted that Student had severe speech and language impairment although he had recently accelerated in his progress. She believed his progress was due to a decrease in behavioral issues.

31. Weinstein did not find any structural abnormalities with Student's mouth. She found that he used appropriate volume during structured activities, but spoke in a monotone with little or no inflection. Student's fluency was not assessed because he did not have spontaneous expressive speech. Student could imitate a model of two- to three-word utterances. In that context, his fluency was within normal limits, but otherwise Student did not have intelligible expressive speech to measure. He was able to vocalize and imitate some sound and oral movements such as lip closure and tongue elevation. He was able to respond to cues such as "put your lips together" to form a "p" sound and "blow the air out" to make the "s" sound. Student had started to imitate sounds and words.

32. Student received a standard score of 55 with an age equivalent of one year and eight months on the Receptive One Word Picture Vocabulary Test. He needed visual and auditory prompts to focus and look at all pictures, but Weinstein believed that he understood the tasks presented. The auditory comprehension subtest of the PLS was administered to ascertain information about Student's auditory comprehension skills. Student was able to follow routine and familiar directions with cues. He was not able to understand verbs in context, recognize actions in pictures, understand pronouns, understand use of objects or simple descriptive concepts which are typically accomplished by the age of two years and 11 months.

33. At the time of the assessment, Weinstein had worked with Student for two and one-half years, four times per week. She noted that, initially, Student did not imitate speech and communicated using vocalizations, facial grimaces, head nods and gestures. He showed little interest in activities and/or communication about them. He also displayed inappropriate behaviors including mouthing objects, placing his hands over his ears when he heard loud noises, hand flapping, and repetitive actions with objects. When frustrated, he bit his fingers, yelled, cried, stood up, paced, and attempted to scratch or hit other students or staff. He was not able to attend to simple direction. At the time of the assessment, Student's inappropriate behaviors had decreased to the point that he could actively participate in speech therapy for 30 minutes at a time with varying degrees of prompting. Weinstein found that he could follow simple directions, match pictures to pictures, match objects to a field of pictures, identify red, yellow, green and blue colors and objects, identify and label body parts, identify and name foods, identify transportation vehicles, identify and label some action verbs spontaneously including *run*, *swing* and *throw*. He was able to imitate models of *sleep*, *slide*, *read*, *walk*, *kick*, *catch* and *sit*. She noted that, with prompts, Student was able to verbally respond to yes/no and "what" questions. At the time of the assessment, he was able to combine two to three words in response to a question with picture symbols as prompts.

Weinstein also noted that Student was beginning to request help using eye contact, body orientation and verbalization.

34. At hearing, Weinstein credibly opined that Student was making progress. She further opined that Student had severe deficits in expressive and receptive language. Weinstein believed that Student's need for speech and language therapy four times a week for 30 minutes a session was a substantial amount of pull-out speech and language service. She opined that he would benefit from a language enriched environment where he would receive language instruction embedded in the curriculum in addition to the individual speech and language therapy.

#### *2008-2009 IEP*

##### *November 14, 2008 IEP meeting*

35. On November 14, 2008, an annual IEP meeting was held for Student. The IEP meeting was scheduled pursuant to a settlement agreement and was for the purpose of determining placement. Parents, assistant principal Jennifer Katz, APE teacher Curran , Autism Spectrum Therapies (AST)<sup>2</sup> program supervisor Gina Chang (Chang), District's attorney Constance Taylor (Taylor), OT coordinator Greta Binkley (Binkley), special education Teacher English, speech and language pathologist Weinstein, school psychologist Pelino and special education director Jessica Fullerton attended the IEP meeting. The IEP team discussed parental concerns, the IEP process, a parental request for classroom observation and the schedule of presentation of assessment reports. After the initial discussions, assessment reports were presented by APE teacher Curran, special education teacher English, speech pathologist Weinstein and school psychologist Pelino. AST personnel presented a progress report for the September to October 2008 time period. The report indicated that Student had met four of his 27 IEP goals and had made progress on benchmarks for 22 of the goals. Student also made progress on all additional goals established by AST. Parents accepted the reports without objection. At the conclusion of the meeting, the IEP team determined that the ABA aide provided by AST services and placement at Miller SDC-LH would remain in place until the conclusion of the IEP process. The IEP team agreed to reconvene on December 9, 2008.

##### *December 9, 2008 IEP meeting*

36. Late in the afternoon on December 8, 2008, Parents sent a facsimile letter to District indicating that Parents could not attend the scheduled December 9, 2008 IEP meeting and requested that it be rescheduled. The letter was not received by special education director Fullerton until the morning of December 9, 2008, after all of the District members of the IEP team had assembled. Fullerton had the IEP team members who were present sign in. However, Fullerton advised the team that the meeting would be rescheduled per Parents' request.

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<sup>2</sup> AST was the Non-Public agency (NPA) provider of the ABA behavioral aide.

*January 26, 2009 IEP meeting*

37. The IEP team reconvened on January 26, 2009. Parents, APE teacher Curran, AST division coordinator Brittany Wolfson (Wolfson), AST program supervisor Chang, AST program supervisor Dana Bacharach (Bacharach), District's attorney Taylor, OT coordinator Binkley, special education teacher English, speech and language pathologist Weinstein, school psychologist Pelino, physical therapist Traci Martinez, special education director Fullerton, Miller principal Judy Hession (Hession) and Wellspring OT therapist Miju Kim (Kim) attended the IEP meeting.

38. At this meeting, Weinstein presented a report from Dr. Lehrhoff of Lehrhoff & Associates, a certified non-public agency (NPA) providing clinic-based speech and language. According to Lehrhoff's report, Student had achieved 50 percent progress on his two speech and language goals which were: 1) to identify an object/picture when directed from a field of three to five pictures, and 2) to indicate a need for assistance using gestures or verbalization with 40 percent accuracy. According to Lehrhoff's report, Student needed to learn to follow two-step commands and had made good progress on his goals, but needed more time. In the report, Lehrhoff also opined that Student needed to increase his receptive vocabulary. Lehrhoff noted that Student could count from one to 13, had started to put three to four words together, and was learning to use the phrase "I want." In classroom activities, Student was able to follow simple two-step directions with minimal to moderate prompting.

39. Kim gave a report on Student's progress in clinic-based OT. Kim reported that Student was able to follow three- to four- step directions for preferred activities, but that Student displayed hyper-responsiveness and discomfort with tactile mediums, such as touching shaving cream and having rice poured on him. Father did not feel such activities were needed and did not want Student to participate in tactile activities as described. OT supervisor Binkley explained the purpose of tactile activities and expressed that such activities would be beneficial to Student.

40. Binkley presented the OT clinic report from NPA Glendale Adventist Therapy. The therapists from Glendale Adventist were available to the IEP team by telephone. According to the report, Student had achieved portions of both OT goals. In the report, OT therapist Stephanie Sayes indicated that Student had difficulty sequencing more than a two-step direction without moderate to maximum assistance. Student had partially achieved the goal of imitating controlled coloring/drawing of lines with a grasp 50 percent of the time. The report noted that Student's difficulty with visual, perceptual and spatial organizational skills contributed to his problems with pencil grasp. According to the report, Student did not need sensory input for organization of behavior. Therefore, clinic equipment and clinical OT were deemed unnecessary. Instead, the recommendation was for two, one-hour sessions of school-based OT per week focusing on fine motor skills. Parents disagreed with the recommendation to discontinue clinic-based occupational therapy. Binkley opined that Student had a continuing need for sensory/vestibular input, but that the purpose of the clinic-based therapy had been achieved and therefore, a clinic was not required to meet

Student's needs. The IEP team drafted goals in the areas of OT and speech and language. The team agreed to reconvene on February 2, 2009 to continue work on the IEP.

*February 2, 2009 IEP meeting*

41. The IEP team reconvened on February 2, 2009. In attendance were Parents, AST director Andrea Ridgeway, AST program division coordinator Wolfson, general education teacher Nancy Bruin (Bruin), District's attorney Taylor, OT coordinator Binkley, special education teacher English, speech and language pathologist Weinstein, school psychologist Pelino, special education director Fullerton and Miller principal Hession. After evaluating all assessment data, the IEP team finalized statements of Student's present levels of performance and identified needs in the areas of academics/pre-academics, functional academics, language and communications, social emotional skills, vocational skills (including time on task), and motor skills development. Goals were drafted in all identified areas of need and are not at issue in this case. Based upon the assessed needs and goals, a discussion of services and placement ensued.

42. At the time of the IEP meeting, Student was receiving speech and language therapy four times per week for 30 minutes per session in school and three times a week for 60 minutes per session from an NPA pursuant to the settlement agreement. Weinstein recommended that Student receive four 30-minute sessions of speech and language therapy in school and reduce the NPA speech and language therapy to two 60-minute sessions per week.

43. At the time of the IEP meeting, Student was receiving OT from two different NPA providers pursuant to the settlement agreement. Binkley recommended that Student's OT services be provided by the District in two weekly 60-minute sessions. She also recommended that there be a one time consultation between District OT staff and Student's NPA providers.

44. To address Student's APE needs, APE teacher Curran recommended that Student receive 30 minutes per week of APE services and compensatory APE services for the time period of November 14, 2008, through completion of the IEP because APE had not been provided during the weeks the IEP team had been meeting.

45. At the time of the IEP meeting, Student only attended school from 8:30 a.m. to 12:30 p.m. each day for a total of 1200 minutes per week. Student received behavioral support from an ABA aide during the entire school day and for 600 minutes weekly in the home. The District members of the IEP team proposed incrementally increasing Student's school day until he reached full day attendance from 8:30 a.m. to 3:00 p.m. with aide support throughout the school day and decreasing aide support at home.

46. After discussion of services and an incremental increase to full day attendance at school, the IEP team discussed placement. General education teacher Bruin discussed the general education curriculum. She opined that the curriculum content of the general

education classroom was too advanced for Student based upon his developmental level. The entire IEP team was in agreement with her analysis and conclusion. At hearing, both parties acknowledged that placement in a general education classroom was not appropriate for Student and such placement is not sought by either party.

47. The IEP discussion next moved to a discussion of placement options. Student had been receiving most of his instruction on an individual basis in the Miller SDC-LH classroom and had not been able to participate in the group lessons thus far. At the end of Student's third grade year, he would need to transition to another program because the Miller SDC-LH was for first through third grade only and Student would be entering fourth grade. Most students from the Miller SDC-LH class that student attended would matriculate to a fourth through sixth grade SDC-LH at Jefferson elementary school. The IEP team did not consider an SDC-LH class to be an appropriate setting for Student. Despite what had been described as his "wonderful progress" on his IEP goals, the IEP team concluded that Student was getting very little out of his Miller SDC-LH placement because most of his instruction was done individually. District members of the team believed that Student needed a lower student-to-teacher ratio than the typical SDC-LH class provided and that Student needed a "language enriched environment." District IEP team members concluded that, as the SDC-LH curriculum became more advanced in fourth grade, Student would fall even further behind the class.

48. Other less restrictive public school placement options in the District such as a special day class for the severely handicapped (SDC-SH) were not considered. District SDC-SH classes are designed for students who have more severe needs than the population typically served by the SDC-LH classes. English testified that a District SDC-SH class could meet Student's needs. English opined that, although a District SDC-SH would be appropriate for Student, he felt that Villa Esperanza was a better placement because he believed that Student had maximized his potential based upon his cognitive ability and needed a more functional curriculum. English believed that Student would be able to function without a one-to-one aide at Villa Esperanza because he would be with students closer to his own cognitive and functional level in a class with a lower student-to-teacher ratio.

49. Although Student did not interact with other Miller SDC-LH students during the classroom lesson, he had developed a relationship with a general education student at recess. With the prompts of the ABA aide, Student regularly played a game of catch with a general education student. He seemed to enjoy the interaction, but was not able to sustain it without prompts. English acknowledged that Student would not have the opportunity to interact with general education students at all at Villa Esperanza and would have only a small number of same aged peers with which to interact at Villa Esperanza. In contrast, a District placement would provide Student access to general education students and a larger number of same aged peers than would Villa Esperanza.

50. District members of the IEP team recommended that Student be placed in a certified non-public school (NPS). The District team members concluded that Villa Esperanza in Pasadena, California, approximately 20 miles from Student's home, was the

most appropriate NPS. The District members of the IEP team opined that Student would need time to transition to Villa Esperanza and fade out the one-to-one ABA aide. Accordingly, they devised a schedule for transition from public school to the NPS and fading of the aide.

51. The District IEP team members offered the following placement and services:

A. *From 11/14/08 to 2/2/09:*

- (1) Placement in the Miller SDC-LH from 8:30 a.m. to 12:30 p.m., 1200 minutes weekly;
- (2) Behavior intervention therapy, individual, by NPA, 1200 minutes per week in school;
- (3) Behavior intervention therapy, individual, by District, 150 minutes per week (to cover lunch break) in school;
- (4) Behavior intervention therapy, individual, by NPA, 600 minutes per week in home;
- (5) Behavior intervention supervision, consultation, by NPA, 180 minutes per week;
- (6) Speech therapy, individual, by District, 30 minutes, four times per week, 120 minutes per week at school;
- (7) Speech therapy, individual, by NPA, 60 minutes, two times per week, 120 minutes per week at the NPA;
- (8) OT therapy, individual, by District, 60 minutes, two times per week, 120 minutes per week at school;
- (9) OT therapy, consultation, by District, 30 minutes, once a week;
- (10) APE, group, by District, 30 minutes once a week at school; and
- (11) Transportation.

B. *From 2/3/09 to 2/27/09:*

- (1) Placement at Miller SDC-LH from 8:30 a.m. to 1:45 p.m., 1575 minutes weekly;
- (2) Behavior intervention therapy, individual, by NPA, 1575 minutes per week in school;
- (3) Behavior intervention therapy, individual by District, 150 minutes per week (to cover lunch break) in school;
- (4) Behavior intervention therapy, individual, by NPA, 225 minutes per week in home;
- (5) Behavior intervention supervision, consultation, by NPA, 180 minutes per week;
- (6) Speech therapy, individual, by District, 30 minutes, four times per week, 120 minutes per week at school;
- (7) Speech therapy, individual, by NPA, 60 minutes, two times per week, 120 minutes per week at the NPA;

- (8) OT therapy, individual, by District, 60 minutes, two times per week, 120 minutes per week at school;
- (9) OT therapy, consultation, by District, 30 minutes, once a week;
- (10) APE, group, by District, 30 minutes once a week at school; and
- (11) Transportation.

C. *From 3/2/09 to 6/4/09:*

- (1) Placement at Miller SDC-LH from 8:30 a.m. to 3:00 p.m. except on Tuesdays when school is out of session early, 1950 minutes weekly;
- (2) Behavior intervention therapy, individual, by NPA, 1800 minutes per week in school;
- (3) Behavior intervention therapy, individual, by District, 150 minutes per week (to cover lunch break) in school;
- (4) Behavior intervention supervision, consultation, by NPA, 180 minutes per week;
- (5) Speech therapy, individual, by District, 30 minutes, four times per week, 120 minutes per week at school;
- (6) Speech therapy, individual, by NPA, 60 minutes, two times per week, 120 minutes per week at the NPA;
- (7) OT therapy, individual, by District, 60 minutes, two times per week, 120 minutes per week at school;
- (8) OT therapy, consultation, by District, 30 minutes, once a week;
- (9) APE, group, by District, 30 minutes, once a week at school; and
- (10) Transportation.

D. *Final two weeks of school/Transition to Villa Esperanza, 6/8/09 -6/19/09:*

- (1) Placement at Villa Esperanza NPS five times per week, 1800 minutes per week;
- (2) Behavior intervention therapy, individual, by NPA, five times per week at school, 1800 minutes per week;
- (3) Speech therapy, individual, by NPS, 30 minutes, four times per week, 120 minutes per week at school;
- (4) Speech therapy, individual, by NPA, 60 minutes, two times per week at NPA, 120 minutes per week;
- (5) OT therapy, individual, by NPA, 60 minutes, one time per week;
- (6) OT therapy, consultative, by NPA, 30 minutes, one time per week at NPS;
- (7) APE, group, by NPS, 30 minutes, one time per week; and
- (8) Transportation.

E. *Extended School Year, 7/6/09-7/9/09:*

- (1) Placement at Villa Esperanza NPS four times per week, 1440 minutes per week;
- (2) Behavior intervention therapy, individual, by NPA, four times per week, 720 minutes per week at school;
- (3) Behavior intervention supervision by NPA, 180 minutes per week;
- (4) Speech therapy, individual, by NPS, 30 minutes, four times per week, 120 minutes per week at school;
- (5) Speech therapy, individual, by NPA, 60 minutes, two times per week, 120 minutes per week at NPA;
- (6) OT therapy, individual, by NPA, 60 minutes, one time per week, 60 minutes per week at NPS;
- (7) OT therapy, consultative, by NPA, 30 minutes, one time per week;
- (8) APE, group, by NPS, 30 minutes, one time per week; and
- (9) Transportation.

F. *Extended School Year, 7/13/09-8/14/09:*

- (1) Placement at Villa Esperanza NPS four times per week, 1440 minutes per week;
- (2) Speech therapy, individual, by NPS, 30 minutes, four times per week at NPS, 120 minutes per week;
- (3) Speech therapy, individual, by NPA, 60 minutes, two times per week, 120 minutes per week at NPA;
- (4) OT therapy, individual, by NPA, two times per week, 120 minutes per week at NPS;
- (5) OT therapy, consultative, by NPA, 30 minutes, one time per week at NPS;
- (6) APE, group, by NPS, 30 minutes, one time per week at NPS; and
- (7) Transportation.

G. *School Year 2009-2010 (from 9/8/09 to 11/13/09):*

- (1) Placement at Villa Esperanza NPS five times per week, 1800 minutes per week;
- (2) Speech therapy, individual, by NPS, 30 minutes, four times per week, 120 minutes per week at NPS;
- (3) Speech therapy, individual, by NPA, 60 minutes, two times per week, 120 minutes per week at NPA;
- (4) OT therapy, individual, by NPA, 60 minutes, one time per week at NPS;
- (5) OT therapy, consultative, by NPA, 30 minutes, one time per week at NPS;
- (6) APE, group, by NPS, 30 minutes, one time per week at NPS; and
- (7) Transportation.

52. The IEP team agreed to reconvene on March 9, 2009 to discuss the offer and to get parental input about the offer. In the interim, Parents agreed to notify special education director Fullerton if they decided to agree to implementation of any portion of the IEP.

53. On March 9, 2009, the IEP team reconvened as scheduled. Parents did not attend the meeting. The District members of the team waited for Parents for one hour and then cancelled the meeting. Fullerton called the parents and left a message that the team had convened, waited and was available to reconvene on March 19, 2009. The District members of the IEP team noted and corrected clerical errors in the draft IEP document. A copy of the corrections and a corrected IEP draft were provided to Parents by mail.

54. On March 10, 2009, Parents participated in a school conference. During the conference, Parents requested an opportunity to conduct an observation of Student's class. Miller principal Hession scheduled an observation for March 17, 2009, from 10:15 a.m. to 11:15 a.m. However, Parents did not appear for the observation.

55. On March 18, 2009, Father verbally notified principal Hession that Parents would not attend the rescheduled IEP meeting on March 19, 2009, and requested that the meeting be rescheduled again. Later that day, District notified Parent by letter of a rescheduled April 6, 2009 IEP meeting indicating that the meeting would proceed with or without Parents and that telephonic participation was available. Father sent a letter to District dated April 2, 2009, advising that Parents were not available on April 6, 2009.

56. The IEP team reconvened on April 6, 2009. Parents did not attend the IEP meeting. The District team members proceeded with the meeting in the absence of Parents. In attendance were AST program division coordinator Wolfson, AST program supervisor Bacharach, District's attorney Taylor, OT coordinator Binkley, special education teacher English, speech and language pathologist Weinstein, school psychologist Pelino, special education director Fullerton, APE teacher Curran, and Miller principal Hession. The IEP team finalized the IEP document without changes.

57. On April 6, 2009, Principal Hession wrote Father a letter offering additional one-hour observation times on April 10, 2009, April 13, 2009, April 14, 2009, and April 17, 2009. Parents conducted their observations on the scheduled days of April 10, 13, and 14, 2009. Parents did not appear for the April 17, 2009 observation.

58. On April 7, 2009, special education director Fullerton mailed a copy of the completed IEP to Parents with a letter requesting that Parents review, sign and return the IEP.

## *Villa Esperanza Observations*

59. Student's expert Robert J. Rome, Ph.D. (Rome) is a licensed psychologist with an extensive background in assessment of children. Rome earned a Bachelor of Arts degree in Hebrew Literature from the University of Judaism in 1972, a Bachelor of Arts degree in Political Science from the University of Southern California in 1970, a Master of Arts in Political Science from the University of California at Los Angeles, a Rabbi and Master of Arts in Rabbinic Literature from the Jewish Theological Seminary of America in 1975, and a Doctorate in Psychology from the United States International University (now Alliant International University) in 1983. Rome has a long history of association with the North Los Angeles County Regional Center including 20 years as a vendor psychologist, three years as a full-time consulting psychologist and service as the acting chief of psychological services in 1991. He also maintains a private psychological and educational consulting practice.

60. Rome observed Student in his office and in the SDC-LH fourth grade classroom at Jefferson Elementary School within District.<sup>3</sup> Rome also observed the proposed placement at Villa Esperanza. He reviewed Student records and informally assessed Student in his office. According to Rome, Student was non-verbal and was able to attend to task for 15 to 30 minutes at a time. Rome opined that the school records showed Student had made progress on his IEP goals and was obtaining a benefit from his placement in the SDC class. According to Rome, Student needed a longer school day and continued assistance of an ABA aide to progress. Rome accompanied Father to observe the proposed placement at Villa Esperanza. Both felt overwhelmed by the smell of feces in the lobby and a chaotic environment. Rome observed two buses of adult clients entering Villa Esperanza through the general lobby area. He observed large adult clients flailing their arms around, hitting other people and requiring restraint. According to Rome, many of the clients appeared to be physically disabled, low functioning and acting out physically. In order to reach the classroom proposed for Student, Rome observed that Student would be required to use the same hallway that the adult clients used and would have continuing contact with the adult clients as they made their way to various therapy rooms and activities around the campus. Rome considered this aspect of the campus and the physical layout of the campus to be a safety concern for Student.

61. Rome observed the multi-grade classroom proposed for Student. He observed six students in the classroom. There were no materials on the walls due to concerns that students would rip things off the walls. There were no computers available for student use. The students did not appear to be engaged in a group lesson. Instead, they were working on individualized materials. Most of the students appeared to be non-verbal. One Student was disrobing, another was screaming, and the others were distracted or not engaged. The students sat at a table and did not have individual desks or books. On the playground, the students did not interact with each other. They sat on benches or walked around. Rome

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<sup>3</sup> This was Student's stay-put placement. When he progressed to fourth grade for the 2009-2010 school year, he was placed in the Jefferson SDC-LH from 8:30 a.m. to 12:30 p.m., a shortened day, which was a close approximation to the Miller SDC-LH that Student had been in at the time of the filing of the first due process hearing request.

opined that the playground equipment was the size typically used for preschoolers. The students did not play with or have access to balls or other recreational equipment during his observation.

62. At the Miller SDC-LH, with prompts from the ABA aide, Student regularly engaged in a game of catch with a particular general education student and seemed to enjoy the interaction. Based upon the strong progress that Student had shown once an ABA aide was placed in the SDC classroom, school records, and the observations Rome conducted of Student in an SDC-LH classroom and observations of the proposed Villa Esperanza program, Rome opined that the proposed program at Villa Esperanza was not appropriate and might result in regression. Instead, Rome opined that Student would be better placed in a full day SDC-SH class with appropriate related services in OT and speech and language, with the assistance of a one-to-one ABA aide.

63. Father was concerned about the lack of balls, because with the help of the aide Student had regularly engaged in a game of catch with a typically developing student during recess, because object control was one of his identified areas of need. Similarly, Student had expressed a desire to use computers and none were available at Villa Esperanza.

64. The observations of Rome and Father deserve considerable weight because the observations were recent in time and made specifically with Student's needs in mind. Of the District members of the IEP team, only school psychologist Pelino and special education teacher English had ever visited the Villa Esperanza campus. Pelino had a familiarity with Villa Esperanza based on infrequent visits over the prior ten years when observing potential placements for other students. She last visited the school in 2007 and did not have much recollection about her visit. She had placed a few students at Villa Esperanza over the past ten years, but did not make a specific observation for Student's needs. She understood Villa Esperanza to provide a comprehensive program that would reduce Student's need for outside services, pull-out services and an ABA aide. In 2007, English observed Villa Esperanza as well as a District SDC-SH class at Stevenson Elementary for potential placement of Student.

## LEGAL CONCLUSIONS

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

### *Issue One: Appropriateness of Assessments*

2. District contends that its assessments were appropriate.

3. For purposes of evaluating a child for special education eligibility, the District must ensure that the child is assessed in all areas of suspected disability. (20 U.S.C. §1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) A school district is also required to ensure that the assessment is sufficiently comprehensive to identify all of the child's needs for

special education and related services whether or not commonly linked to the disability category. (34 C.F.R. § 300.304(c)(6).) A school district is required to use the necessary assessment tools to gather relevant functional and developmental information about the child to assist in determining the content of the child's IEP. (34 C.F.R. § 300.304(b)(1).)

4. The assessment must be conducted in a way that: 1) uses a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent; 2) does not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability; and 3) uses technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors. The assessments used must be: 1) selected and administered so as not to be discriminatory on a racial or cultural basis; 2) provided in a language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally; 3) used for purposes for which the assessments are valid and reliable; 4) administered by trained and knowledgeable personnel; and 5) administered in accordance with any instructions provided by the producer of such assessments. (20 U.S.C. §§ 1414(b) & (c); Ed. Code, §§ 56320, subs. (a) & (b).) The determination of what tests are required is made based upon information known at the time. (See *Vasheresse v. Laguna Salada Union School District* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158 [assessment adequate despite not including speech/language testing, where concern prompting assessment was deficit in reading skills].) No single measure, such as a single intelligence quotient, shall be used to determine eligibility or services. (Ed. Code, § 56320, subs. (c) & (e).) Tests must be selected and administered to ensure that tests administered to a pupil with impaired sensory, manual or speaking skills produces test results that accurately reflect what the test purports to measure and not the pupil's impaired sensory, manual or speaking skills unless those skills are the factors the test purports to measure. (Ed. Code, § 56320, subd. (d).)

5. An assessment plan is to be prepared within 15 days of the initial referral or request for assessment. (20 U.S.C. §1414(a)(C); Ed. Code § 56321, subd.(a).) In order to assess or reassess a student, a school district must provide parents with a proposed assessment plan and a copy of parental and procedural rights under IDEA and state law. (20 U.S.C. § 1414(b)(1); Ed. Code, § 56321, subd. (a).) The assessment plan must appear in a language easily understood by the public and the native language of the student, explain the assessments that the district proposes to conduct, and provide notice that the district will not implement an IEP without the consent of the parent. (Ed. Code, § 56321, subs. (b)(1)-(4).)

6. District met its procedural obligations with respect to the assessment of Student. Pursuant to a settlement agreement, District provided Student with a July 14, 2008 proposed assessment plan which Parents signed and returned on July 14, 2008. The assessment plan identified areas of assessment as academic/pre-academic performance, self-help, social and emotional status, motor ability, speech and language, health, development, vision and hearing, functional analysis assessment and assistive technology. The assessment plan provided an explanation of the purpose of each assessment and identified the personnel responsible for each assessment area and contained an advisement that a child cannot be

assessed or placed into special education without parental consent. Parents were provided a copy of their rights when they signed the assessment plan. Father signed the assessment plan on behalf of Parents indicating consent and agreement. Pursuant to the settlement agreement, the assessment plan identified November 14, 2008 as the IEP date for presentation of the assessment results. The November 14, 2008 IEP date was reflected on the assessment plan.

7. With respect to the academic assessment, Student was assessed by English, his teacher of three years. English, a credentialed special education teacher with 19 years of experience teaching special education, was qualified to conduct the assessment. He had administered the previous version of the Brigance, a standardized test, many times in the past and followed the test manual instructions for this administration of the test. English also observed Student, reviewed work samples and utilized his three years of experience with Student to complete the academic assessment. It was uncontroverted at hearing that the academic assessment identified Student's present levels of performance and unique needs in the area of academics and yielded information that was useful to the IEP team in developing Student's IEP goals. In light of the above, the academic assessment was appropriate. (Findings of Fact 1-6 and Conclusions of Law 1-7.)

8. The psychoeducational assessment was conducted by Pelino, an experienced, licensed school psychologist qualified to perform the assessment. Pelino utilized a variety of tools including standardized tests such as the Ordinal Scales, VMI and the Vineland-2, observation over a several-month period, as well as review of school records, prior District assessment data and outside assessment data. The assessment was conducted in English, Student's dominant language. All tests were administered according to the instructions of the test manual. District's psychoeducational assessment was comprehensive and utilized appropriate measures which considered Student's disability including his communication level. The assessment provided the IEP team with information about Student's cognitive functioning level, academic performance, adaptive skills and functional developmental level. District provided uncontroverted evidence that the psychoeducational assessment identified Student's present levels of performance and unique needs. Accordingly, District's psychoeducational assessment was appropriate. (Findings of Fact 1-13 and Conclusions of Law 1-8.)

9. The FAA was conducted by school psychologist Pelino. Pelino reviewed Student's records and all available assessment data in preparation for the FAA. She observed Student for 120 minutes in a variety of activities at school on several different days. She also utilized observation data gathered by her assistant during an additional 120 minutes of observations in various activities at school on several different days. Pelino identified several problem behaviors and documented the frequency of the behaviors. She noted antecedent events and consequences for each behavior. After evaluating all of the data, Pelino concluded that Student's needs were being met by his program and a positive behavior intervention plan was not warranted. Pelino's FAA was comprehensive, included evaluation of data gathered, and included a recommendation for augmentative communication. The assessment provided the IEP team with important information identifying Student's unique

needs in the area of behavior, including behavioral antecedents and effective intervention techniques and, further, provided recommendations to address the identified needs. District provided uncontroverted evidence that all of Student's behavioral needs were identified and addressed in the FAA. Therefore, the District's FAA was appropriate. (Findings of Fact 1-17 and Conclusions of Law 1-9.)

10. The OT assessment was conducted by District OT Tran. Although Tran did not testify at hearing, her report provided sufficient detail to ascertain her qualifications, the instruments used, the results obtained and the basis for her recommendations. Tran assessed Student using multiple measures including the SPM, the K&1 Child, teacher reports, previous assessment data, work samples and her own observations. Tran administered the SPM and the K&1 Child according to the test manual instructions and for the purposes for which the measures were designed. Through the OT assessment, she obtained information about Student's fine motor skills, gross motor skills, attention, sensory processing, and sensory integration that helped the IEP team to identify Student's unique needs and to design an IEP. Tran recommended that Student receive OT services to support his academic program. She did not specify whether the OT services should be school-based or clinic-based. The uncontradicted evidence offered at hearing established that the District OT assessment identified Student's present levels of performance and his unique needs in the area of OT including fine motor skills and sensory processing deficits and made recommendations to address those needs. In light of the above, Tran's OT assessment of Student was appropriate. (Findings of Fact 1-25 and Conclusions of Law 1-10.)

11. The APE assessment was conducted by APE teacher Curran. Curran is an experienced, credentialed APE teacher. Curran assessed Student's locomotor and object control skills using the TGMDII and observation on two occasions. The TGMDII was age appropriate, as it was designed for use with students aged three years to ten years, 11 months. Curran administered the measure in accordance with the instruction manual and for its intended purpose. District provided uncontradicted evidence that the APE assessment identified Student's present levels of performance and unique needs in the areas of motors skills and object control and provided recommendations to address those needs. Based upon the above, District's APE assessment of Student was appropriate. (Findings of Fact 1-28 and Conclusions of Law 1-11.)

12. The speech and language assessment was conducted by licensed speech and language pathologist Weinstein. Weinstein has 30 years of experience as a speech and language pathologist and three years of experience working directly with Student in a one-to-one therapeutic setting, several times a week. Weinstein administered the Receptive One Word Vocabulary Test and the Auditory Comprehension subtest of the PLS to Student according to the instructions contained in the test manual. She also utilized her years of progress notes and observations to assess Student. Weinstein has extensive personal knowledge of Student's speech and language development gained from her years of experience with Student and objective data from the Receptive One Word Picture Vocabulary Test and the PLS subtest. The test results obtained by Weinstein were reflective of Student's abilities as observed in speech and language therapy sessions. The assessment

provided the IEP team with detailed information about Student's present levels of performance, identified Student's unique needs and provided recommendations to address those needs. Based upon the above, District's speech and language assessment was appropriate. (Findings of Fact 1-34 and Conclusions of Law 1-12.)

*Issue Two: Was Student offered a FAPE?*

13. District contends that the IEP developed between November 14, 2008, and April 6, 2009, offered Student a FAPE. In particular, District contends that, in light of Student's needs, it offered him an appropriate placement at Villa Esperanza. District also contends that its offer to fade out ABA one-to-one aide support was appropriate, as was the offer to provide OT at the NPS rather than in a clinic. Student contends that Villa Esperanza is not the LRE for Student. Instead, he contends that his needs can be met in a District SDC class.

14. Under the Individuals with Disabilities Education Act (IDEA) and companion state law, students with disabilities have the right to FAPE. (20 U.S.C. § 1400 et seq.; Ed. Code, § 56000 et seq.) FAPE means special education and related services that are available to the student at no cost to the parents, that meet the state educational standards, and that conform to the student's IEP. (20 U.S.C. § 1401(a)(9); Ed. Code, §§ 56001, 56040, subd. (a); Cal. Code Regs., tit. 5, § 3001, subd. (o).) "Related Services" are transportation and other developmental, corrective and supportive services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26).) In California, related services are called designated instruction and services, and must be provided if they may be required to assist the child in benefiting from special education. (Ed. Code, §56363, subd. (a).)

15. The Supreme Court in *Board of Educ. v. Rowley* (1982) 458 U.S. 176, 206-207 [73 L.Ed. 2d 690] (*Rowley*), held that the basic floor of opportunity provided by the IDEA consists of access to specialized instruction and related services, which are individually designed to provide educational benefit to a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Rowley*, supra, at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is "sufficient to confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) De minimus benefit, or only trivial advancement, however, is insufficient to satisfy the *Rowley* standard of "some" benefit. (*Walczak v. Florida Union Free School District* (2d Cir. 1998) 142 F.3d 119, 130.) A child's academic progress must be viewed in light of the limitations imposed by his or her disability and must be gauged in relation to the child's potential. (*Mrs. B. v. Milford Board of Education* (2d Cir. 1997) 103 F.3d 1114, 1121.)

16. In a District filed case, the District has the burden of proof to establish by a preponderance of evidence that it complied with the IDEA and companion state law. First, the District must prove that it has complied with the procedures set forth in special education

law. (*Rowley, supra*, 458 U.S. at pp. 200, 203-204, 206-207.) Second, the District must prove that the IEP developed through such procedures addressed the student's unique needs and was reasonably calculated to enable the special needs child to receive educational benefits. (*Id.* at p. 201; *Park v. Anaheim Union High School District* (9th Cir. 2006) 464 F.3d 1025, 1031; *J.L. v. Mercer Island School District* (9th Cir. 2009) 575 F. 3d 1025, 1034.)

17. To comply with the procedural requirements of the IDEA and state law in the development of the pupil's IEP, school districts must include parents in the development of the IEP. ( 20 U.S.C. § 1414 (d)(1)(B)(i); 34 C.F.R. § 300.322; Ed. Code, §§ 56341, subd. (b)(1), 56342.5.) Parents must be given advance notification of the meeting early enough to ensure an opportunity to attend. The notice provided to parents must indicate the purpose, time, and location of the meeting as well as who will be in attendance. It must also inform the parents of the participation of other individuals on the IEP team who have knowledge or special expertise about the child. (34 C.F.R. § 300.322(a); Ed. Code, §§ 56304 & 56341.5.) Parents must be provided procedural safeguards. (Ed. Code § 56500.1.) A public agency must ensure that the IEP team for each child with a disability includes the parents of the child. (34 C.F.R. § 300.321(a)(1); Ed. Code, § 5634) In developing each child's IEP, the IEP team must take into consideration the concerns of the parents. (34 C.F.R. § 300.324(a); Ed. Code, §56341.1, subd. (a).) A meeting may be held without the parents if a district is unable to convince them to attend the IEP meeting. (Ed. Code § 56341. 5.)

18. School districts are required to include certain individuals in the IEP team team: one or both of pupil's parents or their representative; a regular education teacher if a pupil is, or may be, participating in regular education; a special education teacher; a representative of the school district who is qualified to provide or supervise specially designed instruction, is knowledgeable about the general education curriculum and is knowledgeable about the available resources; a person who can interpret the instructional implications of assessment results; and other individuals, including the person with special needs, where appropriate. (34 C.F.R. § 300.321(a); Ed. Code § 56341, subd. (b).)

19. The IDEA imposes upon the school district the duty to conduct a meaningful IEP meeting with parents. (*W.G. v. Board of Trustees of Target Range School District (Target Range)* (9th Cir. 1992) 960 F.3d. 1479, 1485; *Fuhrmann v. East Hanover Bd. of Education* (3rd Cir. 1993) 993 F.2d 1031, 1036.) A parent has meaningfully participated in the development of an IEP when parent is informed of the child's problems, attends the IEP meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools.* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann, supra*, 993 F.2d at p. 1036.) School districts cannot predetermine a pupil's placement prior to the IEP team meeting and without parental involvement in developing the IEP. (*Target Range, supra*, 960 F.2d at p. 1481, 1484.) A school district may arrive at an IEP team meeting with a pre-written offer, but may not take a "take it or leave it" position. (*J.G. v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801, fn. 10, citing *Ms. S v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1131.) School districts do not predetermine an IEP simply by meeting to discuss a child's programming in advance of an IEP meeting. (*Mercer Island, supra*, 575 F.3d at p.1038, citing 34 C.F.R. § 300.501(b)(3)

[an IEP meeting “does not include preparatory activities that public agency personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting”].)

20. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)<sup>4</sup> An IEP is “a snapshot, not a retrospective.” (*Id.* at p. 1149, citing *Fuhrmann v. East Hanover Bd. Of Education* (3d Cir. 1993) 993 F. 2d 1031, 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Id.*) To determine whether a district offered a student a FAPE, the focus is on the adequacy of the placement the district actually offered, rather than on the placement preferred by the parent. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.)

21. An IEP is an educational package that must target all of a pupil’s unique educational needs, whether academic or non-academic. (*Lenn v. Portland School Committee* (1st Cir. 1993) 998 F.2d 1083, 1089.) The term “unique educational needs” is to be broadly construed and includes the student’s academic, social, emotional, communicative, physical, and vocational needs. (*Seattle Sch. Dist. No. 1 v. B.S.*, 82 F.3d 1493, 1500 (9th Cir. 1996) [citing H.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106].)

22. The IEP is the centerpiece of the special education delivery system for disabled children and consists of a detailed written statement that must be developed, reviewed, and revised for each child with a disability. (*Honig v. Doe* (1988) 484 U.S. 305, 311 [108 S.Ct. 592, 98 L.Ed.2d 686]; 20 U.S.C. §§ 1401(14), 1414(d); Ed. Code, §§ 56032, 56345.) In developing the IEP, the IEP team shall consider the strengths of the child, the concerns of the parents for enhancing the education of their child, the results of the initial evaluation or most recent evaluation of the child, and the academic, functional and developmental needs of the child. (20 U.S.C. § 1414(d).) The IEP must include a statement of the present performance of the pupil, a statement of measurable annual goals designed to meet the pupil’s needs that result from the disability, a description of the manner in which progress of the pupil towards meeting the annual goals will be measured, the specific services to be provided, the extent to which the student can participate in regular educational programs, the projected initiation date and anticipated duration, and the procedures for determining whether the instructional objectives are achieved. (20 U.S.C. § 1414 (d); 34 C.F.R. § 300.320 (a); Ed. Code, § 56345, subd. (a).) Where a pupil’s behavior impedes his or her learning or that of others, the IEP team must consider the use of positive behavioral interventions and supports, and other strategies to address that behavior. (Ed. Code, § 56341.1, subd. (b)(1).)

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<sup>4</sup> Although *Adams* involved an Individual Family Services Plan and not an IEP, the Ninth Circuit Court of Appeals applied the analysis in *Adams* to other issues concerning an IEP (*Christopher S. v. Stanislaus County Off. of Education* (9th Cir. 2004) 384 F.3d 1205, 1212) and district courts within the Ninth Circuit have adopted its analysis of this issue for an IEP. (*Pitchford v. Salelm-Keizer School Dist. No. 24J* (D. Or. 2001) 155 F.Supp.2d 1213, 1236.)

23. A school district must also provide a special education program in the least restrictive environment (LRE). This means that the school districts must educate the special needs pupils with non-disabled peers “to the maximum extent appropriate;” and that special classes or special schooling occur only when the nature and severity of the pupil’s disabilities cannot be accommodated in the regular education environment with the use of supplementary aides and services. (20 U.S.C. § 1412(a)(5)(A); see also 34 C.F.R. 300.114; Ed. Code, § 56342, subd. (d).) A placement must foster maximum interaction between disabled pupils and non-disabled students. (Ed. Code, § 56364.2.) The Ninth Circuit has created a four-part balancing test to determine whether special education pupils could be educated in a general education environment which considers the (1) educational and (2) non-academic benefits of full inclusion in the regular education environment, (3) the effect the pupil has on the teacher and other pupils in regular education, and (4) the costs of mainstreaming. (*Sacramento City Unified School District v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1401-1402 (hereafter *Rachel H.*) [adopting factors identified in *Daniel R.R. v. State Board of Ed.* (5th Cir. 1989) 874 F.2d 1036, 1048-1050 (hereafter *Daniel RR*)]]; see also *Clyde K. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 35 F.3d 1396, 1401 [applying *Rachel H.* factors to determine that a self-contained placement outside of a general education environment was the LRE for an aggressive and disruptive pupil with attention deficit hyperactivity disorder and Tourette’s Syndrome].)

24. Unless the IEP requires otherwise, a child with a disability must be educated in the school that he or she would attend if he or she were not disabled. (34 C.F.R. § 300.116.) Each child with a disability must participate with children who are not disabled in non-academic and extracurricular services and activities, such as meals, recess and clubs, to the maximum extent appropriate to the needs of the child. (34 C.F.R. § 522 (a)(2), (b)(2), (3).) When determining which placement is the LRE, consideration is given to any potential harmful effect on the child or on the quality of services he or she needs. (34 C.F.R. §§ 300.116 & 300.117.) California law incorporates these requirements. (Ed. Code, §§ 56031, 56342.)

25. If it is determined that a child cannot be educated in the general education environment, then the LRE analysis requires determination of whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel RR, supra*, 874 F.2d at p. 1050.) School districts, as part of a special education local plan area, must have available a continuum of program options to meet the needs of individuals with exceptional needs for special education and related services as required by the IDEA and related federal regulations. (Ed. Code, § 56360.) The continuum of program options includes, but is not limited to: regular education programs; resource specialist programs; designated instruction and services, including, e.g., LAS, APE and OT; special classes such as special day classes; non-public schools and; instruction in the home, hospitals or other institutions. (Ed. Code, § 56361.)

26. Here, District complied with the procedural aspects of FAPE by providing Parents with appropriate procedural notices and opportunities to meaningfully participate in the IEP process over a five-month period of time. On multiple occasions, IEP meetings were

rescheduled after the District members of the team had gathered and Parents cancelled at the last minute. Parents were present for and participated in the discussions of assessments, unique needs, goals, services and placement. Parents did not attend the final meeting on April 6, 2009. The meeting had been rescheduled to give Parents the opportunity to think about the FAPE offer, visit the proposed placement at Villa Esperanza, and provide any additional input about the FAPE offer to the IEP team. District team members had made an offer of FAPE at the previous meeting. After making reasonable attempts to schedule an IEP meeting with Parents to complete the five-month long IEP process and consider any additional parental input, District proceeded without Parents. When Parents failed to attend the IEP meeting again, the IEP was finalized without changes and forwarded to Parents for review and signature. (Findings of Fact 1-64 and Conclusions of Law 1-26.)

27. Over a series of IEP meetings and based upon assessment data and IEP team discussion, statements of Student's then present levels of performance were developed by the IEP team. Student's unique needs were identified in the areas of academics/pre-academics, functional academics, language and communications, social emotional skills, vocational skills, time on task, and motor skills development. The IEP team drafted goals in all identified areas of need. The goals were accepted as appropriate by all members of the IEP team and are not at issue in this hearing. The IEP team determined that Student needed related services in APE, speech and language, OT and behavior. The IEP team was in agreement about the need for the identified related services, but not the delivery model or duration of the services. The FAPE offer provided that, after a period of fading, all services would be provided by Villa Esperanza. (Findings of Fact 1-64 and Conclusions of Law 1-27.)

28. In order to evaluate the appropriateness of this offer of FAPE, it is necessary to first determine the appropriateness of the offered placement and then determine whether or not the related services offered and their duration and frequency are appropriate to support Student's academic program in that placement and designed to enable Student to receive a FAPE.

29. Here, District failed to prove by a preponderance of the evidence that the District's offered placement at Villa Esperanza was appropriate and the LRE for Student. Here, the parties agree that a general education classroom is not an appropriate placement for Student. Instead, the question is whether or not, considering the continuum of placement options, NPS Villa Esperanza, is the LRE for Student. Here, District had placed Student in an SDC-LH class and recently added an ABA aide to implement behavior intervention and assist Student in accessing his curriculum. Substantial improvement and progress was noted after the ABA aide was added to Student's program.

30. English testified that Student had made wonderful progress on his IEP goals and Weinstein explained that Student had made accelerated progress in speech therapy once his behaviors were better controlled. The IEP team expressed concern about what degree of benefit Student was receiving from the SDC-LH class because his instruction was given individually and he had not been able to participate in group lessons. The measure of

Student's benefit is his progress on his IEP goals. Here, Student met four of his goals and had met benchmarks for all other goals before the IEP process began on November 14, 2008. Student's progress on his IEP goals is an indication of academic benefit. While Student did not have much interaction with other members of the SDC-LH class, he had developed a play relationship with one of the general education students. In that situation, with prompts from the ABA aide, he regularly engaged in a game of catch with the student at recess and seemed to enjoy the interaction. The SDC-LH placement offered Student an opportunity for exposure to general education students on a comprehensive campus at various times of the day and to a variety of same aged peers in SDC classes. District presented no evidence that Student had a negative effect on the teacher or the other students. To the extent that Student had engaged in disruptive behaviors or self-injurious behaviors in the past, the implementation of behavior intervention techniques, sensory strategies and OT therapy eliminated most of the behaviors by the conclusion of the IEP. (Factual Findings 1-64 and Legal conclusions 1-30.)

31. District asserted that Student was severely disabled and needed a smaller, more restrictive placement than the SDC-LH in order to receive a FAPE. District had an SDC-SH class for students functioning at a lower level than those in the SDC-LH class. Student's teacher acknowledged that Student's needs could be met in a District SDC-SH classroom. English considered the Villa Esperanza placement to be a better placement than either of the District SDC classrooms because of concerns that in the future Student would not be able to keep up with the SDC students. Evidence was not introduced as to the costs of maintaining Student in a District placement or placement in the Villa Esperanza NPS. (Factual Findings 1-64 and Legal Conclusions 1-31.)

32. The preponderance of evidence did not establish that Villa Esperanza was the least restrictive environment for Student. Since no one from Villa Esperanza testified about the proposed placement and District's witnesses had only vague recollections to share at hearing, the clear and detailed testimony of Rome and Father are given deference by the ALJ. The Villa Esperanza student population was predominately older than Student. The age, size and behavioral disabilities of the older students on campus presented physical dangers for Student, a ten-year-old boy (nine years old at the time of the offer) with limited expressive language ability and self-advocacy skills. There were only two classrooms for elementary school children, with one multi-age classroom with six students for students between fourth and sixth grade. The class composition provided no opportunity for Student to interact with others and no opportunity for socialization or interaction with typically developing peers. The development of expressive language and social skills were identified areas of need for Student. According to Rome, the students in the proposed Villa Esperanza class did not appear to interact with each other, either in the classroom or on the playground, and were lower functioning than Student. Such a class would not afford Student an opportunity for exposure to general education students at any time, and only provide limited exposure to same aged peers. (Findings of Fact 1-64 and Conclusions of Law 1-32.)

33. Additionally, OT Tran had identified Student's reactions to loud noises as covering his ears and either humming or shouting to drown out the noise. Pelino had noted

the same distraction level as well as biting of fingers and hands to self-soothe in such situations. The proposed classroom that Rome observed was chaotic and noisy, including one child disrobing and another shouting while a teacher attempted to give a group lesson. Although District team members stated that Villa Esperanza offered a language-rich environment, evidence was not introduced to support those statements. The evidence did not support a finding that Student's IEP could be implemented at Villa Esperanza or that he would receive more than a minimal educational benefit from placement at Villa Esperanza. In fact, the evidence showed that noise levels and distractions like those observed by Rome at Villa Esperanza would likely result in an increase in Student's self-soothing and coping behaviors. Rome's assertion that Student would likely regress in such a placement is credible. Finally, Villa Esperanza is 20 miles from Student's home in a different city presenting no opportunity for Student to attend a neighborhood school. (Findings of Fact 1-64 and Conclusions of Law 1-33.)

34. Here, the preponderance of the evidence shows that Student was receiving a benefit from his placement in the SDC-LH classroom and had made progress on his IEP goals in a District SDC-LH class. Furthermore, District had an SDC-SH class geared for more severely disabled Students. Student's own teacher acknowledged that Student's needs could be met in a SDC-SH classroom which was less restrictive than Villa Esperanza. District failed to show why Student's IEP could not be implemented in a District SDC class or why he required removal from the public school class and placement in another city at Villa Esperanza. Accordingly, the preponderance of the evidence did not establish that Villa Esperanza was the appropriate placement in the LRE for Student. (Findings of Fact 1-64 and Conclusions of Law 1-34.)

35. With respect to related services offered in the IEP, because of the integrated nature of the placement offer which wrapped related services with the placement, it is impossible to determine whether the duration and frequency of such services is appropriate under a less restrictive placement offer. Related services are designed to enable the Student to obtain a FAPE and access his special education. Factors such as size and location of classroom, nature of curriculum and student-to-teacher ratio may impact the appropriateness of related services. Accordingly, on the evidence presented, it is not possible to make a finding that the related services, frequency or duration offered in the IEP are appropriate. (Findings of Fact 1-64 and Conclusions of Law 1-35.)

36. For the foregoing reasons, the offer of FAPE contained in the IEP drafted between November 14, 2008, and April 9, 2009, does not offer Student a FAPE in the LRE. (Findings of Fact 1-64 and Conclusions of Law 1-36.)

## ORDER

1. District's assessments under the July 14, 2008 assessment plan were appropriate;

