

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS on behalf of STUDENT,

v.

CORONA-NORCO UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. 2010020194

DECISION

Administrative Law Judge (ALJ) Susan Ruff of the Office of Administrative Hearings (OAH), State of California, heard this matter on April 14 – 15, 19 – 23, and 26, 2010, in Norco, California.

Ralph O. Lewis, Esq., represented the Student and his parents (Student) at the hearing. Student’s parents were present for most of the hearing. Student was not present.

Christopher J. Fernandes, Esq., represented Corona-Norco Unified School District (District) at the hearing. Linda White and Jason Ramirez also appeared at various times on behalf of the District.

Student’s due process complaint was filed on February 3, 2010. At the conclusion of the hearing, the parties requested time to file written closing argument. The matter was taken under submission upon the receipt of the parties’ written closing argument on May 17, 2010.¹

¹ To maintain a clear record, Student’s written closing argument has been marked as Exhibit S-62. The District’s written closing argument has been marked as Exhibit D-125. The closing arguments were originally due on May 10, 2010, but at the request of Student’s counsel, the date was changed to May 17, 2010.

ISSUES²

- 1) Did the District deny Student a free appropriate public education (FAPE) in the least restrictive environment (LRE) by failing to make an appropriate individualized education program (IEP) offer from the time of the prior OAH case (number 2008040704) to the IEP offer made in January 2009, based on failure to offer an appropriate placement, services, goals and present levels of performance?
- 2) Did the District deny Student a FAPE by failing to provide accurate levels of functioning at the January 29, 2009 IEP or any other IEP since the end of the 2007-2008 school year?
- 3) Did the District deny Student a FAPE for the 2008-2009 and 2009-2010 school years, including extended school years for 2008 and 2009, in the following respects:
 - a) The District predetermined Student's placement;
 - b) The goals and objectives in the IEPs were inappropriate, unmeasurable and vague;
 - c) The classroom setting was not appropriate;
 - d) The District did not allow for parental participation at the IEP meetings;
 - e) The District did not offer or provide appropriate educational services to Student, including but not limited to applied behavior analysis (ABA) services, reading, speech and language, occupational therapy and physical therapy?
- 4) Did the District deny Student a FAPE by failing to provide Student with an appropriate placement with the Center for Autism and Related Disorders, including supervision, from the time of the prior OAH case to the present?
- 5) Did the District fail to offer or provide Student with appropriate designated instructional services (DIS services) in the area of speech and language from the time of the prior OAH case to the present?

² These issues are based on those contained in Student's due process request as clarified by the parties and the ALJ during the telephonic prehearing conference held on April 12, 2010. The order of the issues has been modified in this decision to provide greater clarity.

FACTUAL FINDINGS

1. Student is a twelve-year-old boy who is eligible for special education under the category of autism. At all times relevant to this proceeding, Student's family lived within the jurisdiction of the District.

The Prior OAH Decision

2. On April 16, 2008, Student filed a due process hearing request in OAH case number 2008040704, naming the District as the respondent. On July 14, 2008, OAH issued a decision in that case finding, among other things, that the District failed to provide Student with a FAPE for the 2006-2007 and 2007-2008 school years.

3. The decision ordered the District to reimburse Student's parents for the expenses that they had incurred to provide Student with an appropriate education. The decision covered the time period up through and including the final day of the regular 2007-2008 school year, but did not include any time periods after the end of that school year, including any extended school year (ESY).

4. At the time of the 2007-2008 school year, the District scheduled classes on multiple tracks. The final date of school for the children in Student's track was June 27, 2008.

The Events Leading to the September 18, 2008 IEP Meeting

5. As determined in OAH case number 2008040704, the last IEP offer made by the District prior to the end of the 2007-2008 school year was made on March 9, 2007. The District held IEP team meetings on June 6 and July 31, 2007, but no new IEP offers were made. The IEP offer made during the March 9, 2007 IEP meeting did not offer Student a FAPE for the reasons addressed in the prior OAH decision.

6. On July 31, 2008, after the issuance of the decision in OAH case number 2008040704, the District's counsel left a telephone voicemail message for Student's counsel inquiring about Student's parents' interest in holding an IEP meeting and/or discussing Student's placement for the 2008-2009 school year. Student's counsel did not return the call.

7. On August 6, 2008, Aquilino Diaz, a school psychologist working for the District, sent a proposed assessment plan to Student's parents. Even though it was sent to Student's parents in August, the proposed assessment plan was dated June 2008. When Student's father received the assessment plan he assumed that it had something to do with

the prior due process hearing which had been held in June 2008. He sent the assessment plan to his attorney and did not respond to the District or consent to the assessment plan.³

8. On August 14, 2008, the District's counsel faxed and mailed a letter to Student's counsel. Among other things stated in the letter, District's counsel requested that Student's counsel write or call "regarding whether your clients are interested in participating in an IEP to develop a placement for [Student] for the 2008-2009 school year." He also stated that the District was "willing to first informally discuss potential assessments and placements with you if you and your clients' prefer this approach." The District's counsel received no response to this letter.

9. On September 4, 2008, the District sent Student's parents notice of an IEP team meeting to be held on September 18, 2008.

10. At some point prior to September 18, 2008, several District IEP team members attended a staff meeting to discuss the upcoming IEP. In attendance at that staff meeting were: Eloda Burdeshaw, a special education teacher at Adams Elementary School (Adams); Aquilino Diaz, a District school psychologist; Rebecca Chambers, a District autism specialist; Maria Perkins, a District speech-language pathologist (SLP); and Jim Huckeba, a District administrator. Also in attendance were an occupational therapist (OT), a physical therapist (PT), and an adapted physical education (APE) teacher. The staff members reviewed prior IEPs and reports to determine what information they needed to draft an IEP and discussed in what areas they might need to assess Student. They had a general discussion about goals and about possible placements for Student.

11. On September 16, 2008, Student's counsel faxed a letter to Huckeba advising him that Student's parents would attend the September 18 IEP meeting.

12. On September 16, 2008, Linda White, who was at that time the Administrative Director of Special Education for the District, sent a letter to Student's parents asking if they would attend the IEP meeting and also discussing the District's proposed assessment and authorizations for exchange of confidential information with the Student's various private providers.

13. Between June 27, 2008, and September 18, 2008, the District did not provide any educational services to Student. The District did not reimburse Student's parents for any of the educational expenses they incurred during that time, despite requests by Student's parents for reimbursement.⁴

14. The evidence supports a finding that the District failed to provide Student with a FAPE between June 27, 2008, and September 18, 2008. The previous IEP offers made by

³ As discussed in the prior OAH decision, the District had previously sent a proposed assessment plan to Student's parents on June 18, 2007, which was never signed.

⁴ The educational expenses incurred by Student's parents between June 27, 2008, and September 18, 2008, will be discussed below in Factual Findings 112 – 114.

the District had been determined to be inadequate in the prior due process case. Prior to the IEP team meeting on September 18, 2008, there were no special education services offered or provided by the District to Student and no proper IEP offer had been made. As will be discussed in Legal Conclusions 7 – 15 below, until a new IEP team meeting was held and a new IEP offer was made, there was no FAPE.

The September 18, 2008 IEP Team Meeting

15. On September 18, 2008, an IEP team meeting was held for Student. Both of Student's parents attended the meeting with their attorney, participated in the discussion, and answered questions posed by the other IEP team members. The other individuals in attendance at the meeting included, but were not limited to Diaz, Burdeshaw, general education teacher Kelly Diersing, Huckeba, Chambers, APE instructor Natalie Phillips, Perkins, an OT, Elizabeth Moore (the school principal at Adams), the attorney for the District, and Danelle Hopwood, Student's general education teacher at Crossroads Christian School (Crossroads), the private school attended by Student. A supervisor from the Center for Autism and Related Disorders, Inc. (CARD) also attended the meeting to discuss Student's progress with his CARD services and to provide proposed goals and objectives to the IEP team.

16. JoAnne Abrassart, Student's private speech and language therapy provider, also attended the IEP meeting, reported on Student's progress and participated in the discussion. She was in the process of conducting a reassessment of Student at the time of the meeting and was unable to propose goals until that assessment was completed.

17. The information possessed by the District regarding Student at the time of the September 18, 2008 IEP meeting included an independent psychological evaluation report prepared by Dr. Robin Morris, various evaluations and reports prepared by CARD, an evaluation done by the Inland Regional Center and the reports and assessments discussed in the prior due process case before OAH. The IEP team also had input from Student's private providers during the meeting, including Hopwood, Abrassart and the representative from CARD, as well as the District IEP team members.

18. The District made the following offer of placement and services at the IEP meeting: general education placement in a fourth grade public school classroom; a one-to-one aide supplied by a nonpublic agency (NPA) to provide applied behavior analysis (ABA) and instructional assistance⁵ during Student's classroom hours; an ABA home program provided by an NPA for 10 hours a week; ABA supervision and consultation for three hours per month; collaboration between school personnel and the ABA provider; 60 minutes of speech and language therapy per week provided by District personnel; OT services provided by the District for 30 sessions at 30 minutes per session; and APE consultation of 15 sessions at 15 minutes per session.

⁵ The IEP used the abbreviation "IIS" which stood for intensive intervention services.

19. The IEP called for Student's general education placement, OT services and APE to begin immediately, but the other services and specialized instruction were set to begin on November 4, 2008. During the hearing, District witnesses indicated that the November 4, 2008 date was chosen because the school schedule provided for school vacation during part of the month of October.

20. The proposed IEP called for the ABA services and speech-language services to end on May 4, 2009, six months after they began. The public school placement, APE and OT services would continue for the full year, until September 18, 2009. As discussed in Factual Finding 23 below, on September 30, 2008, the District staff sent a follow-up letter restating the proposed placement and services that Student would receive. The letter clarified that all of Student's services, including the one-to-one aide and speech-language services, were to continue for the entire year until September 18, 2009, and that there would be consultation and training by the NPA provider with the District staff through May 4, 2009. The letter also clarified that the IEP team had recommended that CARD continue to be the provider of the one-to-one aide and ABA services, just as CARD had been the provider at the private school.

21. During the hearing, Student contended that the IEP offer was unclear as to whether Student's placement would be in a District general education class or District special day class (SDC). While Student is correct that the summary of services on the first page of the IEP document might be confusing to someone unfamiliar with the District's abbreviations, the rest of the document makes it clear that Student would be primarily in a general education classroom. For example, on page 2 of the document the "setting" category had the box checked for "General Ed. Public Day School." Page 22 of the document states, regarding Student's level of participation in general education classes: "Student will be fully included in the general education setting with support." Moore and other District witnesses who attended the IEP meeting confirmed that Student's parents and their counsel did not ask for clarification regarding placement during the meeting.

22. The IEP team also discussed the District's proposed assessment plan. Student's parents participated in that discussion and requested that additional assessments be added to that plan. At the end of the September 18, 2008 IEP team meeting, Student's parents signed the proposed assessment plan, giving their consent to the assessment. They also signed releases allowing the District to obtain confidential information regarding Student from Student's various private providers, including: Rancho Therapy, CARD, Inland Regional Center, Lindamood-Bell, JoAnne Abrassart, Dr. Kohn, and Crossroads Christian School. In each case, the signed authorization stated that it remained valid until January 1, 2009. It was understood that another IEP team meeting would be held after the assessments were completed.

23. On September 30, 2008, the District sent a letter to Student's parents summarizing and clarifying what had been offered in the September 18, 2008 IEP. The letter confirmed that the offer was to place Student in the general education class at Adams

(Student's home school)⁶ with a one-to-one aide throughout the school day. The specialized instruction and services called for in the IEP included: 1) special academic instruction consultation for 15 minutes per week; 2) ABA/intensive instructional services provided by an NPA in school for 30 hours per week; 3) ABA home services provided by an NPA for 10 hours per week; 4) speech and language therapy services for 60 minutes per week; 5) APE consultation for 15 sessions at 15 minutes per session; and 6) 30 sessions of OT at 30 minutes per session. The letter clarified that these services would continue throughout the IEP year, and would end on September 18, 2009, not on May 4, 2009, as stated in the IEP.⁷ Only the consultation between the District ABA specialist and the NPA supervisor for three hours per month would end on May 4, 2009, and the training by the NPA of the District staff working with Student. The letter also clarified that the IEP team recommended contracting with CARD to provide the NPA services described in the IEP as long as CARD was willing and available to do so. The letter stated that the IEP team had proposed meeting again five months after the commencement of the placement to discuss how Student was doing with the transition.

24. Student's parents did not agree to the September 18, 2008 IEP offer and the District did not provide any educational services to Student between September 18, 2008, and January 16, 2009, except for conducting an assessment of Student. The District did not reimburse Student's parents for any educational expenses they incurred during that time, despite requests for reimbursement.

25. Student contends that the proposed September 18, 2008 IEP did not offer Student a FAPE for several reasons. First, Student contends that the IEP did not contain proper present levels of performance for Student. The law requires an IEP to contain a statement of the child's present levels of academic achievement and functional performance.

26. The IEP document contained three pages listing a summary of Student's present levels of performance. Those present levels included a discussion of strengths and weaknesses in language/communication/speech, social skills, conversation skills phonological awareness, audiological skills, and social behavior. The information presented in these present levels was based on reports and assessments from Student's private providers, including reports on reading skills provided by Lindamood-Bell, reports of social skills provided by CARD, and reports of phonological skills provided by Abrassart. During the hearing, Abrassart explained that part of the language contained in Student's present levels of performance was taken from the summary contained in one of Abrassart's prior reports.

⁶ A pupil's "home school" refers to the public school located near the pupil's home that the pupil would normally attend absent any special education needs.

⁷ There was no testimony during the hearing that Student's parents were confused by the difference between the end dates in the IEP and the September 30, 2008 letter. There was also no evidence of correspondence by Student's counsel indicating any confusion. The parents did not accept any portion of the September 18 IEP, before or after the September 30 letter, so even if there had initially been confusion, there was ultimately no denial of FAPE on this basis.

27. The present level of performance under the heading of “reading” stated: “Goals written based on assessments presented, reg. ed. teacher input from Crossroads & parent input.” The present level under the math heading stated: “see above.” The present level under written expression stated: “Difficulty with written language and fine motor skill per parent, teacher & reports presented.”

28. Student contends that these present levels of performance were inadequate for the IEP team to rely upon to develop goals and objectives for Student and that the present levels contain no scores regarding cognitive functioning. While Student is correct that these present levels of performance could have been written more clearly and completely, particularly those relating to reading, math, and written expression, under the circumstances of the September 18, 2008 IEP, they were sufficient. The District had attempted on two occasions to obtain permission to assess Student (once prior to the time of the last OAH decision and a second time on August 6, 2008), but Student’s parents had not consented to an assessment prior to the September 18, 2008 IEP team meeting. Therefore, at the meeting the District was forced to rely upon its prior assessments, the reports and assessments from the private providers, and the information presented orally during the meeting to develop present levels of performance for Student. The IEP meeting notes included detailed discussions of the information given by the private providers who attended the meeting. The IEP team had sufficient information to develop present levels of performance and goals and objectives for Student, and the IEP notes contained whatever information was necessary to fill in the gaps on the present levels of performance pages.

29. Further, as discussed in Legal Conclusions 4 and 25, even if the District committed a procedural violation by failing to detail specific present levels of performance with respect to reading, math, written expression, and cognitive functioning, that procedural violation did not give rise to a substantive denial of FAPE.

30. Student also contends that the District failed to allow parental participation during the IEP team meeting. The evidence does not support that contention. The District witnesses who attended the meeting were unanimous in their testimony that Student’s parents were given an opportunity to provide input during the meeting and that the District staff asked questions of the parents regarding their preferences. Student’s parents had their attorney with them during the meeting, presented their opinions regarding the proper placement for Student, and attached a written dissent to the end of the IEP document. There was no denial of FAPE in this regard.

31. Student contends that the District committed a procedural violation by “predetermining” Student’s placement. The evidence does not support a finding of predetermination. Instead, there was a discussion of placement during the IEP team meeting and Student’s counsel gave input that Student’s parents wished to have their son remain at his private school. The District’s counsel explained that, because Crossroads was not a state certified nonpublic school (NPS), the District could not place him there. Student’s counsel disagreed. The District ultimately offered a general education classroom placement at

Student's home school of Adams. This was a different placement than the SDC offered in the prior District IEP and was equivalent to the general education classroom at the private school that Student was attending. There was no evidence of predetermination.⁸

32. As stated above in Factual Finding 10, several of the District IEP team members held a staff meeting prior to the September 18 IEP meeting. However, there was no evidence that they made any predetermination regarding placement or services at that staff meeting. Instead, what was ultimately offered at the IEP team meeting was a placement very similar to what Student was already receiving at his parents' expense – a general education classroom with one-to-one aide assistance. The only difference was that Student's parents preferred a private, parochial school, while the District offered a public school placement.

33. Student also objects to the goals and objectives contained in the IEP. First, Student contends that not all necessary individuals were present for the discussion of the goals and objectives during the September meeting.

34. At some point prior to the end of the September 18 IEP team meeting, Hopwood and the CARD representative left the meeting. Student contends that they left prior to the District's presentation of its proposed goals and objectives and prior to the discussion of Student's placement and services. The testimony of the various witnesses was conflicting on when they left and whether they were present for the discussion of the District proposed goals and objectives, placement and services.

35. However, even if Student's contention is correct, the fact that these two IEP team members left early does not invalidate the District's offer of FAPE or the goals and objectives contained within the proposed IEP. The IEP team had reports from CARD and Student's other private providers, and input from Hopwood regarding Student's progress at the private school. Prior to the departure of these two individuals, the IEP team had already received significant input from them. CARD had provided proposed goals and objectives, several of which were incorporated into the proposed IEP. The meeting notes reflect substantial input by Hopwood regarding Student's needs and levels of performance in his general education classroom at the private school.⁹

⁸ When discussing the subject of predetermination, Student's written closing argument contends that the District witnesses testified "the only placement considered was the...Adams...special day class...." Student's contention in this regard undercuts any finding of predetermination, because the District ultimately offered a general education classroom, not an SDC. If the District staff had predetermined to put Student in an SDC as Student contends, the District IEP members clearly changed their minds after considering the input they received during the IEP team meeting.

⁹ Student's written closing brief argues that the IEP team no longer had a general education teacher with knowledge of Student's present levels of performance after Hopwood left. It is not clear whether Student is attempting, for the first time, to allege a procedural violation based on the failure of the IEP team to have all the required members in attendance. If so, Student's due process request never raised that procedural objection, so that issue will not be addressed in this decision.

36. Student also contends that the goals and objectives in the IEP were incomplete and were based on the prior IEP from March 2007. There were several statements in the IEP about the need for further assessment, but the testimony of the District witnesses at the hearing made it clear that they drafted their goals based on the information they possessed at the time of the September 18, 2008 meeting, not the March 2007 IEP. Student's mother testified that there were comments made during the meeting that the goals could not be completed without an assessment, and there was a statement in the IEP that the goals were presented as drafts pending acquisition of further information. There was also a statement in the January 2009 IEP that it was a continuation of the September 18 IEP. There was nothing inappropriate about any of these comments or statements – because Student's parents had not signed the District's proposed assessment plan, the District had no choice but to use information available, pending that assessment. The proposed September 18 IEP did, in fact, contain new goals, based on all the information the District possessed at the time of the September 2008 IEP, and those goals were different from the ones in the District's prior IEP. Just because the District acknowledged that the goals might change after further assessment did not invalidate the goals.

37. Student also objects to the way the goals and objectives were worded. Student's expert witnesses Melanie Lennington and Robin Morris testified that many of the goals were compound, confusing and incapable of being measured. However, a review of the goals and objectives contained within the September 18, 2008 IEP offer shows that the goals and objectives were properly drafted, measurable and were appropriate to meet Student's needs. The purpose of goals is to provide a means of determining whether a child is making progress in his educational program. They are part of the collaborative process of an IEP and are sometimes drafted during the meeting.¹⁰ There is no statutory requirement for particular wording that must be used in goals, and different IEP teams may draft goals using different language. The testimony in the instant case demonstrates the different stylistic preferences that individuals may have with respect to IEP goals. Lennington and Morris preferred to break goals into many, extremely specific goals, while the District preferred to have more inclusive goals. However, those stylistic differences do not make the District goals improper or incapable of measurement.

38. Despite these stylistic differences, the District's goals were still capable of being measured. For example, Goal One called for Student to initiate conversations with peers and/or adults, ask/answer questions appropriately and remain on topic for four exchanges in 4/5 opportunities. Lennington believed that the goal covered too many areas and did not match the present level of performance stated in the goal. The present level of performance stated: “[Student] is currently learning how to initiate and maintain a conversation per 3/08 report.” Contrary to Lennington's opinion, the goal was directly related to the present level of performance and was clear and measurable. The District staff

¹⁰ For example, as discussed in Factual Finding 75 below, during the January 2009 IEP team meetings, JoAnne Abrassart, Student's private speech-language therapy provider, objected to some of the District's proposed IEP goals, and changes were subsequently made in accordance with her concerns.

could measure whether Student initiated the conversations, asked and answered questions and remained on topic. This goal did not need to be broken into multiple goals in order to be measured.

39. Morris also objected to many of the goals based on problems with the present levels of performance listed as part of the individual goals. For example, some of the goals did not contain a present level specific to the goal. However, as stated above, Student's parents had failed to sign a proposed assessment plan for well over a year prior to the September 18, 2008 IEP meeting, so the District was forced to rely upon outside reports and older information. There was no denial of FAPE if the present levels were not as precise as Morris would have preferred or if individual goals failed to contain a present level of performance. Even if there had been a procedural violation in the drafting of the goals, as discussed in Legal Conclusion 25 below, there was no denial of FAPE. The IEP team had plenty of information regarding Student's present levels in the meeting notes. District staff who would have been implementing the goals understood the goals, explained them sufficiently during the IEP team meeting, and would be able to rely on those goals to determine if Student had made progress.¹¹

40. Student also objected to the goals and objectives listed in the September 18 IEP, on the basis that the IEP did not contain goals relating to Student's maladaptive behaviors. However, the goals proposed by CARD specifically addressed behavior and maladaptive behaviors. There was no denial of FAPE on this basis.¹²

41. During the hearing, Student raised concerns about the goals in the September 18 IEP because four of the proposed goals from CARD were not included in that IEP. However, an examination of the omitted goals shows that the subjects of those goals were addressed by other goals in the proposed IEP. For example two of the omitted CARD goals dealt with identifying a problem and solutions to that problem and predicting outcomes. The District's proposed goals number two and five already addressed similar issues. The other two proposed CARD goals addressed unspecified gross motor activities. During the IEP meeting, the CARD representative referred to activities such as playing basketball in connection with those goals. The District's proposed goal number four addressed engaging in outdoor activities such as basketball.

42. There was no denial of FAPE based on any of the goals or objectives contained in or omitted from the September 18, 2008 IEP.

¹¹ If the goals or present levels were vague or confusing to Student's parents, they could have discussed those concerns during the IEP meeting. Student's parents were represented by competent, experienced counsel during all the IEP team meetings at issue in this case. During the meeting, Student's parents could have requested that the language of the goals or present levels be changed. In their written dissent attached to the IEP, Student's parents raised concerns about the individuals who left the meeting prior to the discussion of goals and a concern that the goals were based on outdated information, but they did not object to the language used in the goals.

¹² In Student's written closing argument, Student also contended that the September 2008 IEP should have contained a behavior support plan. However, that was not alleged in Student's due process request and will not be considered here.

43. Student also contends that the District failed to offer Student a FAPE in the September 18, 2008 IEP, because the District did not offer an appropriate educational placement or services for Student. An IEP must be reasonably calculated to provide a child with educational benefit based on what is known to the IEP team at the time of the meeting. An IEP must include related services which are necessary to assist the child to benefit from special education.

44. The September 2008 IEP offered Student a general education classroom placement with supports and services. Student does not dispute that a general education placement was appropriate. At the time of the September 2008 IEP team meeting, Student had been participating in a general education classroom with a one-to-one aide at Crossroads for over a year and had been making educational progress in that setting. The classroom at Crossroads had approximately 27 pupils in it, and Student functioned well in that classroom with his one-to-one aide. The evidence supports a finding that a general education public school placement with appropriate supports and services was the least restrictive environment appropriate for Student's education.

45. Student's objection to the proposed placement involves the particular public school that was offered in the IEP. The September 2008 IEP called for Student to be placed in the general education classroom at his home school of Adams. Adams was the school Student had previously attended prior to being unilaterally placed by his parents in the private school. Student's parents felt uncomfortable placing Student back in the same public school that was the subject of the prior due process case. Student's expert Morris agreed that it would not be appropriate to put Student back at Adams, based on the history of due process proceedings between the parties.

46. However, Student presented no evidence as to why there would be a problem (aside from the comfort level of Student's parents) in placing Student at Adams. For example, there was no evidence to show that there would be any hostility by the District staff towards Student or his parents if Student had gone back to Adams. The District employees who testified at the hearing were professional, courteous, and dedicated to their jobs. Whatever mistakes the District may have made in the past, there was no evidence that the District employees harbored any ill will toward Student or his family based on past disputes.

47. Lennington testified that pupils with autism will sometimes have a negative reaction to a particular location. She opined that Student might look at his past failures at Adams and have a difficult time going back. There was testimony at the hearing that, shortly before the summer of 2009, when Student's parents told Student that he might have to go back to Adams, his anxiety and obsession about things such as disease increased greatly. Student's father testified that Student exhibited anxiety when he went back to Adams for his assessment in the fall of 2008.

48. The evidence at hearing was unclear as to what extent Student's anxiety in the summer of 2009 was caused by his concern about returning to Adams. Morris' testimony

indicated that there might have been additional reasons for Student's anxiety during that time. Morris explained that Student's anxiety began around April 2009 when his parents were unable to continue paying for CARD services for a time. She discussed Student's difficulty with transitions and that part of his anxiety may have been due to the transition to the intensive Lindamood Bell program during the summer of 2009. She explained that it was necessary for him to attend the summer Lindamood Bell program, despite the risk of anxiety.

49. Even assuming that Student's anxious conduct was due solely to the prospect of going back to Adams, that information does not invalidate the September 18, 2008 IEP offer. While that anxiety is a concern, there was no evidence that the anxiety was so severe that it would interfere with Student's education. Morris felt it was necessary for Student to attend a summer Lindamood Bell program despite any anxiety that might have caused. Apparently she felt he could gain educational benefit despite his anxiety. If Student had attended Adams in accordance with his September 18, 2008 IEP, and if his anxiety interfered with his education, that might have been cause for the District to consider a different placement or offer additional services to address his anxiety. However, the information the District possessed at the time of the September 2008 IEP team meeting indicated that a general education placement at Adams would be appropriate.

50. Morris and Lennington also objected to Adams because it was a school with a large population of English-language learners. According to their testimony, approximately 45 percent of the pupil population at Adams was made up of children for whom English was a second language. They raised concerns that an autistic child such as Student might have difficulty if his role-model peers were themselves learning English. However, the District's IEP called for Student to have a one-to-one aide during his school day. The aide could easily direct Student to peers who spoke proper English as role models during recess and lunch. That is not a basis for finding Adams to be an improper placement.¹³

51. Student's parents and their experts also objected to the lack of training for the teachers and aides at Adams in autism-related issues. However, the proposed IEP called for Student to have a one-to-one ABA aide provided by an NPA provider such as CARD to assist Student during the day, and a six-month transition plan to allow the NPA aides to train the District staff. That training would be sufficient to fill in any gaps in the autism-related knowledge of the Adams staff. The teachers at Crossroads had no special training in autism, but Morris explained that the CARD aides had been working with the teachers there. Those same CARD aides would have been available to train the teachers at Adams, if necessary.

52. Morris also raised concerns about Adams based on an observation that she conducted in November 2009. That observation is discussed in detail in Factual Findings 82 – 86 below. Morris had a concern about the way the general education teacher dealt with an autistic child during her observation. However, as discussed below, the situation involving

¹³ Nothing in this decision is intended to imply that it is inappropriate for a child with autism or any other disability to be placed at a school with a large population of English-language learners, with or without a one-to-one aide.

that child was much different than Student's situation and did not make the proposed placement inappropriate. Further, Morris' observation occurred over a year after the September 2008 IEP meeting and involved a fifth grade class, not the proposed fourth grade placement.

53. The evidence supports a finding that the District offered Student an appropriate placement in a general education classroom at Student's home school. There was no denial of FAPE.

54. Student contends that the September 18, 2008 IEP failed to provide a FAPE because it did not provide for ABA services. There was general agreement among both the District and the Student witnesses that Student requires a one-to-one aide in order to function in a general education classroom. The September 2008 IEP called for Student to receive the services of a one-to-one aide from an NPA during school hours and 10 hours a week of a home ABA program. There was no evidence at hearing that this amount of service would be insufficient to meet Student's needs. Instead, the evidence indicated that this was equivalent to or greater than what he was receiving at the private school where he made educational progress. The IEP did not specify CARD to be the provider, but, as discussed in Legal Conclusion 31 below, a school district is not bound to use a particular NPA provider. Any competent provider of ABA services would have been sufficient to provide Student with a FAPE.

55. However, Student is correct about the lack of ABA services in one respect. The September 2008 IEP called for Student to begin the general education classroom placement as of September 18, but not to receive his one-to-one aide services until November 4, approximately a month and a half later. All witnesses agreed that the one-to-one aide was essential for Student to make educational progress in the general education classroom. Therefore, the proposed IEP did not and could not offer Student a FAPE until the aide services began. The evidence supports a finding that the District failed to offer Student a FAPE until November 4, 2008. The evidence also supports a finding that, on and after November 4, 2008, the District properly offered Student a FAPE with an appropriate one-to-one aide to meet Student's needs due to his autism.

56. The evidence also supports a finding that the speech-language therapy services called for in the September 18, 2008 IEP were sufficient, given the information the District had at the time. The IEP called for Student to receive 60 minutes of speech and language therapy once a week. That is the same amount of speech and language services that Abrassart had been providing to Student prior to the September 18, 2008 IEP team meeting. During her testimony, Abrassart explained that one time a week for an hour each session was still appropriate for her services for Student at the present time. However, like the one-to-one aide services discussed above, the IEP called for the speech and language services to begin on November 4, 2008. Therefore, prior to that date, the District did not offer Student a FAPE with respect to speech and language services.

57. In Student's due process hearing request, Student contended that the IEP did not offer Student appropriate OT or PT services. Student called no OT or PT expert witnesses to testify at the hearing. Student failed to address these issues in Student's written closing argument, so it appears that Student has dropped these issues. If Student has not dropped these issues, Student failed to meet his burden regarding them.

58. Student also objected to the reading services offered in the IEP. Student's expert Morris believed that the District's offer of resource specialist program (RSP) services for Student would not be sufficient to meet Student's needs, because resource programs tend to be group settings while she believes Student needs one-to-one tutoring. Student also contends that the IEP should have contained specialized reading instruction, for example by an NPA such as Lindamood Bell.

59. The evidence supports a finding that the reading and RSP services called for in the IEP were reasonably calculated to meet Student's needs and provide him with educational benefit. The IEP called for Student to receive instruction by a credentialed teacher in consultation with a special education teacher. Student presented no evidence to show that a credentialed teacher was unable to teach reading – even Student's current teacher at the parochial school Alece Beauchamp admitted during her testimony that credentialed teachers are trained to teach reading. To the extent that any methodologies used by Lindamood Bell might have been appropriate for Student's education, District special education teacher Bernadette Meade was trained in the use of Lindamood Bell methodologies and could assist the classroom teacher and CARD aide with that instruction.

60. The evidence supports a finding that the District offered Student an educational program that was reasonably calculated to provide him with educational benefit on and after November 4, 2008 (when his one-to-one aide and speech-language services would begin). As of that date, the District was in compliance with the procedural and substantive requirements of the Individuals with Disabilities Education Act and there was no longer any denial of FAPE.

The January 16 and January 29, 2009 IEP Team Meetings

61. Student's parents did not agree to any portion of the September 18, 2008 IEP either at the meeting or after receiving the September 30 letter of clarification. After the meeting, the District began the assessment process. Student's parents fully cooperated with the District in that process and the District was able to conduct the assessments in a timely fashion. The parties attempted to schedule subsequent IEP meetings in November and December 2008, but Student's parents requested that the meetings be postponed, either due to lack of sufficient notice for the meeting or due to scheduling conflicts with work.¹⁴

¹⁴ Student's due process request did not challenge any of the District's assessments, so there is no need to discuss the assessments in detail here. In his written closing argument, Student contended that the assessments were never completed because no vision therapy assessment, psychoeducational assessment or cognitive testing was completed. However, because those issues were not raised in the due process request, they will not be considered

62. During the hearing, the District raised concerns about the short notice given by Student's parents when canceling the meetings. However, the evidence showed that Student's parents were attempting in good faith to cooperate with the District's scheduled meetings and that the necessity for rescheduling the meetings was due to circumstances beyond the control of Student's parents. The evidence supports a finding that both parties were working in good faith during this time in trying to have the IEP team meeting held in a timely fashion.

63. The IEP team meeting was eventually held on January 16, 2009. The parties did not complete the meeting that day, and a follow-up meeting was held on January 29, 2009. On January 29, 2009, the District made a new offer of FAPE to Student. Because the January 16 and 29 IEP meetings involved a continuation of what was essentially the same meeting, they will be addressed together in this decision.

64. The District offered the following services in the January 2009 IEP offer: 1) general education placement at Adams, Student's home school; 2) special education small-group instruction four times a week for 30 minutes per session to address written language, math and reading; 3) collaboration and consultation between the resource specialist and the general education teacher four times a week for 30 minutes each session; 4) individual, special education pull-out services in reading two times a week for 120 minutes each session; 5) 20 sessions of individual, pull-out PT services, for 30 minutes each session; 6) OT in-class services of 30 sessions per year at 30 minutes each session; 7) speech-language therapy provided by a District employee of 60 sessions a year at 30 minutes each session, in both small-group and individual sessions; 8) APE, small-group, pull-out services of 30 sessions per year at 30 minutes each session; 9) consultation APE services with the general education teacher at Adams, 15 times per year at 15 minutes each consultation session; 10) a behavior support plan included in the IEP; 11) a one-to-one aide provided by an NPA to accompany Student during school hours, 12) consultation and collaboration between the NPA provider and the school 12 times per year at 60 minutes each session; 13) in-home, direct, one-to-one instruction provided by an ABA NPA provider for eight hours per week, with time allotted for supervision and clinical meetings; 14) speech-language services provided by an NPA for 44 sessions per year, one hour each session; 15) ESY services; and 16) transition services to assist Student's return to the public school.

65. Student's parents attended both January meetings along with their attorney. District employees and representatives of Student's private providers also attended the meeting, including but not limited to: JoAnne Abrassart, representatives from CARD, general education teacher Evonne Ramsey, school administrator Huckeba, and District special education teacher Susan LePard. Approximately 20 individuals attended each of the two January meetings.

here. To the extent that the assessments were relevant to the subsequent IEP offer, the assessments will be discussed in connection with that IEP offer.

66. The team members discussed the District's assessments and the new reports and information presented by Student's private providers. Abrassart had finished her new assessment, and she participated in the discussion during the meetings, raising objections to some of the District's goals, and proposing her own goals. Ultimately, in part because of this discussion, the District's proposed IEP on January 29, 2009, included most or all of Abrassart's proposed goals and also called for Abrassart to provide speech-language therapy for Student in addition to the speech-language therapy provided by the District employees.

67. The proposed January 29, 2009 IEP contained over 40 goals, including the goals proposed by CARD and Abrassart. The goals covered behavior, social skills, completing tasks, writing, reading, reading comprehension, gross motor and fine motor skills, math, problem-solving, speech-language, OT, PT, and APE. At the end of the January 29 IEP meeting, the finished document was not ready to hand to Student's parents, but they were able to pick it up later that same day. Student's parents did not sign their agreement to the IEP during the meeting or after they received the final version of the document.

68. Student's parents and their private providers had a full opportunity to participate in the discussion during the IEP team meeting. Student contends that the District did not permit parental participation during the meeting, but the evidence shows a robust discussion during the meetings. For example, during the January 16 meeting, JoAnne Abrassart disagreed with Maria Perkins, the District speech-language pathologist, about the District's proposed speech-language goals. Abrassart's proposed goals were ultimately adopted by the IEP team. Likewise, the District agreed that the NPA one-to-one aide and home ABA services would be provided by CARD (the parents' preferred provider), and that, in addition to the District speech-language therapy, Abrassart would also provide one hour per week of speech and language services to Student. Although the IEP document did not specify the names of the NPA providers of the services, the testimony at hearing was unanimous that the IEP team agreed to have CARD and Abrassart provide those services to Student. The fact that the District agreed to have Student receive NPA speech and language therapy by his parents' preferred provider *in addition to* the District-provided speech-language services is strong evidence that the District was greatly influenced by the parents' preferences.

69. Likewise, there was no evidence of predetermined placement. The District offered a general education placement at Student's home school, with an abundance of supports and services designed to meet Student's educational needs. Student's parents preferred a general education placement for Student and the District offered a general education placement. Just because the District did not agree to public funding of the private, parochial school preferred by Student's parents does not mean the placement was predetermined.

70. Student next contends that the January 2009 IEP failed to contain accurate present levels of performance for Student. In addition to the information the District possessed at the time of the September 2008 IEP discussed above, the January 2009 IEP team had additional input and assessments from Student's private providers as well as the

District's 2008 assessment. The January 2009 IEP contained four pages of present levels, covering Student's strengths and weaknesses in reading, math, written expression, communication and speech, social behavior, physical skills (including gross and fine motor skills), and self-help/prevocational skills. These present levels were highly detailed and addressed all aspects of his abilities and needs. Student's written closing argument objected that there were no scores listed for Student's cognitive ability, because the District's assessment did not include cognitive testing. Student also argues that the District assessors did not conduct the Vineland Adaptive Scales (Vineland) assessment correctly, leading to inaccurate behavioral present levels.

71. During his testimony, Diaz explained that he did not do cognitive testing during the 2008 assessment of Student because the Regional Center had just finished cognitive testing less than a year before. The Inland Regional Center psychological evaluation dated December 18, 2007, included results from the Wechsler Intelligence Scale for Children IV, an assessment of cognitive functioning. This report was available to the IEP team at the September 2008 and January 2009 IEP team meetings. With a cognitive test conducted less than a year before the District's assessment, there was no need for further cognitive testing. The failure to do additional cognitive testing did not invalidate the District's 2008 assessment and did not make the January 2009 present levels of performance inaccurate. Even if the District erred by not including those specific cognitive scores in the IEP, given the abundance of information contained in the present levels of performance and the rest of the document, that procedural error was not sufficient to give rise to a substantive denial of FAPE.

72. The same holds true for the Vineland. The Vineland consists of a series of questions answered by Student's parents regarding Student's behavior. Student complains that the District assessor conducted the Vineland over the telephone and filled it out based on the answers Student's parents gave him, rather than handing the paper to the parents to complete. Student contends that this was an improper way of conducting the Vineland so the present levels of performance and behavior support plan were improper. Even assuming that Student is correct that the Vineland was somehow compromised because Student's parents did not have the paper in their own hands when they answered the questions, there was still no denial of FAPE. The IEP team had numerous sources for information regarding Student's behavior, including information provided by Student's teacher and CARD, assessments and reports, and the observations of the District personnel. Diaz testified that changes were made to the behavior plan during the IEP meeting, and it was a collaborative effort. The present levels in the IEP and the problem behaviors listed in the behavior support plan were consistent with other reports regarding Student's behavior. There was no denial of FAPE.

73. Lennington opined that the present levels of performance in the January 2009 IEP needed more specificity in the areas of behavior and socialization. However, as stated above, the IEP team had first hand information about Student's social and behavioral skills from the team members. Even if the present levels for socialization or other areas were not as detailed as Lennington might prefer, there was no denial of FAPE. Morris also wanted more specificity in the present levels of performance, such as specific test scores. However,

there was plenty of information available to the IEP team regarding Student's needs and abilities without listing these specific scores. There was no denial of FAPE.

74. Student also contends, based on the testimony of District OT Nicole Ortiz, that the present levels of performance for OT in the IEP did not match the OT goals. However, that does not accurately summarize Ortiz' testimony – instead, in response to cross-examination, she explained why the goals used certain language and how the goals would be applied to Student. Even Lennington admitted during her testimony that the OT present levels written in the IEP were fine.

75. Student raises several objections to the goals in the proposed January 2009 IEP. First, Student contends that the goals were drafted before the meeting and provided to each of the participants at the start of the January 16 meeting. Based on this, Student argues that the District predetermined goals. However, the testimony during the hearing contradicted any concern about predetermination. During her testimony, JoAnne Abrassart talked about the discussion regarding speech-language goals that occurred during the January IEP team meetings. She objected to some of the proposed goals in the January 16 IEP, and those goals were changed in the January 29 IEP offer that was ultimately made. The District staff adopted Abrassart's goals and Abrassart agreed with the remaining District speech-language goal. The IEP team also adopted the CARD goals in the January 29 offer, including the ones omitted from the September 2008 IEP. There was no predetermination.

76. Student also contends, based on the testimony of Lennington and Morris, that the goals could not be understood or measured. Once again, their objections are based on the wording of the goals. However, the evidence shows that the goals were a collaborative effort based on discussions during the meeting. Lennington and Morris were not at the January IEP meetings and admitted that Student's parents had not raised any concerns about the language of the goals to them when Student's parents retained them as experts.

77. Lennington's opinion that the goals contained too many "embedded goals" is unpersuasive. The goals were measurable and clear – Lennington's preference to have many little goals does not make the District's more inclusive goals inappropriate. Likewise, Lennington's confusion about the language in a few of the goals does not make those goals improper. Student's mother explained that all the team members received a draft of the goals at the start of the January 16 meeting. If anything was confusing or unclear about the goal language it could have (and should have) been addressed during the meeting. The absence of such a discussion indicates that the team members understood what was meant by the goals or that the discussion during the meeting was sufficient to dispel any confusion. Lennington admitted that her testimony during the due process hearing was the first time the District learned about her objections to the goals. Lennington's testimony regarding the wording of the goals is unpersuasive to show a denial of FAPE.¹⁵

¹⁵ Indeed, Lennington's testimony is an indication that, no matter how much discussion and collaboration occurs regarding goals during an IEP team meeting, someone from the outside, months after the IEP in question, will likely be able to find some type of flaw in the wording.

78. Morris objected to the goals because they did not discuss the level of prompting that Student would receive by his one-to-one aide. On that basis, she believed they could not be measurable. However, she was not at the IEP meeting, and there was no evidence that any IEP team member raised this concern. Clearly the team believed that a credentialed teacher or other qualified District staff could measure Student's progress on the goals, even without specific language in the goal regarding prompting.

79. Morris opined that the present levels stated in several of the goals did not match the goal. However, a review of the goals' language does not support her opinion. For example, she complained that in Goal 12 the present level talked about emotions but the goal did not. Contrary to her opinion, the present level discussed Student's difficulty with taking another person's point of view. The goal involved Student identifying and solving problems when presented with a picture, scenario or activity, an activity connected to his ability to take another's point of view. There was no discrepancy. Morris' objections to other goals were equally unpersuasive.

80. In contrast to Morris and Lennington, the District employees testified that the goals were appropriate and measurable. For example, Evonne Ramsey, the District fourth grade general education teacher from Adams who attended the January 2009 IEP meetings, testified that the goals were appropriate based on the information she had about Student at the time of the meetings.

81. Student's main objection to the January 2009 IEP involves the proposed placement in a general education classroom at Adams.¹⁶ Student's experts Lennington and Morris testified that they believed Adams would not have been an appropriate placement for Student based, in part, on their observation of that placement. As with the September 18 IEP, their objections related to the particular school, not to a general education placement for Student. All the witnesses for both sides agreed that a general education placement with a one-to-one aide and supports was appropriate for Student. The parties just disagreed about where that general education placement should be.¹⁷

¹⁶ There was considerable testimony during the hearing about the scheduling of observations by Student's parents at Adams and other District elementary schools after the January 29, 2009 IEP meeting. It is not necessary for this decision to discuss the scheduling conflicts and the accusations of each side as to who was responsible for the schedule changes and delays, because the due process request contained no allegation that Student was denied a FAPE related to any of those observations. The District never offered any other public school placement for Student besides his home school of Adams.

¹⁷ There was evidence that Student was making good progress in that general education setting with a one-to-one aide. For example, Beauchamp testified that Student has gained two grade levels in reading since the beginning of the current school year in September 2009, and indicated that in some of his subjects, such as science, Student is now working at grade level. Although her testimony is not directly relevant to the January 2009 IEP offer because it was not information the District possessed at the time, it does provide additional reassurance that the District's offer of a general education placement was appropriate when made. Hopwood, Student's Crossroads teacher at the time of the January 2009 IEP, also testified about the progress Student made in her class.

82. Lennington and Morris observed Adams on November 6, 2009. Student's father accompanied them. They met with the school principal who explained, among other things, that approximately 45 percent of the pupils at the school were English-language learners and that the school had many services for children who came from a disadvantaged background. Lennington believed that the school staff had a positive attitude, worked well together as a team, and that the teacher in the classroom they observed was a good and enthusiastic teacher.

83. Lennington described a campus program in which volunteers agreed to be "hugs buddies" for children who needed extra support. The teacher in the class they observed was a "hugs buddy" for one autistic boy who came into her class to eat lunch. He was not actually a pupil assigned to her class and he did not participate in her class while he was eating his lunch there. The children in the class were friendly towards him. She saw him engage in autistic, self-stimulatory behavior while he was there.

84. Lennington reported that during the observation they met with the school resource teacher Susan LePard, who informed them that she was at maximum capacity for the number of children she could carry on her caseload. According to Lennington, they were also told that the speech-language therapist was at maximum capacity on her caseload.

85. In addition to the concerns regarding the placement addressed in Factual Findings 45 – 53 above, Lennington and Morris objected to the Adams placement based on what they learned during the observation. In particular, they were concerned about the way the autistic boy was treated in the class they observed. However, despite their concerns, there is no indication that Student would have been treated that way if he had been assigned to that class. The boy in the "hugs buddy" program was not assigned to that classroom as a pupil and apparently had no one-to-one aide.

86. They also opined that Adams was inappropriate because the special education resource program at Adams was full. This is not a valid objection for two reasons. First, the observation occurred many months after the IEP in question. There was no evidence that the program was full at the time of the IEP. Second, even if the program was full on January 29, 2009, that was not sufficient to invalidate the offer. A school district is required to provide the services called for in the IEP. If a district does not have sufficient staff to provide the services, the district is required to make arrangements to have the services provided. As LePard testified, subsequent to the date of the Adams observation, the District hired additional resource staff.

87. Student's other objections to the placement are the same as those raised regarding the September 2008 IEP. Student objects that Adams had many English-language learners, but, as stated in Factual Finding 50 above, that would not be a problem in Student's circumstances. Student's concerns that the general education teacher had no specific training with autistic children would be addressed by the assistance she would receive from the special education staff and from the one-to-one aide provided by CARD.

88. Student also contends that White told Student's mother during a school observation at Eisenhower Elementary School in October 2009, that Adams would not be a good fit for Student. White denied that she made such a comment. She explained that she knew Student's parents did not want Student to go back to Adams, so her comments were made concerning the request by Student's parents to observe Adams. It was clear from the testimony of the various witnesses that White's comments were made in an attempt to resolve the ongoing dispute with Student's parents by suggesting a placement at a different elementary school (Eisenhower) which Student's parents had observed and which seemed to be an appropriate fit for Student. White never intended to imply that the District's IEP offer was invalid. In any event, her comments, made many months after the January 29, 2009 IEP offer, did not invalidate that offer.

89. The District's experts, on the other hand, believed that Adams was an appropriate placement for Student. Diaz explained that the District offered the same model of education that had been successful for Student at Crossroads – general education with a one-to-one aide. In addition, the District could offer specialized services, such as OT and APE, to help Student to achieve greater success. Ramsey testified that the children at Adams are very accepting of individuals with special needs, and that her general education fourth grade class would have been an appropriate placement for Student with his one-to-one aide. LePard also agreed that the services in the proposed IEP were appropriate to allow Student to meet his goals.

90. Student's mother testified as to how well Student was progressing at Crossroads. Student's parents want him to stay there. While their concerns for their son are understandable, as discussed in Legal Conclusion 5 below, the law looks at the District's proposed placement to determine whether a child has been offered a FAPE. If the District has offered a FAPE, the preferred placement of the child's parents is not a consideration, even if that proposed placement would provide the child with greater educational benefit.

91. Student's due process request also alleged that the District failed to provide Student with appropriate CARD services and speech and language services. However, the January 29, 2009 IEP offered CARD services equivalent to what Student had received in his private placement. The IEP also offered both District-provided and NPA-provided speech-language services. There was no testimony that these services, as offered in the January 29, 2009 IEP, were inappropriate or insufficient to meet Student's needs. Likewise, there was no testimony that the OT or PT services called for in the January 2009 IEP were inappropriate or insufficient to meet Student's needs. As stated above in Factual Finding 59, the combination of general education and special education services would be sufficient to address any needs Student had in the area of reading.

92. The evidence supports a finding that the January 29, 2009 IEP offer was reasonably calculated to provide Student with educational benefit at the time it was made, and would address his educational needs. The District followed the procedures set forth in federal and state law in holding the meeting and making the IEP offer. There was no denial of FAPE.

Events Occurring after January 29, 2009

93. Student next contends that the District denied Student a FAPE because the District failed to provide Student with CARD and Abrassart's services, as called for in the January 2009 IEP, after Student agreed to those services. The District contends that Student never provided an unconditional, written acceptance of the services and that the District had no obligation to provide those services as long as Student remained in the private school.

94. On February 4, 2009, Student's counsel sent a letter to the District's counsel regarding the proposed January 29, 2009 IEP. The letter stated in part:

My client and I have had an opportunity to review the document and have the District's offer of "FAPE" contained on page 43 of 48.

My clients agree with No. 13 regarding the Applied Behavior Analysis (ABA) programming with the following addition that the current NPA provider for [Student] which is; the Center for Autism and Related Disorders (CARD) will continue to be the provider of this service, unless they are no longer available or able to provide the service or the District and the Parents mutually agree to another NPA provider.

My clients will agree to No. 12 regarding Shadow Aide services, with the following addition that the current NPA provider for [Student] which is; the Center for Autism and Related Disorders (CARD) will continue to be the provider of this service, unless they are no longer available or able to provide the service, or the District and the Parents mutually agree to another NPA provider.

My clients will agree to No. 14 regarding Speech and Language Services, with the following addition that the current provider for [Student] which is; Joanne Abrassart will continue to be his provider unless she is no longer available or able to provide the service or the District and the Parents mutually agree to another provider.

My client will withhold agreement at this time of the other offered services until they can view the other placement that may be appropriate at other campus locations within the district as was discussed at the IEP meeting. My clients are anxious to see those alternative as quickly as possible.

95. On March 11, 2009, counsel for the District responded to the letter from Student's counsel. In the letter the District's counsel rejected Student's conditional acceptance of portions of the January 2009 IEP. The District indicated that the District intended to contract with Abrassart and CARD to provide services but could not guarantee any particular service provider would be chosen. The letter also stated in part:

In addition to the conditions placed on your clients' consent, they have not yet consented to the basic placement offered by the IEP team, e.g., the general education classroom at Adams Elementary School. Rather, the Parents have only conditionally consented to some of the related services offered to support the placement recommended by the IEP team. Though parents may consent to certain portions of an IEP, the District is not obligated to provide [Student] with the offered ABA or speech service unless and until his Parents consent to the general education classroom placement at Adams.

96. On April 14, 2009, Student's counsel sent a letter to the District stating, in part:

On today date I telephoned you and in regards to [Student]. I informed you that [Student's] ABA service are being halted by (Center for Autism and Related Disorders) CARD due to non payment. At the last...IEP meeting the parents agreed to services for ABA as well as Speech and Language from Joanne Abrassart. Neither of these educational services are being provided. If I am correct it is your position that the District is not required to fund those services because [Student's parents] have not agreed to a classroom within the District. The [parents] have the right to agree to any part of the services offered and to reject any part they believe are not an offer of FAPE.

97. On April 17, 2009, the District sent a response to April 14 letter which, among other things, referred back to the District's March 11 letter in response to Student's request for CARD and Abrassart services.

98. In April 2009, Student's parents visited Eisenhower Elementary School and thought that placement might work for Student. There were no openings for new pupils at Eisenhower at the time, but District program specialist Lois (Stephanie) Traphagen told Student's parents during the observation that the District would work on trying to open a place for Student there. After the observation, Student's parents left messages for Traphagen about Eisenhower, but did not hear back from her.

99. On May 18, 2009, the District sent a letter to Student's parents. The letter stated that the parents should contact the principal at Adams to complete the paperwork if they wished to re-enroll Student in a District school. The letter also stated the District did not agree to the conditions attached to Student's acceptance of portions of the IEP, so they did not currently have consent to implement any portion of the IEP.

100. On May 19, Student's counsel sent a letter to the District's counsel which stated in part:

The Parents have agreed to portions of that IEP with out limitation. After finally allowing them to observe placements the parents notified your

client of the placement that best suited their son, Eisenhower Elementary, where they meet with the Program Specialist. [Student's mother] attempted to call the District leaving messages without return calls, the only response has been Dr. Hucaba's letter which tells them that they will not be able to choose any other placement, other than Adams Elementary School where the ALJ found to be inappropriate for [Student]. Further the District employees open hostility toward my clients at that school site (Adams) does not make it conducive for their son.

101. The letter concluded with the paragraph:

Now after weeks of being ignored the SELPA director has sent them a letter directly telling them that the only enrollment option is Adams Elementary School and implying that the [parents] have accepted portions of the IEP with limitations. This is not true and the [parents] asked for some clarification of the Districts offer but non the less accepted those portions of the IEP as is their right.

102. On June 5, 2009, Student's parents sent the District a letter stating that because the District had not offered an appropriate placement for Student, Student's parents were placing Student in a Lindamood Bell program beginning on June 15, 2009. Student's parents requested that the District reimburse them for that placement.

103. On June 8, 2009, the District sent a letter to Student's parents in response to a voicemail message from Student's parents requesting that Student's school of attendance be changed from Adams to Eisenhower. The letter stated that the District wished to hold an IEP team meeting to discuss that request and to discuss the request of Student's parents that the District reimburse them for the Lindamood Bell placement. The letter included an IEP meeting invitation for June 18, 2009.

104. On June 16, 2009, Student's parents sent the District a letter stating that they could not attend the IEP on June 18, 2009, and requesting alternative dates for a meeting. Traphagen telephoned Student's parents and left voicemail messages regarding rescheduling. However, no IEP team meeting was rescheduled or held. Shortly thereafter, Student filed a due process request against the District in OAH case number 2009061459. That case was later withdrawn by Student, and the instant case was filed in February 2010. As of the date of filing this due process case, no further IEP team meetings had been held for Student.

105. On August 17, 2009, Student's parents gave notice that they believed the District had not offered an appropriate placement for Student, so they would be unilaterally placing him at Crossroads Christian School starting on September 2, 2009. Student's parents stated that they expected the District to reimburse them for the placement.

106. The evidence supports a finding that Student's parents never provided an unconditional written acceptance to any portion of the January 29, 2009 IEP offer. The

February 4, 2009 letter from Student's counsel did not accept what was offered in the IEP – it added conditions to what was offered. While the witnesses were all in agreement that the IEP team contemplated that CARD and Abrassart would be the service providers, Student attempted to add conditions to limit the District's ability to choose different providers for those services at a later time. That was not what was offered. If it had been what was offered, Student's counsel would not have felt the need to draft his clients' acceptance with conditions.

107. Student's April 14, 2009 letter did not accept the services. It merely recounted that the parents had agreed to CARD and Abrassart services at the January IEP meeting. However, there was no evidence of any written acceptance of those services during the meeting. Student's parents were represented by competent, experienced counsel all during this case. They could have signed the IEP agreeing (unconditionally) to some of the services or sent a letter saying that they accepted certain services with no conditions. There is no evidence that they ever did so. A letter referring to a past oral acceptance is not the same as a written acceptance.

108. The May 19, 2009 letter states that the parents "have agreed to portions of that IEP with out limitation." It seems to refer once again to their oral acceptance during the IEP team meeting, which is not the written acceptance contemplated by the law.

109. Even assuming that the May 19, 2009 letter did constitute an acceptance to the portion of the IEP providing for ABA services and speech-language services without the conditions contained in the February 4, 2009 letter, Student also faces another hurdle. Student did not accept the portion of the IEP calling for Student to attend a District school. In their "acceptance" of those services, Student's parents anticipated that the one-to-one aide would be provided to Student at the private school. Likewise, Abrassart testified that she provided Student's speech-language services to him at the private school.

110. The District's IEP offer was not to provide aide services or speech-language services at a private school. The January 29 IEP offered the one-to-one ABA aide and speech-language services to be provided at the public school, in order to support Student in the general education classroom. The IEP team never offered a private school placement. Student's parents were adding yet another condition to their consent -- they wanted the IEP services to be provided to Student at his private school. The evidence supports a finding that Student's parents never gave unconditional consent to receipt of the CARD and Abrassart services at the public school as proposed in the January 29, 2009 IEP.¹⁸

111. Further, as discussed in Legal Conclusions 40 – 49, even if Student had unconditionally accepted the CARD and Abrassart services, Student was not entitled to the

¹⁸ While the home portion of the ABA services was not intended to be given at the private school, the home services were part of the package of ABA services, supervision and consultation. Student offered no evidence that they could be effectively separated from the rest of the CARD services.

services as a matter of law. The ability of a parent to agree only to portions of an IEP was never intended to circumvent the separation between public and private schools in special education law. Students who attend private school at the choice of their parents (rather than as a placement ordered by an IEP team) are not entitled to a FAPE at public expense. Services may be provided according to the proportional system established by law, but that is not what Student's parents sought in this instance. The District offered the supports and services in the IEP to assist Student in a public school placement. The District's offer constituted a FAPE in the LRE. Student's parents chose to reject that FAPE offer and place their son in a parochial school. Once they did so, he was no longer a child enrolled in the District and was not entitled to the services under the IEP. There was no denial of FAPE based on the District's failure to provide CARD services or speech-language services to Student between January 29, 2009, and February 3, 2010, the date of filing this due process hearing request.¹⁹

Factual Findings Regarding Educational Expenses Incurred by Student's Parents

112. The evidence supports a finding that the District denied Student a FAPE during the time period from June 27, 2008, up to November 4, 2008. As stated above in Factual Findings 3 – 4, the decision in OAH case number 2008040704, although issued on July 14, 2008, only covered the time period up to the end of the 2007 – 2008 school year on June 27, 2008. Therefore, it is appropriate to order the District to reimburse Student's parents for their expenses incurred in July, August, September and October, 2008. Student's parents incurred the following educational expenses for Student during that time period:

For CARD services: July 2008: \$8205
August 2008: \$6930
September 2008: \$9499.80
October 2008: \$9030

The total amount Student's parents paid to CARD during the time period in question was: \$33,664.80

¹⁹ During the hearing, an issue arose as to whether the District had failed to hold an annual IEP team meeting for Student by January 29, 2010, one year after the January 29, 2009 meeting. Although the ALJ requested that the parties address that issue in their written closing briefs, upon further reflection, it is not an issue appropriately addressed in this decision. Student's due process request did not allege a denial of FAPE based on the failure of the District to hold an IEP meeting by January 29, 2010, so the issue was not fully litigated at the hearing. Even if the District had committed a procedural violation by failing to hold an IEP team meeting during the five days between Friday, January 29, 2010, and the date of filing of Student's due process request on Wednesday, February 3, 2010, that de minimus delay would not have been sufficient to give rise to a substantive denial of FAPE. This decision only addresses the period of time up to February 3, 2010. As of that date, the District had offered Student a FAPE. Student's due process request asked for compensatory education and reimbursement throughout the 2009-2010 school year, which would end in June 2010. However, since there was no denial of FAPE after November 4, 2008, there is no need to make any findings regarding those other requested remedies.

For Crossroads Christian School: Enrollment fee of \$225 for the 2008-2009 school year. Monthly tuition charges of \$466.67 per month, during the period from July 1 through November 1, 2008. The total amount Student's parents paid to Crossroads for tuition and the 2008-2009 enrollment fee during the time period in question was: \$2,091.68. The balance of equities does not call for the District to reimburse Student's parents for any additional costs for school supplies or school uniforms beyond what was already included in the monthly tuition fee.

For Abrassart:

September 2008: \$481.28

October 2008: \$412.50

At Abrassart's recommendation, Student's parents also purchased a program known as Fast Forward to assist Student's education during the summer of 2008. Abrassart testified that Fast Forward was designed to address language deficits such as the ones Student exhibited, and she believed it would benefit him educationally. The Fast Forward program cost Student's parents \$1940. They also paid Abrassart \$900 as an implementation fee for the Fast Forward program in July 2008. The total amount for Abrassart's services and Fast Forward during the time period in question was: \$3,733.78.

113. As discussed in Legal Conclusions 50 – 53 below, it is appropriate to order the District to reimburse Student's parents for the amounts that they paid during these time periods to Crossroads, Abrassart, and CARD. The total amount of reimbursement, rounded to the nearest dollar figure is \$39,490.00.

114. Student's parents also submitted invoices for other expenses incurred prior to November 4, 2008, such as expenses for vision therapy and physical therapy, but as discussed in Legal Conclusion 52, the balance of equities does not call for the District to reimburse those expenses. Some of those expenses were of questionable educational necessity. In light of the District's swift actions to try to remedy the past problems after July 14, 2008, it is only equitable to require the District to reimburse for the major educational expenses incurred by Student's parents during that time.

LEGAL CONCLUSIONS

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

2. Under the IDEA and corresponding state law, students with disabilities have the right to a free appropriate public education (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(9); Cal. Code Regs., tit. 5, § 3001, subd. (p).)

3. The congressional mandate to provide a FAPE to a child includes both a procedural and a substantive component. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034], the United States Supreme Court utilized a two-prong test to determine if a school district had complied with the IDEA. First, the district is required to comply with statutory procedures. Second, a court will examine the child's IEP to determine if it was reasonably calculated to enable the student to receive educational benefit. (*Id.* at pp. 206 - 207.)

4. Not every procedural violation of IDEA results in a substantive denial of FAPE. (*W.G. v. Board of Trustees of Target Range School District* (9th Cir. 1992) 960 F.2d 1479, 1484.) According to Education Code section 56505, subdivision (f)(2), a procedural violation may constitute a substantive denial of FAPE only if it:

- (A) Impeded the child's right to a free appropriate public education;
- (B) Significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a free appropriate public education to the parents' child; or
- (C) Caused a deprivation of educational benefits.

5. In *Rowley*, the Supreme Court 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, supra*, 458 U.S. at p. 201.) *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. (*Id.* 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. (*Rowley*, at pp. 200.) In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) An IEP is evaluated in light of information available at the time it was developed, and is not to be evaluated in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) The Ninth Circuit has endorsed the "snapshot rule," explaining that an IEP "is a snapshot, not a retrospective." The IEP must be evaluated in terms of what was objectively reasonable when it was developed. (*Ibid.*)

6. The most efficient way to examine the District's actions and the IEP offers in the instant case is to divide the facts into three distinct time periods -- 1) the time between June 27, 2008, and September 18, 2008; 2) the time between September 18, 2008, and January 29, 2009; and 3) the time after January 29, 2009. The issues raised by Student will be analyzed in light of the events occurring during each of those times.

The District Failed to Offer Student a FAPE between June 27, 2008, and November 4, 2008.

7. As discussed in Factual Findings 2 – 14 above, the OAH decision in case number 2008040704 determined that the District had not offered Student a FAPE for the school years prior to July 14, 2008, when the decision was issued. Although the OAH decision did not order the District to hold an IEP meeting, until such a meeting was held, the District had no offer of FAPE outstanding for Student. The next IEP meeting was not held until September 18, 2008.

8. The District argues that it was not required to hold an IEP team meeting for Student or make another offer of FAPE until Student’s parents signed the August 2008 proposed assessment plan. The District’s position in this regard is not well taken.²⁰

9. The IDEA requires that a school district have in place at the beginning of each school year for every child with a disability within that district’s jurisdiction an IEP that meets the requirements of the law. (20 U.S.C. § 1414(d)(2)(A).) An IEP team must review a pupil’s IEP periodically, but not less frequently than annually, to determine whether the annual goals for the child are being achieved and to see if any changes must be made to the IEP. (20 U.S.C. § 1414(d)(4).)

10. A reevaluation of a child shall occur “(i) not more frequently than once a year, unless the parent and the local educational agency agree otherwise; and (ii) at least once every three years, unless the parents and the local educational agency agree that a reevaluation is unnecessary.” (20 U.S.C. § 1414(a)(2)(B).)

11. As discussed in Factual Findings 5 – 14 above, the District did not have an IEP in place for Student at the start of the 2008-2009 school year. In addition, the District did not hold an annual IEP for Student within one year after its previous IEP in 2007. The District held no IEP for Student until September 18, 2008.

12. The District relies upon three cases to support its contention that it was not required to hold an IEP team meeting because Student’s parents had not signed the assessment plan. In *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1315, the school district sought to reassess the pupil for his three-year review. The court held that if the child’s parents wanted him to receive special education, they were obliged to permit testing. In *Dubois v. Connecticut State Board of Education* (2d Cir. 1984) 727 F.2d 44, the court held that a parent’s refusal to permit an assessment did not equate with a failure to exhaust administrative remedies. In *Andress v. Cleveland Independent School District* (5th Cir. 1995) 64 F.3d 176, the court held that a school district is entitled to conduct an

²⁰ Student argues that the OAH decision in case number 2008040704 “placed” Student at the private school and that the District was required to fund that placement until the parents agreed to a different IEP offer. Student is mistaken. That OAH decision did not make any prospective placement order for Student, nor did it find that the District was required to place Student in Crossroads Christian School in order to provide Student with a FAPE.

assessment using its own personnel, and that the parents' refusal to permit an assessment relieves a district of its obligation to provide special education services to the parents' child.

13. In the instant case, unlike the cases relied upon by the District, there was no evidence that Student's parents refused to sign an assessment plan between July 14, 2008, and September 18, 2008. As discussed in Factual Findings 7 – 22 above, the evidence showed that the plan was sent on August 6, there was an informal attempt to follow up through the parties' counsel, and then the District noticed an IEP team meeting for September 2008. At no time did Student's parents refuse to sign the plan. Student's father testified that when he received an assessment plan dated June 2008, he thought it had something to do with the prior due process proceeding and sent it to his attorney. His testimony was credible and his actions were reasonable. There is no evidence that Student's parents or their counsel were deliberately trying to delay this matter -- only approximately a month passed between the time the assessment plan was sent to the parents and the time the IEP team meeting was held. Student's parents attended the meeting without seeking any delay or continuance of the meeting date and signed the assessment plan at the meeting.

14. Further, none of the three cases relied upon by the District involved a situation in which a school district had no current IEP offer because an administrative decision found that the school district had not offered a FAPE to the child. In the instant case, the District knew as of July 14, 2008, that it had no valid IEP in place for this child, so a new IEP team meeting needed to be held as soon as possible. Nothing in the three cases cited or any other law relied upon by the District relieves the District of its obligation to hold an IEP team meeting under these circumstances.

15. To the District's credit, the District acted swiftly and appropriately after receiving the July 14 decision. The District's counsel first attempted to deal informally with Student's counsel. When that did not work, the District noticed an IEP meeting. At that IEP meeting, the District IEP team members used all the resources available to the IEP team to make an offer of FAPE. Nothing in this decision is intended to criticize the District's actions between July 14, 2008, and September 18, 2008. However, because the District's actions prior to July 14 had led to a denial of FAPE, until a new and proper FAPE offer was made, Student could not receive the services to which he was entitled by law. The evidence supports a finding that the District denied Student a FAPE between June 27, 2008, and September 18, 2008.

16. As discussed in Factual Findings 15 – 23 and 55 – 56 above, the District also denied Student a FAPE between September 18, 2008, and November 4, 2008, when his one-to-one aide and speech language services were scheduled to begin. There was no dispute that, as of September 18, 2008, Student could only function in a general education setting with a one-to-one aide. There was also no dispute that Student required speech-language therapy services. Although the September 18, 2008 IEP called for Student's general education services to start as of September 18, the one-to-one aide and speech-language services did not begin until November 4, 2008. According to the District witnesses, this was done because the District had a school vacation during part of October. While it is

understandable that the District might want to begin services after that, it does not change the fact that there was still no FAPE for Student until those services began.

17. The evidence supports a finding that the District failed to offer Student a FAPE between September 18, 2008, and November 4, 2008.

The District Offered Student a FAPE Between November 4, 2008, and January 29, 2009.

18. In Student's first issue, Student contends that the District failed to offer an IEP prior to January 29, 2009, that contained a proper placement, services, goals and present levels of performance. In Student's third issue, Student raises some of these same procedural and substantive allegations and also adds allegations that the District predetermined Student's placement, failed to allow for parental participation at the IEP meetings and did not provide appropriate ABA, reading, speech-language, OT and PT services. For convenience and clarity, this decision will discuss all procedural and substantive issues with respect to the September 18, 2008 IEP at the same time.

19. An IEP consists of a written statement which includes, among other things: "a statement of the child's present levels of academic achievement and functional performance including ... how the child's disability affects the child's involvement and progress in the general education curriculum." (20 U.S.C. § 1414(d)(1)(A)(I).) An IEP must also contain a statement of measurable annual goals, including academic and functional goals, designed to "meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and... meet each of the child's other educational needs that result from the child's disability." (20 U.S.C. § 1414(d)(1)(A)(II).) The IEP must contain "a description of how the child's progress toward meeting the annual goals...will be measured and when periodic reports on the progress the child is making toward meeting the annual goals...will be provided." (20 U.S.C. § 1414(d)(1)(A)(III).) An IEP must show a direct relationship between the present levels of performance, goals and objectives, and the specific educational services to be provided. (Cal. Code Regs., tit. 5, § 3040, subd. (c).) As indicated in these code sections, the purpose of the goals is to enable the IEP team to determine if the child is making progress.

20. The laws do not specify any particular language that must be used for goals. The comments to the federal regulations are instructive on the issue of the specificity required of IEP goals. When discussing Title 34 Code of Federal Regulations part 300.320 (2006), which mirrors the IDEA requirement for measurable annual goals, the comment stated the following:

Comment: One commenter requested clarification as to whether IEP goals must be specific to a particular discipline (e.g., physical therapy goals, occupational therapy goals). One commenter recommended that goals be explicitly defined and objectively measured. Another commenter recommended requiring IEP goals to have specific outcomes and measures on an identified assessment tool. One commenter recommended clarifying that

an IEP team is permitted, under certain circumstances, to write goals that are intended to be achieved in less than one year.

Discussion: Section 300.320(a)(2)(i), consistent with section 614(d)(1)(A)(i)(II) of the Act, requires the IEP to include measurable annual goals. Further, § 300.320(a)(3)(i), consistent with section 614(d)(1)(A)(i)(III) of the Act, requires the IEP to include a statement of how the child’s progress toward meeting the annual goals will be measured. The Act does not require goals to be written for each specific discipline or to have outcomes and measurements on a specific assessment tool. Furthermore, to the extent that the commenters are requesting that we mandate that IEPs include specific content not in section 614(d)(1)(A)(i) of the Act, under section 614(d)(1)(A)(ii)(I), we cannot interpret section 614 to require that additional content. IEPs may include more than the minimum content, if the IEP team determines that additional content is appropriate.

(71 Fed. Reg. 46662 (Aug. 14, 2006).)

21. As stated above in Factual Findings 25 – 29 and 33 – 42, Student’s experts Lennington and Morris criticized the present levels of performance and the goals contained within the September 18, 2008 IEP. Most of their objections related to the specificity of the language used in setting forth the present levels of performance and their opinion that the goals should have been broken into many, very specific goals.

22. Student’s written closing argument cites to cases discussing the importance of goals, but those cases do not require the level of specificity demanded by Lenington and Morris. In *Escambia County Board of Education v. Benton* (S.D.Ala. 2005) 406 F.Supp.2d 1248, the educational agency’s own expert admitted the problems with the IEP goals. The hearing officer found that the goals and present levels were so vague that, in one example, the goal called for the child to demonstrate “eighty percent accuracy of his present level of performance.” (*Id.* at p.1271.) Unlike that case, the goals in the instant case were sufficiently clear that no one challenged their wording during the September 2008 IEP team meeting. It was only months after the IEP team meeting in question, that Student’s hired experts criticized the goals.

23. Similarly, in *Cleveland Heights-University Heights City School District v. Boss* (6th Cir. 1998) 144 F.3d 391, the child’s parents refused to sign the proposed IEP because it provided no objective way to determine the child’s progress. The court described one goal that stated the child would “improve her reading fluency when reading a passage aloud 8/10 times.” (*Id.* at p. 394, n. 1.) In contrast, in the instant case the goals were far more specific and Student’s parents did not criticize the language of the goals during or shortly after the meeting.

24. As stated in Factual Findings 27 – 28 above, some of the present levels of performance could have been stated more clearly. However, given the difficult

circumstances the District faced in trying to formulate an IEP without a current District assessment, there was no violation of law. Likewise, any language in the goals indicating that they were written pending further assessment did not invalidate the goals or make them incapable of being measured under the circumstances.

25. Even if there had been a procedural violation with respect to the present levels or the goals, the evidence does not support a finding that it was sufficient to give rise to a substantive denial of FAPE. As stated above in Legal Conclusion 4, a procedural violation gives rise to substantive denial of FAPE only if certain factors are present. Those factors are not present in the instant case. As stated in Factual Findings 15 – 28 above, the IEP team had plenty of input from Student’s private providers and general education teacher at the private school, as well as numerous reports and the opinions of the District IEP team members. Even if the District erred by not specifying some of the present levels in the IEP, the evidence supports a finding that the District had sufficient information to develop goals, placement and services during the IEP team meeting. Likewise, even if the wording of the goals could have been made more specific, there was no confusion as to those goals during the IEP team meeting or immediately after it. The District employees who would have been measuring those goals were well aware of what those goals stated and what they were measuring. Any deficiencies in the language of the present levels of performance or the goals did not impede Student’s right to a FAPE, cause any deprivation of educational benefits, or significantly impede the opportunity of Student’s parents to meaningfully participate in the decision making process regarding the provision of FAPE to their son. There was no substantive denial of FAPE.

26. As discussed in Factual Findings 33 – 35 and 41 – 42, there was also no denial of FAPE because two of Student’s private providers left during the meeting or because some of the CARD proposed goals were omitted from the September 2008 IEP.

27. Student also contends that the District committed a procedural violation of IDEA because the District predetermined Student’s placement and denied Student’s parents the opportunity to participate in the September 18, 2008 IEP team meeting. Parents are an important part of the IEP process. An IEP team must include at least one parent of the special education child. (Ed. Code, § 56341, subd. (b)(1).) The IDEA contemplates that decisions will be made by the IEP team during the IEP meeting. It is improper for the district to prepare an IEP without parental input, with a preexisting, predetermined program and a “take it or leave it” position. (*W.G. v. Board of Trustees of Target Range School District, supra*, 960 F.2d at 1484.)

28. As discussed in Factual Findings 30 – 32 above, the evidence does not support a finding that the District predetermined the placement or prevented Student’s parents from participating in the meeting. Instead, the District invited the parents to participate at each stage of the IEP team meeting and specifically requested input on placement. Student’s counsel was able to provide the input that Student’s parents wished to have Student remain in the private school. Just because the District IEP team members did not agree to place Student in the private school does not mean that the District had predetermined a placement

and would not listen to alternatives or that the District did not wish to consider the input of Student's parents. There was no procedural denial of IDEA and no denial of FAPE.

29. Student also contends that the September 2008 IEP failed to offer him a FAPE from a substantive point of view. As noted above in Legal Conclusion 5, an IEP offers a substantive FAPE if it is reasonably calculated to provide the child with educational benefit based on what the District knew at the time the offer was made. As set forth in Factual Findings 15 – 23 and 43 – 60 above, the evidence supports a finding that the September 2008 IEP offer was reasonably calculated to provide Student with educational benefit based on what the District knew at that time. The District knew that Student had been attending a general education classroom at a private school with one-to-one aide support and was gaining educational benefit in that environment. The District offered to place Student in the equivalent setting in a public school with a one-to-one aide and additional special education supports. Based on everything the District knew at the time of the September 2008 IEP team meeting, the District was reasonable in assuming that Student would continue to gain educational benefit in the proposed setting.

30. The objections raised by Student's experts were not to the general education placement, but instead specifically to the classroom at Student's home school of Adams. However, the experts' concerns were not raised until many months after the September 2008 IEP team meeting, so they could not have been part of the District's considerations. Even if they had been raised at the time of the meeting, they were not sufficient to show a denial of FAPE for all the reasons discussed in Factual Findings 45 – 53 above. There was no denial of FAPE.

31. Student also contends that the IEP offer failed to contain appropriate ABA, reading, speech-language, OT and PT services. California law defines special education as instruction designed to meet the unique needs of the pupil coupled with related services as needed to enable the pupil to benefit from instruction. (Ed. Code, § 56031.) "Related Services" include 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 (DIS services), and must be provided "as may be required to assist an individual with exceptional needs to benefit from special education...." (Ed. Code, § 56363, subd. (a).) A district may choose providers for these DIS services and is not required to use a particular provider or company because of parental preference. (*N.R. v. San Ramon Valley Unified School District* (N.D.Cal. 2007) 2007 WL 216313; *Slama ex rel. Slama v. Independent School District No. 2580* (D.Minn. 2003) 259 F.Supp.2d 880, 885.)

32. As discussed in Factual Findings 54 – 60 above, the evidence supports a finding that the offer of DIS services in the September 2008 IEP was sufficient to meet Student's needs. The September 2008 IEP offered one-to-one ABA services, just as Student was receiving privately. The level of speech-language services called for in the September 2008 IEP was equivalent to what Student was receiving privately. The District general education and special education instructors had sufficient expertise to assist Student with

reading, and could use Lindamood Bell methodologies, if appropriate. Student failed to meet his burden of showing that the September 2008 IEP failed to contain appropriate OT and PT services.

33. The evidence supports a finding that the September 2008 IEP was reasonably calculated to provide Student with educational benefit and would meet his educational needs. There was no denial of FAPE.

The District Did Not Deny Student a FAPE by Failing to Provide Accurate Levels of Functioning in the January 29, 2009 IEP.

34. As discussed in Factual Findings 61 – 74 and Legal Conclusion 4, the present levels of functioning contained within the January 29, 2009 IEP were sufficient and accurate given the information the District possessed at the time of the meeting. Even if there was a technical violation in the way they were worded, that violation did not give rise to a substantive denial of FAPE. The IEP team had an abundance of information at the time of the January IEP team meetings and provided Student with a placement and services designed to meet his needs. Any technical defect in the present levels did not impede Student's right to a FAPE, cause a deprivation of educational benefit or significantly impede the opportunity of his parents to participate in the decision making process. There was no denial of FAPE.

The Proposed January 2009 IEP Offered Student a FAPE in the LRE.

35. Student raises both procedural and substantive objections to the District's January 2009 IEP offer. First, Student contends that the District predetermined Student's placement and failed to allow for parental participation at the IEP team meetings. As discussed in Factual Findings 61 – 69 above, the evidence does not support either of Student's contentions. The District not only listened to the information provided by Student's parents, their counsel and their private providers, the District made substantial changes to the proposed IEP to address their concerns. The District adopted the proposed goals and objectives from Abrassart and CARD and included private speech services by Abrassart in addition to the speech services provided by the District staff. The District proposed to allow CARD to continue to provide one-to-one ABA services to Student, knowing that CARD was the preferred provider of Student's parents. The District went to great lengths to accommodate the wishes of Student's parents. There was no predetermination and no denial of FAPE.

36. Student next contends that the January 29, 2009 IEP failed to contain appropriate goals and objectives. As discussed in Factual Findings 75 – 80 above, Student's position is not well taken. As stated in Legal Conclusions 19 – 25 above, goals and objectives are intended to be a tool that the IEP team uses to determine if the child is making educational progress. The goals and objectives are part of a discussion at an IEP team meeting, and the end result is often a collaboration between the meeting participants. This case presents a very good example of that -- the District speech-language pathologist had a

discussion with Abrassart at the January 16 IEP meeting, as a result of which the District's proposed speech language goals were changed. It would not be productive or reasonable to hold the IEP team to a standard raised by two outside experts who reviewed the IEP report long after the meetings in question. If the IEP goals had truly been vague and incapable of being measured, the time to address those concerns would have been during the two IEP team meetings or in the correspondence immediately following those meetings. The District was clearly open to such discussions, as evidenced by what happened regarding the speech- and language goals. The evidence showed that there was correspondence between the parties' counsel after the January IEP team meeting, but the concerns regarding the wording of the goals were not raised. Apparently, no one at the meeting believed that the goals were vague or incapable of being measured.

37. Student has failed to meet his burden of showing that the District committed a procedural violation of IDEA regarding the goals contained in the January 29, 2009 IEP. However, even if there was such a procedural violation, it did not give rise to a substantive denial of FAPE. The wording of the IEP goals did not cause a deprivation of educational benefits, impede Student's right to a FAPE, or significantly impede his parent's opportunity to participate in the decision making process. There was no denial of FAPE.

38. Student also contends that the January 29, 2009 IEP failed to offer him a FAPE from a substantive point of view. The IEP contained the same type of general education placement and one-to-one aide support as Student was receiving at the private school. As discussed in Factual Findings 81 – 92 above, the concerns Student raised to placement at Adams were not sufficient to show a denial of FAPE. The general education classroom at Student's home school, with supports and services designed to meet his needs, was the least restrictive environment appropriate to enable Student to gain educational benefit.²¹

39. Likewise, Student has failed to meet his burden to show that the DIS services and supports in the January 29, 2009 IEP failed to meet his needs. As discussed in Factual Findings 91 – 92, the ABA and speech-language services called for the January 29, 2009 IEP were equal to or greater than what Student had received in the private setting. The testimony of the District witnesses was persuasive that the teachers at Adams were capable of providing any reading services Student required, including using Lindamood Bell methodologies if appropriate. Student did not bring in expert testimony to show that the OT and PT services contained in the proposed January 2009 IEP were insufficient to meet Student's needs. There was no denial of FAPE.

²¹ Student raised no LRE challenge to the District's proposed placement, so it is not necessary for this decision to address the legal standards for determining LRE.

*The District Did Not Deny Student a FAPE by Failing to Provide Student with CARD and Speech-Language Services Between January 29, 2009, and February 3, 2010.*²²

40. As stated in Factual Findings 93 – 111 above, after the January 29, 2009 IEP offer was made, there was correspondence between counsel regarding the ABA services and speech-language services offered in that IEP. Student contends that Student consented to those portions of the IEP, but the District failed to provide the ABA services and speech-language services after Student consented. The District contends that Student gave only a conditional consent to those terms and that the District’s offer was predicated upon the public school placement.

41. In general, the law permits a child’s parents to accept some IEP services, but not others. Education Code section 56346, subdivision (e), provides: “If the parent of the child consents in writing to the receipt of special education and related services for the child but does not consent to all of the components of the individualized education program, those components of the program to which the parent has consented shall be implemented so as not to delay providing instruction and services to the child.”

42. Federal and State education laws and regulations distinguish between children in public and private schools. A child with a disability attending public school is entitled to a FAPE at public expense. However, if a parent chooses to send his or her child to a private school, that child is not entitled to a FAPE at public expense. (Ed. Code, §§ 56174; 56174.5; 34 C.F.R. §§ 300.137; 300.138.) Instead, children in private schools receive a proportional share of special education services under a services plan, which may provide for a different amount of service than the child would receive in public school. (See, e.g., 34 C.F.R. § 300.138 (2006).)

43. A district may be required to fund a private school placement if the IEP team agrees that such a placement is required to offer a child a FAPE. (Ed. Code, §§ 56365; 56366.) In addition, if a district has failed to offer a FAPE to a child, in some instances a parent may be reimbursed for educational expenses, including private school tuition. (*School Committee of the Town of Burlington, Massachusetts v. Department of Education* (1985) 471 U.S. 359 [105 S.Ct. 1996; 85 L.Ed.2d 385] (*Burlington*).) However, parents who choose to enroll their child in a private school while a due process case is pending, do so at their own financial risk. If the decision finds that the district offered a FAPE, the child’s parents are not entitled to reimbursement from the school district. (*Id.* at pp. 373 – 374.)

44. As discussed above in Factual Findings 93 – 111 above, Student’s parents chose to place their son in a private, parochial school despite the fact that the District had offered a FAPE. Normally, therefore, he would not be entitled to services under an IEP.

²² Student’s issues four and five are combined here because they relate to the same situation. To the extent that issues four and five address the time periods before January 29, 2009, they are already addressed elsewhere in this decision.

However, Student contends that his parents had the right to accept portions of the IEP and not others. Therefore, he argues that his parents could choose to accept the CARD and Abrassart services, but not the public school placement.

45. This case involves a clash between two important aspects of special education law – a parent’s right to accept only part of an IEP and the public policy that a private school education will not be funded by public money when there is a perfectly appropriate public placement to provide a FAPE. The District relies on the case of *Board of Education of the Appoquinimink School District v. Johnson (Appoquinimink)* (D.C.Del. 2008) 543 F.Supp.2d 351. In that case, a school district had offered a FAPE to a deaf child, but the child’s parents chose to place the child in a private school. The federal court overturned an order requiring the district to pay for a sign language interpreter for the child at the private school on the basis that the child was privately placed and had no right to receive services beyond the proportionate share given to private school pupils.

46. The *Appoquinimink* case seems to be directly on point. To require the District to provide Student with a one-to-one ABA aide at the Crossroads Christian School seems little different than the provision of a sign language interpreter in *Appoquinimink*. In both cases, the school district offered a FAPE and the parent placed the child in private school. Both cases involve whether a district can be ordered to provide DIS services to the child in the private school. Under the holding of *Appoquinimink*, the answer is no.

47. The District also cites strong public policy reasons to support its position. If Student’s position is correct, the statutory scheme would become meaningless – parents could place their child at a private school and then insist that all IEP services be given to the child at the private school, simply by agreeing to everything in the IEP except the public placement. That cannot have been the intent of the law permitting a parent to accept only part of an IEP. Instead, it seems more logical that the law is intended to cover a situation in which the parents of a public school child choose to accept some IEP services, but not others (such as OT but not PT).

48. The evidence supports a finding that Student’s parents never unconditionally accepted any portion of the January 29, 2009 IEP offer. Even if they had done so, Student was not entitled to receive those IEP services until he attended a District school. The District had offered Student a FAPE in the January 2009 IEP. If Student’s parents chose to keep Student in the private school after that time, they did so at their own expense. All they had to do to receive the DIS services was to place Student back in public school. While the law permitted them to accept parts of that IEP offer and not others, the DIS services were tied to the public school placement. Student’s parents could not accept the services at a different location.

49. There was no denial of FAPE based on the District’s failure to provide CARD services and NPA speech-language therapy services to Student after January 29, 2009.

Student's Parents are Entitled to Reimbursement for Educational Expenses Incurred

50. Compensatory education is an equitable remedy designed to “ensure that the student is appropriately educated within the meaning of the IDEA.” (*Parents of Student W v. Puyallup School District, No. 3* (9th Cir. 1994) 31 F.3d 1489, 1497.) There is no obligation to provide a day-for-day compensation for time missed. The remedy of compensatory education depends on a “fact-specific analysis” of the individual circumstances of the case. (*Ibid.*) The court is given broad discretion in fashioning a remedy, as long as the relief is appropriate in light of the purpose of special education law. (*Burlington, supra*, 471 U.S. at p. 369.)

51. From June 27, 2008, to November 4, 2008, there was no FAPE offer outstanding for Student, and his parents were forced to provide him with educational services. As discussed in Factual Findings 5 – 15 and 55 – 56, the District acted swiftly and in good faith to try to remedy its past errors after it received the OAH decision in the prior due process case. However, until it held an IEP meeting and made a new offer, Student was without an educational program and without a FAPE. Therefore, it is appropriate to require the District to reimburse Student’s parents for their major educational expenses incurred during that time.

52. The situation might be different if Student’s parents had delayed the IEP meeting, but they did not do so. While it would have been better if Student’s counsel had responded swiftly to the inquiries of the District’s counsel prior to September 18, 2008, Student’s parents and their counsel attended the first IEP team meeting noticed by the District after July 14, 2008, and a new offer of FAPE was made. The balance of equities weighs in favor of requiring the District to reimburse Student’s parents for the CARD services, Abrassart services, Fast Forward program, and tuition at Crossroads as discussed in Factual Findings 112 – 113. These were clearly educational expenses, and there was no evidence that the services were educationally inappropriate. However, in light of the District’s swift actions to try to remedy the past problems after July 14, 2008, and the failure of Student’s counsel to respond swiftly to the District’s inquiries, the balance of equities does not call for the District to reimburse any of the other expenses incurred by Student’s parents during that time, such as school uniforms and or vision therapy.

53. As discussed in Factual Findings 112 – 114 above, the evidence supports a finding that the District should be required to reimburse Student’s parents for their educational expenses in the amount of \$ 39,490.00.

ORDER

The District shall reimburse Student’s parents the amount of \$ 39,490.00 within 90 days of the date of this Decision.

