

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

PASO ROBLES JOINT UNIFIED SCHOOL  
DISTRICT.

OAH CASE NO. 2011070195

NOTICE: This Decision has been  
Reversed by the U.S. Court of  
Appeals Ninth Circuit. Click [here](#) to  
view the Appellate decision.

**DECISION**

Administrative Law Judge (ALJ) Rebecca Freie, Office of Administrative Hearings (OAH), State of California, heard this matter on March 19 through 23, and 28 through 30, 2012, in Paso Robles, California. The last day of hearing was conducted telephonically on April 23, 2012.

Marcy Tiffany, Attorney at Law, represented Student. She was assisted by paralegals Jennifer Ralph and Todd Hogue. Mother was present throughout the hearing. Father was present during the first day, and part of the second day of hearing when he testified. Mother and Father are referred to collectively as Parents. Student did not attend the hearing.

Shauna Cunningham, Attorney at Law, represented Paso Robles Joint Unified School District (District). She was assisted during the first week of hearing by Marsha Bedwell, Attorney at Law. Marcia Murphy, Special Education Director for the District, was present throughout the hearing as the District's representative.

On July 6, 2011, Student filed a request for a due process hearing (complaint) with the Office of Administrative Hearings (OAH). On November 18, 2011, OAH granted Student's motion to amend his complaint, deemed the amended complaint filed on that date, and all timelines recommenced. On December 20, 2011, OAH granted a continuance. At hearing oral and documentary evidence were received. The matter was then continued to April 30, 2012, to permit the parties to submit written closing arguments. The record was closed on April 30, 2012, upon receipt of the closing arguments, and the matter was submitted for decision.<sup>1</sup>

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<sup>1</sup> For the record, Student's closing argument is designated as Student's Exhibit S- 80, and the District's closing argument is designated as District's Exhibit D-76. The District

## ISSUES<sup>2</sup>

1. For the 2009-2010 school year (SY) did the District deny Student a free appropriate public education (FAPE) by failing to:
  - a. Appropriately assess him in all areas of suspected disability, specifically autism, and behavioral functioning?
  - b. Provide Parents with the notice of procedural safeguards at the individualized education program (IEP) team meetings on December 4, 2009, and May 28, 2010, and as otherwise required by law?
  - c. Make Student eligible for special education under the category of autistic-like behaviors?
  - d. Offer Student goals and placement in the least restrictive environment (LRE) that would meet his unique needs as a child with autism?
  - e. Appropriately address his behavioral issues such as crying, lack of compliance, tantrums, separation issues and refusal to participate in classroom activities by not providing him with a behavior support plan (BSP)?
  - f. Provide him with appropriate speech and language services?
  - g. Offer him any placement or services for extended school year (ESY) 2010?
2. For the 2010-2011 SY Did the District deny Student a FAPE by failing to:
  - a. Appropriately assess him in all areas related to his suspected disability, specifically autism, and behavioral functioning?
  - b. Provide Parents with the notice of procedural safeguards at the IEP team meetings on October 15, 2010, and December 10, 2010, and as otherwise

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also submitted a Request to Correct Closing Argument which is designated as District's Exhibit D-77. The Request for correction is granted.

<sup>2</sup> The Issues were modified at the commencement of the due process hearing from those stated in the Order Following Prehearing Conference (PHC) at the request of Student, and with the concurrence of the District and the ALJ. The issues were further modified, reordered, and renumbered for clarity of this decision by the ALJ. No substantive changes were made.

provided by law?

- c. Make Student eligible for special education under the category of autistic-like behaviors?
- d. Offer him goals and placement in the LRE that would meet his unique needs as a child with autism?
- e. Appropriately address his behavioral issues such as shutting down in class, refusing to speak to staff, tantrums, noncompliance, and rarely participating in classroom activities, by not providing him with a BSP?
- f. Provide him with appropriate speech and language services?

3. From the beginning of the 2011-2012 SY to December 23, 2011, did the District deny Student a FAPE by failing to:

- a. Make Student eligible for special education under the category of autistic-like behaviors?
- b. Offer him goals and placement in the LRE to meet his unique needs as a child with autism?
- c. Address maladaptive behaviors?
- d. Provide him with appropriate speech and language services?<sup>3</sup>

*Student's Proposed Remedies*<sup>4</sup>

1. The District shall change Student's primary disability from speech and language impairment to autistic-like behaviors.

2. The District shall provide Student with compensatory education including speech and language therapy, one-to-one applied behavior analysis (ABA) services in home and in school, and remedial education services with placement in a preschool classroom for typically developing children.

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<sup>3</sup> Student presented a document at the beginning of the hearing which was not made an exhibit, but contained sub-issues c and d.

<sup>4</sup> The proposed remedies listed have been modified from those listed in the Order Following PHC based on discussion with the parties and rulings during the hearing, as discussed in the section titled "Procedural Matters."

3. The District shall reimburse Parents for the private assessments conducted by Betty Jo Freeman, Ph.D. and Genevieve Sullivan.

4. The District shall reimburse Parents for the cost of privately provided placement and services, up to December 23, 2011.

5. Any further appropriate relief as determined by the ALJ, based on the evidence from the hearing.

6. Parents shall be identified as prevailing parties.

### PROCEDURAL MATTERS

During the PHC, the parties agreed that the evidence would be limited to events up to December 23, 2011, which was the last date Student received the private ABA services for which Parents seek reimbursement. Further, Student initially requested an order for prospective placement or, in the alternative, an order that an IEP team meeting be held with the condition that Student be placed as ordered by the ALJ in this Decision. However, as the hearing progressed, the ALJ found that some events after December 23, 2011, were relevant to the issues and parties' contentions, specifically the District's comprehensive assessment of Student that was finalized in January 2012, and a video recording of Student made in January 2012, as well as comments of a District witness concerning that video recording, and another made in November 2011. However, because the District made an offer of placement at an IEP team meeting held March 5, 2012, and the parties were unwilling to stipulate that the appropriateness of that offer was an issue, the ALJ determined that an order for prospective placement would be inappropriate, should it be found that Student was entitled to relief. This ruling was made on the record during the hearing. Accordingly, any order for relief is limited to compensatory education.

### CONTENTIONS

Student contends that he was denied a FAPE from December 4, 2009, to February 3, 2011, because the District did not conduct an appropriate initial assessment on October 30, 2009. Further, Student claims that the District denied him a FAPE until February 3, 2011, because it did not conduct any further assessments, even though Student was struggling in District programs, which should have led the District to conclude that further assessment was necessary prior to February 3, 2011. Student asserts that Parents were not provided with their notice of procedural safeguards at any time prior to February 3, 2011. Student also contends that he should have been made eligible for special education and services under the category of autistic-like behaviors, but instead he was made eligible as a child with a speech and language impairment. Because his eligibility classification was incorrect for all school

years at issue, Student contends that he was denied a FAPE and access to appropriate programs and services.

Student claims that the District gave him goals that did not meet his unique needs as a child with autistic-like behaviors, and placed him inappropriately for both the 2009-2010 SY, and the 2010-2011 SY. As a result, he argues that he was denied a FAPE. He contends that District should have provided him with behavioral interventions during the years in question, including home-based behavioral interventions. In addition, he claims that the District provided him with inappropriate speech and language therapy which also resulted in a denial of a FAPE. Finally, Student contends that the District should have offered him ESY at the conclusion of the 2009-2010 SY, and its failure to do so denied him a FAPE. For all years in question, Student claims he required one-to-one home-based applied behavior analysis (ABA). As a result of the District's acts and omissions, Student contends that he is owed compensatory education and reimbursement for services and assessments privately procured by Parents. Student also claims that any District argument that Parents were uncooperative with the District should not be given weight; Parents were as cooperative as they were able, given that they were uninformed about their rights and the special education process due to the District's failure to educate them.

The District contends that it initially assessed Student appropriately, since a regional center psychologist conducted a comprehensive assessment in November 2009 that was considered by the initial IEP team on December 4, 2009. Based on the information District had at its disposal afterwards, the District asserts that it made a reasonable determination that Student did not need further assessment until it sent Parents an assessment plan and request for their consent to it in early February 2011. The District claims that it did provide Parents with the notice of procedural safeguards at all times it was required to do so. The District also argues that Student was made eligible for special education services as a child with speech and language impairment, based on information it had available to it at all times prior to the filing of the complaint. The District then argues that regardless of Student's eligibility category, his needs were properly identified and addressed by the District, and thus he was provided with a FAPE.

The District also contends that its goals and offers of services in IEP's met his unique needs when they were made, and he received educational benefit during the first two school years at issue. The District claims that because Student did not demonstrate behavioral issues at school, and Parents did not communicate to it the extent of behavioral issues that he displayed at home, it was not necessary to provide him with behavioral interventions beyond advice that was given to Parents during his first two school years. As to speech and language services, District argues that Student received speech and language services that were appropriate in light of the information available to the District at that time. Further, the District claims that it did not offer Student ESY during the summer of 2010 because Student did not demonstrate at that time that he would regress if he did not receive those services. The District also contends that for the 2011-2012 SY, it did not deny Student a FAPE; it repeatedly asked Parents to participate in an IEP team meeting and consider placement it

proposed in an intensive special education preschool program, along with other services, but Parents refused to do so. Finally, the District argues that based on Parents lack of cooperation with the District during the times at issue, they should be denied extensive compensatory education if any is to be ordered, and based on inconsistent testimony by them, their testimony is not to be believed.

In this Decision, the ALJ evaluates the evidence in light of the parties' contentions, and finds that Student failed to meet his burden of persuasion on the issues to be decided.

## FACTUAL FINDINGS

### *Background and Jurisdiction*

1. Student is presently five years of age and has resided with Parents within the boundaries of the District for most, if not all of his life. When he was 27 months old, he became a client of Tri-Counties Regional Center (Tri-Counties) and he was provided with early intervention services which included speech and language therapy as well as occupational therapy. His eligibility criteria for these services was global developmental delays. Tri-Counties discontinued its services when Student received an IEP and began attending preschool in the District, as will be described further below.

### *Provision of a FAPE*

2. Under both the Individuals with Disabilities Education Improvement Act (IDEA) and State law, students with disabilities have the right to a FAPE. A FAPE means special education and related services that are available to the student at no charge to the parent or guardian, which meet the state educational standards, and conform to the student's IEP. The IDEA does not require school districts to provide special education students the best education available, nor to provide instruction or services that maximize a student's abilities. A student with special needs receives a FAPE when he receives special education and related services that meet his unique needs and he receives educational benefit.

*2009 Assessment*

3. When a student is suspected of having a disability, a school district is obligated to have him assessed. Testing, assessment materials, and procedures used for the purposes of assessment must be selected and administered so as not to be racially, culturally, or sexually discriminatory. The assessment is to be conducted by persons who are competent and have knowledge of that disability. Tests and other assessment materials shall be provided and administered in the language and form most likely to yield accurate information on what the pupil knows and can do academically, developmentally, and functionally, unless doing so is not feasible. No single procedure may be used as the sole criterion for determining whether the student has a disability or determining an appropriate educational program for the student. If standardized test instruments cannot be used to assess a child alternative means may be used.

4. A child must be assessed at least once every three years, but generally not more frequently than every 12 months. A parent, school district or other agency, or member of the public may request assessment of a child, and the school district must respond to that request within 15 days.<sup>6</sup>

5. On October 30, 2009, a few weeks before his third birthday, the District conducted an assessment of Student. The assessment was conducted by Christie Youngdale, a District resource specialist, and Linda Stinson, a District speech and language therapist.<sup>7</sup> A District school psychologist, William Peck, also observed part of the testing as he did when some students were assessed, especially if there was a suspicion that the child might be on

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<sup>5</sup> Other than an assessment by the District on October 30, 2009, Student did not begin receiving services, nor was he entitled to receive services, from the District prior to turning three in December. Therefore, references to the 2009-2010 SY are for services he received from the District after his third birthday in December 2009.

<sup>6</sup> Certain exceptions to this rule are not applicable to this Decision.

<sup>7</sup> Ms. Youngdale has had a California teaching credential since 1976, and received a special education credential in 1986. Since 1991 she has held a clear special education credential. Ms. Stinson has been employed by the District for 15 years as a speech pathologist. She has an undergraduate degree from California State University San Diego, and a master's degree from California State University Fullerton. She has worked in a variety of positions as a speech and language therapist since being licensed in the field and has conducted 75-80 assessments each year since 1991 in that capacity. Ms. Stinson has 30 years of experience as a speech pathologist. Ms. Stinson and Ms. Youngdale co-teach classes for preschool aged children with IEPs, and have done so for many years.

the autism spectrum, so a determination could be made as to whether additional assessment might be needed.<sup>8</sup> Portions of the Revised Brigance Diagnostic Inventory of Early Development, and the Preschool Language Scale were administered. The Portage Guide to Early Intervention, and the L.A. [Los Angeles] Unified School District Preschool Developmental Scale were also utilized. In addition, Ms. Youngdale and Ms. Stinson observed Student, tried to engage him in play, and used other informal curriculum based measurements. Ms. Stinson attempted to conduct standardized speech and language testing with Student, but was unsuccessful in doing so. Parents were interviewed and said Student's lack of compliance was an issue, but did not go into detail about what they meant by that.

6. Mr. Peck testified credibly that on October 30, 2009, when he observed Student, he saw that he used a variety of facial expressions and displayed emotions. He did not appear extremely withdrawn during the evaluation, nor inordinately attached to Parents. Mr. Peck was very impressed when Student initiated and directed a ball-passing game with Parents which did not appear to be obsessive or repetitive behavior, and demonstrated his skill at turn-taking, and this was not the behavior of a child with autism in his opinion. Ms. Stinson and Ms. Youngdale also assessed Student's behavior and demeanor for signs that he might be on the autism spectrum and would therefore require additional assessment. Mr. Peck, Ms. Stinson, and Ms. Youngdale all knew that Student was to be assessed by a Tri-Counties psychologist before the IEP meeting that would be held near Student's third birthday. None of these professionals observed obvious characteristics seen in a child with autism during this assessment.

7. When meeting with Parents for the assessment, Ms. Stinson and Ms. Youngdale also explained the preschool programs that were available in the District for children with disabilities.<sup>9</sup> These programs included the Little PEPers program (PEPers) and the PAWS program (PAWS).<sup>10</sup> Typically developing children did not attend these programs.

8. In November 2009, Tri-Counties conducted a psychological assessment of Student. Linda Griffin, Ph.D. conducted the assessment, and gave Student a provisional medical diagnosis of pervasive developmental disorder not otherwise specified (PDD-NOS). This disorder is found on the autism spectrum but is not itself autism. Dr. Griffin obtained

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<sup>8</sup> Mr. Peck received his undergraduate and master's degrees from California State University Northridge, and has been licensed and credentialed as school psychologist since 1980. He is also a licensed educational psychologist and a licensed Marriage, Family and Child Counselor. Mr. Peck has worked for the District as a school psychologist since 1986.

<sup>9</sup> It was unclear whether the District offered preschool programs for typically developing children that year.

<sup>10</sup> The acronym "PEP" stands for "Parent Education Preschool." The acronym "PAWS" is used for "Peers Are Wonderful Support."

background information by reviewing Tri-Counties' records, talking to his Early Start therapist, and interviewing Parents. She also interviewed Parents using the Vineland II Adaptive Behavior Scales and the Childhood Autism Rating Scale. She attempted to use a standardized assessment tool to measure Student's cognitive abilities, but was unable to do so successfully due to Student's inattention and poor reciprocal interaction. She also conducted an observation of Student playing. In her assessment, Dr. Giffin cautioned that Student should be monitored as PDD-NOS could develop into autism, and further recommended that Student be reassessed in 18 to 24 months from the date of her assessment. In addition, she recommended that Student receive speech and language therapy, and "[a] preschool program to help with language, social relating, cognitive development, and self help skills [for] at least 3 days per week." Parents understood that PDD-NOS was on the autism spectrum.

### *Preschool Programs*

9. An IEP team meeting was held on December 4, 2009. A few days before the meeting the District received a copy of Dr. Griffin's psychological assessment. That assessment and the District's assessment from October 30, 2009, were considered. Because Dr. Griffin's report was so thorough, the District saw no need to conduct further assessments of Student, and relied heavily on the report. Parents attended the meeting, as did a representative from Tri-Counties. Ms. Stinson, Ms. Youngdale, and Mr. Peck also attended. Parents were active participants in the IEP team meeting and consented to the IEP at the conclusion of the meeting.

10. At that initial IEP team meeting the two special education preschool programs, PEPers and PAWS, were discussed. Regardless of which program Student was to attend, he would also receive group speech and language services for 25 minutes, seven times a month during the time he attended preschool. Although Parents had not observed either program, they were familiar with the PEPers classroom as that was where Ms. Stinson and Ms. Youngdale conducted their assessment of Student.

11. The PEPers preschool met two days a week for one-and-one-half hours each day. It was taught by Ms. Stinson and Ms. Youngdale with the assistance of two paraeducators.<sup>11</sup> Parents were also expected to work with the children. Eight to 10 children attended the class. All of the children enrolled in the program had special needs. As a general rule, a parent or other adult would accompany the child to the program, since it was intended to be a parent-participation program, and for a portion of each day the adults would be engaged with the children in the classroom. There was also a parent education component

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<sup>11</sup> In his closing brief, Student argued that neither Ms. Stinson nor Ms. Youngdale held proper credentials to teach a preschool child with autism. However, no evidence was presented at hearing about what credentials were needed to teach a preschool child with autistic-like behaviors, so this argument was not considered.

of the program when the adults were separated from the children. However, children could still attend without a parent or other adult if other obligations kept an adult from attending.

12. The PEPers program was intended to be a supplemental program for children with special needs, and was not intended to replace a preschool program with typically developing children. Many of the students did attend private preschool, or were engaged in other programs with typically developing children. The PEPers program was focused on communication skills, and children were referred to the program because they had special needs in this area. Some children were on the autism spectrum. Language development and communication and social skills concepts were embedded in the PEPers program, and another function of the program was to teach children who required them “learning to learn” skills.<sup>12</sup>

13. PAWS was a more intensive preschool program. Students attended five days a week, for three hours each day. It was not a parent-participation program. Typically developing children did not attend the program. The class was taught by a single teacher, with paraprofessional assistance, so the adult to student ratio was approximately equal in both of these programs. Like the PEPers class, PAWS focused on language and communication, as well as social skills and learning to learn skills. The class Student attended for the 2010-2011 SY was very similar to the PAWS program, and is discussed in another section of this decision.

14. At the IEP team meeting on December 4, 2009, the IEP team decided that Student would begin attending PEPers, which was co-taught by Ms. Stinson and Ms. Youngdale, even though the PEPers program only met two days per week, and Dr. Griffin had recommended that Student attend preschool a minimum of three days each week. Student began attending PEPers immediately. Parents consented to the IEP on that date, agreeing with the goals and the District’s offer of placement and services. Because it had been difficult to assess Student in October, District staff thought that his participation in the PEPers program would give them additional information about him that would help them determine whether he needed a more intensive program. The IEP stated in the placement section that “[d]ue to the child’s changing needs and individual response to therapy, adjustments may be made based on teacher recommendation and parent agreement.”

15. Student had a great deal of difficulty separating from Mother at the PEPers program when parents were expected to leave the children and go to another area for “parent education.” Student was to receive speech therapy after circle time, which included all of the children and their parents, but when Mother attempted to leave, Student usually clung to her, wrapping himself around her legs in an effort to prevent her from leaving. Ms. Stinson used

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<sup>12</sup> Several witnesses testified about learning to learn skills. These include the ability to sit still, participate in classroom routines, attend to instruction, comply with requests, take turns, complete tasks and maintain focus, as well as other skills related to success in school.

several strategies to help Student to separate from Mother, and sometimes they were successful, but often they were not. Although Mother testified that Student engaged in many other problematic behaviors in class, including frequent noncompliance with routines and activities, Ms. Stinson did not report any problematic behaviors other than sporadic difficulty separating from Mother. Ms. Stinson was persuasive that such separation behavior was not uncommon for children of his age.

16. As required in the IEP of December 4, 2009, Ms. Youngdale and Ms. Stinson monitored Student's progress in the PEPers program, to determine whether his program needed adjustment. On about February 10, 2010, after Student had attended 12-14 sessions of PEPers, Ms. Youngdale telephoned Mother and explained that, although Student was making some progress in PEPers, the District believed that Student needed a more intensive program, i.e. the PAWS program. The District believed that participation in PAWS would be more beneficial for Student than PEPers because he would be attending the program for five days a week for a total of 15 hours, rather than just spending a total of three hours total in two separate sessions. The PAWS program not a parent-participation program. Mother told Ms. Youngdale that she would discuss the proposed change with Father. The evidence established that Parents decided to keep Student in the PEPers in part because they were concerned with the separation issues Student was having, and since PAWS was not a parent-participation program, they did not want Student to experience separation from Parents each day to attend the class. The District, wanting to maintain a good relationship with the family in this early stage did not try to pressure the family into changing Student's program by calling an IEP team meeting.<sup>13</sup>

17. In April 2010, Parents took Student to Disneyland for three days. The trip was a terrible experience for the family. Student was very anxious about the noise and crowds. He did not want to go on most of the rides, and then when he went on one he liked, he would refuse to get off. After this trip, Mother met with Ms. Stinson. The evidence established that Ms. Stinson and Mother discussed the signs of autism and whether Student might be autistic. Ms. Stinson did not believe Student had autistic-like behaviors. She explained to Mother that Student would probably make better progress in the more intensive PAWS program. However, the District and Parents decided that Student should continue in the PEPers program to the end of the school year in June 2010.

18. Mother testified that there was no help for parents of children in the PEPers program. However, her testimony was not credible because Ms. Stinson testified persuasively that in the PEPers program, there was a heavy emphasis on working with the parents of the students to teach them how to deal with various issues that might arise with their children, both those that were developmental, and those related to a child's disability.

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<sup>13</sup> Student did not argue that the District should have called an IEP team meeting to discuss a change of program, rather than simply having Ms. Youngdale suggest it to Parents in a telephone conversation.

There was a library of books on various subjects that parents could borrow, and Ms. Stinson and Ms. Youngdale were also available to respond to parent questions, model appropriate interaction with the children, and counsel parents about various issues they might encounter with the children. Parents were given suggestions about games and activities they could do with their children at home, many of which supplemented what was happening with the children in the PEPers classroom. Notes by Ms. Stinson in Student's log reflected a discussion with Mother in April 2010 when she suggested strategies Parents could use to gain better compliance from Student.<sup>14</sup> Although Mother testified that she did not recall this discussion, she recalled other conversations with Ms. Stinson that were recorded in the log. The contact notes in the Student log were found to be more reliable than the memories of some witnesses because they were recorded by staff right after the contact.

19. In the spring of 2010, Parents became involved in a group of parents whose children had disabilities that might qualify them for special education, particularly autism or autistic-like behaviors.<sup>15</sup> They attended an "autism fair" in San Luis Obispo. Mother also began researching autism and other subjects that might be pertinent to Student on the internet.

20. On May 28, 2010, an IEP team meeting was held. Parents, Ms. Stinson, Ms. Youngdale, and Mr. Peck attended, as well as another District representative, and the transportation supervisor for the District.<sup>16</sup> The IEP team found that Student made some progress in the PEPers program, although the District believed PAWS was a more suitable placement and offered PAWS for the next school year. Parents agreed that Student would attend PAWS, commencing with the beginning of the 2010-2011 SY, and the IEP of December 4, 2009, was thus amended with Parents' consent. Parents agreed to provide transportation. Student's speech and language services were to be continued as spelled out the December 4, 2009 IEP.

21. One day prior to the May 28, 2010 IEP team meeting, Student was informally assessed by Pamela Reading, a speech and language pathologist in private practice.

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<sup>14</sup> The log was a series of notes kept by the District when various staff had contact with parents or other professionals concerning a child, although not every contact was always recorded.

<sup>15</sup> Although Father testified that Parents did not become involved with this group until after the complaint was filed in this matter, July 2011, Mother contradicted this testimony when testifying about the source of referrals Parents received for private services they procured for Student in the summer of 2010.

<sup>16</sup> The transportation supervisor was a participant because the District wanted to make sure Parents understood that Student was entitled to transportation to and from preschool if Parents were unable or unwilling to transport.

However, Parents never mentioned this to the District at the IEP team meeting. In her written report Ms. Reading indicated that she asked Parents to provide her with copies of any assessment reports completed by the District. She indicated in her report that she would conduct a formal speech and language assessment if one had not been completed within the previous six months. However, there was no evidence that Parents ever asked the District to either reassess Student, or provide Ms. Reading with the October 30, 2009 assessment report.

22. Ms. Stinson testified persuasively that both she and Ms. Youngdale were knowledgeable about signs of autistic-like behaviors, and neither suspected that Student was such a child, which might have triggered a need for further assessment by the District. Further, other than his separation issues, Student did not demonstrate behavioral problems in the school setting. In addition, although Mother testified that Student had very serious tantruming and noncompliant behavior at home or in the community with Parents, there was no evidence that she relayed this information to any District staff, other than discussing the Disneyland trip with Ms. Stinson. Student did not present persuasive evidence that the District was on notice that Student required any additional assessment during the 2009-2010 SY.

#### *Procedural Safeguards*

23. A procedural violation results in a denial of FAPE only if it impedes the child's right to a FAPE, significantly impedes the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the parents' child, or causes a deprivation of educational benefits.

24. A school district is required to provide to parents a copy of their rights and procedural safeguards only one time a school year, although it is to inform them about procedural safeguards at each IEP team meeting. However a copy shall also be given to parents upon initial referral or parental request for assessment, when parents have filed an initial complaint with the state or a due process hearing request, when a decision is made to make a removal that constitutes a change of placement of an individual with exceptional needs because of a violation of a code of pupil conduct, or upon request by a parent. There is no provision in either State or federal law that district personnel explain the notice of procedural safeguards to a parent in the absence of an affirmative request by the parent.

25. Student claims that Parents were never given a copy of the notice of procedural safeguards until the District sent them an assessment plan in February 2011, and Parents so testified. Parents testimony was not persuasive because documentary evidence, and the credible testimony of District witnesses, including Ms. Stinson and Mr. Peck established that Parents were given a copy of procedural safeguards during the 2009-2010 school year, both on October 30, 2009, when the District assessed Student, and at the IEP meeting on December 4, 2009. On the consent for assessment form signed by Parents on October 30, 2009, a box is checked indicating Parents were given their procedural rights.

The same was true for the IEP developed on December 4, 2009, which also showed Parent signatures.

26. The IEP amendment form from May 28, 2010, does not contain a section for Parents to indicate receipt of the notice of procedural safeguards. However, Ms. Murphy testified credibly that it was District policy at all IEP meetings for District personnel to explain to parents that they had certain procedural rights. If parents requested a detailed explanation, District staff would refer them to Ms. Murphy who, as the Director of Special Education for the District, would meet with them personally to make sure they understood their rights. The evidence established that the District did comply with the laws concerning the provision of procedural safeguards at all times as required during the 2009-2010 SY.

### *Eligibility*

27. Student contends that he was denied a FAPE for the 2009-2010 SY because the District categorized him as a child with a speech and language impairment, rather than a child with autistic-like behaviors. A student is eligible in California for special education and related services under a variety of categories, which include autistic-like behaviors and speech and language impairment, if the child needs specialized instruction and services to receive a FAPE. However, as long as a child remains eligible for special education and related services, the IDEA does not require that the child be placed in the most accurate disability category, so long as the child receives services that meet his or her unique needs.

28. A properly crafted IEP addresses a student's individual needs regardless of his eligibility category. The assignment of the wrong eligibility category to a child with a disability may be a procedural violation.

29. As previously discussed, the IEP team in December 2009, found Student to be eligible for special education and services as a child with a speech and language impairment. Although Dr. Griffin had diagnosed Student as having PDD-NOS, which is a medical disorder found on the autism spectrum, her diagnosis was provisional. Betty-Jo Freeman, Ph.D. established that this provisional diagnosis identified a condition that needed to be watched closely to make sure it did not develop into full-blown autism.<sup>17</sup> Dr. Griffin said the same in her report.

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<sup>17</sup> Dr. Freeman testified on behalf of Student as an expert witness. She received her Ph.D. in psychology in 1969, and taught at the University of California Los Angeles (UCLA) School of Medicine from 1973-2003. She is now a Professor Emeritus. Dr. Freeman is a well-known expert in the field of autism. She has conducted and participated in numerous studies, authored or co-authored dozens of articles, and conducted dozens of trainings in the area of autism for various professions. Dr. Freeman has also been a consultant for school districts, and has a private practice in which, for the most part, she assesses children who are suspected of being autistic and consults with their parents.

30. Because the December 2009 IEP team found that Student was eligible for special education as a child with a speech and language impairment, he was placed in PEPers. As previously discussed, this preschool class was a language enriched class, and social skills were also a focus. Children on the autism spectrum attended the class, although the class had many students who were not on the spectrum. The evidence established that during the 2009-2010 SY, the District did not have an autism-specific preschool class.

31. It was immaterial whether Student's needs were labeled for eligibility purposes as autistic-like behaviors, or speech and language impairment. Student's unique needs as described on the IEP were identified as being in the areas of pre-academic, fine motor and gross motor, behavior, social, communication and self help. As is discussed more thoroughly below, the evidence established that the PEPers class met those needs, and Student received educational benefit which demonstrated that it was an appropriate placement, although the PAWS program would have provided greater educational benefit.

#### *2009-2010 Goals, Placement, and LRE*

32. An IEP must contain a statement of measurable annual goals related to meeting the child's needs that result from the child's disability. The IEP must also contain a statement of how the child's goals will be measured. The IEP must show a direct relationship between the present levels of performance or baselines, the goals, and the educational services to be provided. However, if baselines are misstated, or proposed goals do not have a direct relationship to the baselines, this is a procedural error, and it must then be demonstrated that due to this procedural error, the child was denied a FAPE, or his parents were denied meaningful participation in the IEP process as a result of the procedural error. Inappropriate placement will be grounds for relief if it is demonstrated that Student did not receive educational benefit for the school year at issue.

33. An IEP must also contain a statement of the program modifications or supports that will be provided for the student to advance appropriately toward attaining his annual goals and to be involved in and make progress in the regular education curriculum; and a statement of any individual accommodations that are necessary to measure the student's academic achievement and functional performance. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight.

34. A special education student is to be educated with typically developing peers to the greatest extent possible. A classroom for typically developing peers is generally considered to be the LRE for a special education student. However, some children with disabilities may be better suited to receive educational services in a more restrictive environment such as a class with fewer children, more adult support, and very specific teaching strategies.

#### *Preschool Annual Goals*

35. The IEP that governed the 2009-2010 SY was developed on December 4, 2009. The IEP team created eight annual goals for Student. Parents consented to this IEP in its entirety. He now contends that these goals were inappropriate for a child with autism, and as a result the placement was inappropriate that school year because it did not meet his unique needs as a child with autism. Student claims the inappropriateness of the goals and resultant placement denied him a FAPE. Student's two expert witnesses, Dr. Freeman and Genevieve Sullivan, supported Student's contention that District's goals were inappropriate for a child with autism.<sup>18</sup>

36. In the area of communication there were three goals: an expressive language goal, receptive language goal, and an articulation or sound goal. The expressive language goal provided that Student would "combine words into 3 word phrases to make comments and requests in 2 out of 3 opportunities." Student's baseline level of performance for this goal was that he had a vocabulary of 15 to 20 words, and used other nonverbal means to communicate. According to Dr. Freeman, this goal was inappropriate because it did not correlate to the baseline of a vocabulary of 15-20 words, and there was an assumption that Student had the skill level to create a three word sentence. Dr. Freeman believed a more appropriate goal would have been to increase Student's vocabulary. Ms. Sullivan, on the other hand, testified that this goal was inappropriate because it was not demanding enough, and in her opinion, he could have achieved this goal in a month, if the District had focused on goals that would teach Student "learning to learn" behaviors.

37. Ms. Stinson, Student's preschool teacher and speech and language therapist, testified that she had prepared the speech and language goals. In regards to the expressive language goal, there was evidence that Student occasionally put together two words, such as "Hi Mama," and he demonstrated communicative intent by using words, signs and gestures. Ms. Stinson's expectation was that in 12 months his vocabulary would increase to more than 50 words, which would enable him to "combine words into 3 word phrases . . ." Because it was not clear from the goal that Student's vocabulary needed to be increased before he could begin to speak in three-word phrases, this goal did not match the baseline. However, it was, based on the evidence at hearing, a reasonable goal that would provide Student with educational benefit. Accordingly, this goal met Student's expressive language needs.

38. The receptive language goal required Student to "identify two items named in a field of five with 80% accuracy." The baseline for this goal was that Student could "follow routine commands," that were familiar to him, and one-step directions in a small field. As part of the baseline, Ms. Stinson made a statement that Student's receptive language skills

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<sup>18</sup> Ms. Sullivan received her master's degree in counseling and guidance from California Polytechnic University, San Luis Obispo in 1991. She became a Board Certified Behavioral Analyst (BCBA) in 2001, and has worked with children with autism since the 1990s. She is currently the Clinical Director for Autism Connections, a nonpublic agency in San Luis Obispo.

were “suspected to be weak.” Dr. Freeman criticized this goal as being too low for Student in that it required him to identify only two objects in a field of five. Further, the baseline stated on the goal concerned her because the assessments done did not support District’s suspicion of weak receptive language skills. However, Ms. Stinson was more persuasive in explaining that the low baseline was called for by the assessments because, she had attempted to conduct standardized speech and language testing. She was unable to do so due to Student’s lack of cooperation. Ms. Stinson also explained that the baseline for this goal described Student has having difficulty identifying two items in a small field, and a “small field” is two to three items. If Student met this goal, he would be able to point to, or give someone two items when asked to do so, picking them from a field of five. Based on the knowledge the IEP team had at the time the goal was drafted, it was an appropriate goal to meet Student’s receptive language needs, and it would also increase his vocabulary.

39. The third communication goal required Student to “produce/imitate consonant-vowel-consonant-vowel . . . target words that include age appropriate sounds with 40% accuracy.” The baseline for this goal was that Student had “limited ability to imitate sounds and words.” Dr. Freeman stated that this goal was inappropriate because it seemed to be a rote goal, and it was unclear whether it was related to Student’s level of functioning. Although there was some indication that Student had difficulty imitating, she found this goal, requiring him to imitate sounds, was inconsistent with the one that called for him to create three word sentences. The baseline was defective because it did not state what percentage of the time Student was able to imitate sounds and words at the time he was tested. However, by imitating words, Student was increasing his vocabulary and speaking. Therefore, this goal met Student’s speaking needs. For each of these communication goals, Parents and the special education staff were to monitor achievement.

40. The District’s preschool IEP also provided a compliance goal. The baseline for this goal was that Student had “difficulty complying with teacher directed activities. He requires redirection to attend and comply with some presented tasks.” The goal required Student to “comply and attend to teacher directed activities by sitting in desired area, looking at teacher and participating in crafts or activities for a period of ten minutes independently.” According to Dr. Freeman, this goal was inappropriate because it was labeled as a compliance goal, when it actually appeared to be an attention goal. Further, in Dr. Freeman’s opinion, it was unrealistic; a more meaningful goal would have been Student to attend to a task for its duration. Dr. Freeman believed that an appropriate compliance goal would have been for Student to respond when given a command. Ms. Sullivan also found this goal inappropriate. Instead, she would have had a goal that Student would comply with a directive from an adult for both preferred and non-preferred activities within five seconds, 80 percent of the time.

41. Ms. Stinson was more persuasive in establishing that this goal was realistic because a typical preschooler needs to have the ability to engage in a 10-minute task, since that is the usual undivided period of time for instruction in a preschool setting, and classes for that age group are usually structured in 10-minute increments with breaks in between to

allow the children to move. The goal required compliance since Student was required to remain seated, required to maintain eye-contact with the teacher, and required to be engaged in the task at hand. It was also an attention goal, and a learning-to-learn skill that he needed. Although the baseline was weak in that it did not indicate how long he could attend to a task initially, the goal itself met Student's preschool compliance and attention skill needs,

42. The IEP also gave Student a social goal. This goal was for Student to say his name three out of three times when asked. The baseline for this goal was that Student understood turn-taking, and did attempt to ask his mother questions, but did not say his name. Dr. Freeman found this goal to be "ridiculous." First, she stated that a better social goal would have been a turn-taking goal. Secondly, she questioned this goal because if it was to be measured by asking Student to say his name, and he refused, repeating the question of "what is your name?" would turn the encounter into a power struggle. However, witnesses for the District consistently testified that if Student did not respond to a request, the question would be rephrased. Dr. Freeman disagreed and stated that rephrasing was also inappropriate because Student was then rewarded for not complying with a request. Dr. Freeman believed that a better goal would have been "labeling."

43. Ms. Sullivan also disapproved of this goal. In her opinion Student should have had "25 social goals." A better social goal would have been one that had Student spontaneously imitating pretend play of another child. In Ms. Sullivan's opinion, all of the learning-to-learn goals should have been in the IEP: "He will sit, he will listen, he will look, he will comply, he will wait for instructions, he will learn to imitate, he'll be willing to talk, tenacity, he will keep trying even if it's hard, he won't throw tantrums." In other words, Ms. Sullivan would have provided Student with goals that taught him how to learn, and then would have begun teaching goals such as those in the IEP itself.

44. Both Dr. Freeman and Dr. Sullivan's criticisms were unwarranted and unpersuasive. According to the baseline, and the ball-passing game during the District's October 30, 2009 assessment, Student already understood the concept of turn-taking, at least with Parents. Secondly, District personnel repeatedly testified that they consciously used strategies with Student that were intended to avoid power struggles. In addition, since learning-to-learn skills were embedded in both the PEPers and PAWS programs, Student would have learned those skills by participating in either program, and the evidence established that he had done so in part by the end of the 2009-2010 SY.

45. As Ms. Stinson credibly testified, the goal for Student to say his name was indeed a social goal. One of the first things children often say when meeting a peer for the first time is "What's your name?" Some preschool-aged children have not acquired the ability to respond by saying their name in reply, nor do they understand the social concept of responding appropriately. Responding to a question asking one's name is the first step in making a friend for a preschooler. Also, because the PEPers program was embedded with social skills activities, it was not necessary to have an array of specific social skills goals. The goal therefore met Student's social skill needs at that time.

46. For the District’s fine motor goal, there was a baseline that Student “is not yet imitating simple shapes.” The proposed goal was that he would “copy a vertical line, a horizontal line and a circle in 3 of 4 opportunities.” Dr. Freeman found this goal to be inappropriate because, in her view, he could already do this; however, the evidence showed that could not do this when the goal was developed. This goal was more than just a fine motor goal, it was also an imitation goal. This goal was intended to help Student develop the ability to copy different types of shapes, and to be able to do so after seeing another person do so. According to Dr. Freeman, this did not seem to be an important goal for a child with autism since it had nothing to do with helping him to relate to peers. However, even children with autism should be given the opportunity to develop pre-academic skills in preschool so they can participate in classes with typically developing children.

47. To achieve his gross motor goal, District’s goal provided that Student was to “trap a thrown playground ball from five feet in 3 of 4 opportunities.” The baseline was that Student was unable to trap such a ball when “bounced from 3 feet in 3 of 5 opportunities.” However, Dr. Freeman criticized this goal because it was not written in a way that required him to relate to peers, and therefore was not meaningful. In fact, in her opinion, that was something that all the goals should have addressed: that Student would interact with peers by initiating play, taking turns, etc. However, Dr. Freeman was not persuasive. This gross motor goal required Student to develop a skill so he could play a game children commonly play with each other. Again, both the PEPers and PAWS programs were intended to teach the children social skills and learning to learn skills, and were embedded with these concepts. Accordingly, the gross motor skill goal met Student’s preschool needs.

48. The final goal that Student contends was inappropriate was a counting goal that required him to “count 1-5 objects in 3 of 4 opportunities.” The baseline for this goal was that Student did “not count [by speaking] number words, but [did] make a counting rhythm.”<sup>19</sup> Student did not establish that this goal failed to meet his academic counting needs in preschool, and based on Ms. Stinson’s testimony, Student was required to count actual objects, not just engage in rote counting.

49. Dr. Freeman stated generally that the problem with all the goals was that they did not address the needs of a child with autism—the goals did not address the big picture, that Student needed to socially interact with peers, and one of the best ways to do this was to engage in play with peers, yet there was no play goal. Further, according to Dr. Freeman, Student had a deficit in imitation skills, but this deficit was not addressed in the goals.

50. The testimony of both Dr. Freeman and Ms. Sullivan was problematic for the ALJ. First, they were basing their opinions of the appropriateness of the goals on several

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<sup>19</sup> There was also a toileting goal. Student did not dispute the appropriateness of this goal, and had made great progress in meeting this goal by the end of the 2009-2010 SY.

factors that were not known by the IEP team when the goals were formulated on December 4, 2009. They both approached Student's goals from the perspective that he was a child with autism. However, at the time of that IEP team meeting Student had a provisional medical diagnosis of PDD-NOS and did not demonstrate significant autistic-like behaviors in the school setting. Dr. Freeman testified that because he was under the age of three years, it would have been inappropriate for Dr. Griffin to diagnose him as a child with autism. In her report Dr. Griffin stated that Student had "mild" signs consistent with autism and further said that he would need to be assessed in 18-24 months. Dr. Freeman explained that this was because Student's symptoms could have developed into full-blown autism at that time, or could have diminished or disappeared.

51. Another difficulty with the testimony of Dr. Freeman and Ms. Sullivan as to the goals was that, in those instances where they both testified that specific goals were inappropriate, each found the goal to be inappropriate, but not for the same reasons, and each had a suggested substitute goal or goals that were different than the other professional's suggestion. Finally, neither expert seemed to understand that the child they saw in their office, or in his home, was not the child that District personnel saw in school during the 2009-2010 SY: a child who was beginning to speak in class, had adjusted to routines, could, occasionally, by the end of that school year, attend to a task for 10 minutes, and with the exception of separation from Mother in the PEPers program, was compliant, and cooperative for much of the time, and not disruptive in class.

#### *Preschool Placement*

52. As found above, at the IEP team meeting on December 4, 2009, the team discussed both the PEPers program, and the PAWS program. Parents' desire that Student attend the PEPers program was respected by the District team members, and that was the placement recommended for Student in the IEP to which Parents consented. In February and April 2011, the District recommended moving Student to the PAWS program for five days a week, but kept him in the PEPers program at Parents' request.

53. Each PEPers class opened with "circle time," a 10-12 minute segment when all the children and parents participated in activities such as singing, and/or having a story told or read.<sup>20</sup> Following circle time, the adults would go to another area of the classroom for the next 10 minutes or so, and they would be given instruction about dealing with various types of issues they might be having with their children, and told about the activities in which the children would be engaged that day, or in the future. Then the parents would return and be stationed in two specific activity centers in the room where they would work

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<sup>20</sup> Circle time is a group activity common in preschool, kindergarten, and some early elementary school grades. Students sit in a circle, either on the floor or in small chairs, and the teacher gives group instruction in a fun way that often involves singing, talking about the calendar and seasons, and upcoming holidays, for example.

with the children who went to those centers. When the parent instruction was taking place, teachers and aides would work with the students in small groups or individually. Following the parent instruction time, the children would circulate among four centers, two being run by parents, and two being run by classroom staff. Center activities would be focused on developing a specific skill.

54. Student made progress in the PEPers program, although Ms. Stinson and Ms. Youngdale believed he would have made more in the PAWS program. In April 2010, it was reported that Student was imitating and learning to speak more words and he was speaking some to communicate. He was still having difficulty with the goal of identifying two objects in a field of five, but he was making slow progress on his goals, although he often refused to copy shapes and trap the ball. He was making good progress on a toileting goal. The evidence established that Student therefore did receive educational benefit during the 2009-2010 SY, and thus received a FAPE. Although Student argues that he should have received a strict ABA program for this school year, provided to him in the home setting, failure of a school district to provide a child with disabilities with the program his parents prefer does not establish that a school district's placement was deficient.

#### *LRE*

55. Although generally the concept of LRE is concerned with children with disabilities being educated with typically developing peers, Student did not argue that he should have been educated with these peers for the 2009-2010 SY. Rather, Student contends that LRE for him that year was a home-based ABA program, and he supported this claim by presenting evidence of the gains he made in such a program from August 1, 2011 to December 23, 2011.

56. Student regained eligibility for Tri-County services during the summer of 2011, based on the assessment by Dr. Freeman that had not yet been shared with the District. As a result, Tri-County began funding 15 hours each week of ABA services provided by Autism Connections Inc. These services were provided to Student in his home. In addition, Parents began funding additional home-based ABA services beginning August 1, 2011, and elected to continue those home-based services in lieu of sending Student to a District program when the school year began on August 22, 2011.

57. Student presented the testimony of Parents, Ms. Sullivan and Dr. Freeman to demonstrate the progress he made with home-based services. They also presented videos of Student in the home program from November 2011 and January 2012 to demonstrate this progress. This evidence established that Student's home behavior and behavior with Parents in the community improved markedly as a result of the home-based ABA services. However, it was less clear what progress Student would have otherwise made in areas that would have been addressed by a District program and services during the 2011-2012 SY. This is because, as described by Parents, Student's behavior in the home setting was so markedly different than his behaviors as described in the school setting. Nor was there

evidence that Student would have made similar progress had he received in-home ABA services during the 2009-2010 SY.

58. The PEPers program was a self-contained classroom on an elementary school campus twice a week. However, on a continuum of placements, a self-contained classroom is a less restrictive placement than a program in the child's home. Accordingly, Student failed to meet his burden of proof that the PEPers program was not LRE for him for the 2009-2010 SY.

*2009-2010 Preschool Behavior Interventions*

59. There are many behaviors that will impede a child's learning or that of others. These behaviors require the IEP team to consider and, if necessary, develop a BSP. A proper BSP will identify the antecedents of the behavior one is seeking to change, and formulate a plan of action to be taken to prevent or change the behavior to that which is desired, usually with a description of positive reinforcement that is to be given when the desired behavior is demonstrated. An IEP that does not appropriately address behavior that impedes a child's learning denies a student a FAPE.

60. Student contends that he should have been provided with a BSP to address behavioral concerns in the PEPers program. Mother testified that Student's behavior was "terrible." According to her, Student was resistant to everything in the class: he would not willingly put on his name tag, look at a book with her during circle time, or separate from her so he could engage in other classroom activities. Mother described Student's tantrum behaviors of screaming, crying, and clinging to her legs so he would not be separated from her as being pretty much continuous throughout class time. She testified that he would not participate in activities or centers in the classroom.

61. Ms. Stinson painted a very different picture of Student in the PEPers program. Although he did have separation issues from mother, his difficulty separating from her was inconsistent. The other behaviors described by Mother were not reported by Ms. Stinson and there were no notes in Student's log that corroborated Mother's testimony about these maladaptive behaviors. Ms. Stinson presented as a very experienced, caring and competent speech and language therapist working with preschool-aged children, and her testimony was given great weight.<sup>21</sup> It was highly unlikely that Student would have been permitted to remain in the PEPers program classroom if he was screaming, crying and tantruming during most of his time there. Accordingly, Student failed to establish that he required a BSP in the classroom in order to receive a FAPE.

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<sup>21</sup> Ms. Youngdale did not testify, although the parties stipulated to the admission of her credentials from the California Commission on Teacher Credentialing.

62. Although the evidence established that Student had tantruming and noncompliant behaviors frequently at home, Student did not establish that Parents reported this as a continuing issue to any school District staff during the 2009-2010 SY, other than Mother's conversation with Ms. Stinson in April 2010 following the family's trip to Disneyland. As previously discussed, Parents also did not describe Student's home behaviors with Ms. Stinson and Ms. Youngdale when they assessed him in October 2009, other than telling them that he was not compliant at home. There was testimony from several District witnesses that it could, in some circumstances, provide services to address in-home behaviors. However, Parents testified repeatedly that they did not request services from the District to address what they considered to be behavioral issues.

#### *2009-2010 Speech and Language Services*

63. The IEP of December 4, 2009, called for Student to have seven 25-minute group sessions of speech and language therapy each month. Student contends that he did not receive the right type of speech and language services. Mother testified that Student did not receive enough speech and language services. However, she simply made a blanket statement, and did not describe how she knew this, nor did she provide any example of a failure to provide these services. Student did not present any evidence other than Mother's opinion on this issue. There was also no evidence whatsoever that Parents ever complained to the District during the 2009-2010 SY that Student was not receiving the requisite number of minutes each month, even though Mother was an active participant in the classroom and was present at every session that Student attended.

64. In its closing brief Student claimed that the speech and language services provided to Student this school year were inappropriate because the District did not provide him with speech and language services appropriate for a child with autism, nor services to address articulation issues. However, Student presented no evidence as to what type of speech and language services he required, and why the services provided to him were inappropriate for the 2009-2010 SY.

65. Ms. Stinson began speech and language sessions with Student right after circle time when the parents went to their parent education session. As previously described, Student had difficulty separating from Mother, so one of the techniques Ms. Stinson employed was to have Mother remain with Student, but read a magazine or book and not be engaged with him. During that time, Ms. Stinson worked with Student on his therapy. The entire program was infused with language and social concepts, as these were the focus of the class. Ms. Stinson was persuasive in her testimony that even if she had known Student had autism, she would not have altered her services to Student from what they were. In addition, since the PEPers program was designed for children with needs in the area of speech and language, the entire program was focused on providing the children with a language enriched environment. Ms. Stinson credibly established that she provided the speech and language therapy called for in Student's IEP of December 4, 2010. Student failed to meet his burden

of proof that the District did not provide him with appropriate speech and language therapy, in the amount called for in his IEP for the 2009-2010 SY.

### *2010 ESY*

66. ESY services are included in the IEP if the IEP team determines, on an individual basis, that the services are necessary for the provision of a FAPE. ESY services are provided where interruption of the pupil's educational program may cause regression which, when coupled with limited recoupment capacity, render it unlikely that the pupil will attain the level of self-sufficiency and independence that would otherwise be expected.

67. The IEP of December 4, 2009, indicates that ESY was discussed at the team meeting that date. There is a checked box that ESY is not recommended. In February 2010, Mother asked if Student would be provided with services during the summer of 2010. She was asked to speak to Ms. Stinson about it towards the end of the school year. A few months later Mother discussed ESY with Ms. Stinson. Ms. Stinson encouraged Mother to seek out private speech and language therapy that could be covered by the family's health insurance, and this was pursued by the family. There was no evidence that either Parents or District staff believed that Student would regress if he did not receive ESY, nor was there any discussion of this when the IEP team met on May 28, 2010, to modify the IEP to reflect placement in the PAWS program for the 2010-2011 SY. Although they did not tell the District, Parents had already pursued private speech and language services with Ms. Reading who had assessed Student the previous day, but there was no evidence that they did so because they thought he would regress if he did not receive them. Therefore, Student did not establish that he needed ESY services, and District's lack of an offer for ESY did not deny him a FAPE.

### *2010-2011*

#### *Assessment*

68. During the summer of 2010, Parents sought out services for Student, specifically speech and language therapy services, and the services of a behaviorist. He was privately evaluated by a speech and language pathologist and an occupational therapist, as well as a neurologist. The speech and language pathologist and the occupational therapist each generated written assessment reports. With the exception of the neurologist, to whom they were referred by Student's pediatrician, Parents learned about the other professionals from the parent support group they had joined during the previous school year.

69. Pursuant to Student's May 2011 IEP, Student was to be placed in the classroom of Eileen Higgins for the 2010-2011 SY for his second year of preschool. This had previously been known as the PAWS program. However, when the 2010-2011 SY began, Parents informed the District that Student would not be entering PAWS. Instead, they decided to keep him home and access the private services of a behaviorist. They

communicated this information to the District by telephoning Ms. Higgins and telling her that they did not want Student to begin school until November 1, as they were accessing private services for Student and did not want Student to experience more change at the time. However, there was no evidence that they explained why they believed Student needed these services.

70. There was little evidence as to what behavioral services Student received, although it was clear from Mother's testimony that Parents were not very happy about what transpired. Mother testified about an incident where a behaviorist spent an hour trying to physically force Student to stay in one place, which required Mother's assistance in holding him down. District staff had never used physical restraint with Student, as none had been necessary.

71. In mid-October 2010, Student's IEP was again amended with Parents' consent to reflect that Student would be attending a preschool class at Winnifred Pifer Elementary School. This class was taught by Noah Cooper, and had approximately eight students with mild to moderate language and social skills deficits, and was the equivalent of Ms. Higgin's class.<sup>22</sup> It was a classroom where the needs of children who were mildly to moderately autistic could be addressed, even moreso as the year progressed. Mr. Cooper taught the class with the assistance of two paraprofessionals. The class was held for three hours each morning, Monday through Friday. Although not referred to as the PAWS program, it was the equivalent placement.<sup>23</sup>

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<sup>22</sup> Mr. Cooper moved to California from Florida where he had received his master's degree in special education. Prior to that time he had taught regular education students in Florida schools for eight years. He received a California special education credential in 2009, and also has a California early childhood education credential. He began working for the District in 2010, and had previously worked for the San Luis Obispo County Office of Education after coming to California in 2008.

<sup>23</sup> Ms. Murphy became the Director of Special Education for the District in 2007, after working for the San Luis Obispo County Office of Education (SLOCOE). Prior to Ms. Murphy becoming the Director of Special Education for the District, preschool children with disabilities in the District had attended programs designed and operated by SLOCOE. During the summer of 2010, the District began designing and operating its own preschool programs for children with disabilities, particularly those with speech and language impairment, or on the autism spectrum.

Because the District was in the process of transitioning from placing preschoolers with special needs in programs offered by SLOCOE to developing its own similar programs during the 2010-2011 SY, the names of some of the programs referred to in the hearing changed. Mr. Cooper's class was sometimes referred to as PAWS, and at other times as "Mr. Cooper's class." It is referred to in this Decision as "Mr. Cooper's class."

72. Although Father attended the IEP team meeting on October 15, 2010, with Mr. Peck and Mr. Cooper, he did not mention any of the private services Student had received, nor any of the private assessments Parents had obtained.

73. Student began attending Mr. Cooper's class on November 1, 2010. The first couple of days, he experienced some separation anxiety. The evidence established that although Student cried for 20 to 30 minutes after Mother left the first day, that disappeared by day three, and once she left the classroom, he would go to his schedule posted on the wall, check it, and go to where he was supposed to be. Other than the initial separation difficulties, he had no separation difficulties for the remainder of the school year.

74. An IEP team meeting was held on December 10, 2010. Attending that meeting were Parents, Mr. Cooper, and Mr. Peck. Student was also present. Student's speech and language therapist, Erica Castro, was not present because she was a part-time District employee and was not scheduled to work that day.<sup>24</sup> However, she had previously met with Mother and talked to her about some of the issues covered at the IEP team meeting, including a request from Ms. Castro that Parents record Student talking at home. Parents were active participants at this IEP team meeting.

75. Parents tape-recorded the IEP team meeting of December 10, 2010. Parents may record an IEP team meeting if they give the District at least 24 hours advance notice.<sup>25</sup> The evidence established that Mother emailed Mr. Cooper the day before the IEP team meeting to inform him that the meeting would be recorded, but Mr. Cooper had not opened this email when the meeting convened at 8:00 a.m. the next day. It is likely that Mother's email was sent to Mr. Cooper less than 24 hours before the IEP meeting began. Without telling Mr. Cooper and Mr. Peck, the other team member, that he was recording the meeting, Father placed his iPhone on the table where they were meeting shortly after the meeting began, and Mother later transcribed the recording. Both Mr. Peck and Mr. Cooper did not discover that most of the meeting had been recorded until they were testifying at the hearing and Student's attorney referred them to the transcript.<sup>26</sup>

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<sup>24</sup> Ms. Castro received her undergraduate and masters degree from California State University Chico. She has been licensed as a speech and language pathologist since 2006. Other than a break to work in a family business, she has worked in schools as a speech and language pathologist since that time. She has not worked for the District since the end of the 2010-2011 SY.

<sup>25</sup> Ed. Code § 56341.1, subd. (g).

<sup>26</sup> Both were permitted to listen to the recording and read the transcript prior to testifying about that meeting, and both the recording and transcript were admitted into evidence because Mr. Cooper and Mr. Peck testified that, although the beginning of the meeting had not been recorded, both the transcription and recording were relatively accurate.

76. At the time of the meeting, Student had spent approximately 15 school days in Mr. Cooper's class. The IEP team was concerned that Student was not talking at all in the class, either to adults or peers, although he was communicating by means of gestures and some body language. This was in contrast to the end of the previous school year in the PEPers classroom where it was reported that he was speaking two-word phrases. Mr. Peck and Mr. Cooper wondered if Student's lack of verbal communication this school year was "selective mutism," since Parents indicated that he was speaking at home.<sup>27</sup> Mr. Cooper and Ms. Castro were hoping that Student would begin speaking in class as he became better adjusted to the routine and structure of the class, and more comfortable engaging with peers and adult staff.

77. At the IEP team meeting of December 10, 2010, Parents did not discuss the private assessments and services they had obtained during the summer and fall, nor did they discuss any of the findings or recommendations in those reports, or present any of the written reports that had been provided to them by these assessors.<sup>28</sup> Parents did not discuss the behavioral services Student had received privately before he resumed attendance at school.

78. At the IEP team meeting of December 10, 2010, Parents reported that Student had maladaptive behaviors at home, such as tantruming which included crying and some aggressive behaviors such as hitting and kicking. However, Student did not engage in any of these behaviors at school. Mr. Peck offered Parents some guidance on dealing with these kinds of behaviors at home. One of the strategies was having a visual schedule, which Mother said he had at home. Mr. Peck also discussed the concept of "social stories," which Mother indicated she had researched online.

79. Because Student had just recently begun attending Mr. Cooper's class, neither he nor Mr. Peck, felt there was a need to assess Student at that time about the reported in-home behaviors, or Student not speaking in class, nor did Parents request additional assessments or services.

80. The IEP offer on December 10, 2010, called for Student to be placed in Mr. Cooper's class, and to receive seven 25-minute sessions of group speech and language services. Parents did not sign the IEP, saying they wanted to take it home to review before signing it. Although they were asked several times thereafter to return the signed IEP, Parents did not do so. They claimed that since the goals in the new IEP were identical to

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<sup>27</sup> Selective mutism is a psychiatric diagnosis which is not applicable to people with autism. It was described as a condition where someone will speak in some environments, but not in others.

<sup>28</sup> These reports were not provided to the District until after the complaint was filed in July 2011.

those in the previous year's IEP, they did not think there was any necessity for them to sign this IEP.

81. In January 2011, Mother discussed Student's home behaviors with Mr. Cooper again although she was not specific about what she referred to as "aggressive behaviors." Student was still not speaking in class. In addition, Ms. Sullivan, who had been retained by Parents to conduct an assessment of Student, came to observe Student in Mr. Cooper's class. Student's attorney sent a letter to the District informing them that Student now had legal representation, and requested an IEE. Therefore, on February 3, 2011, Mr. Peck developed a comprehensive assessment plan that was sent to Parents. The plan called for assessments in the areas of academic/pre-academic achievement, social/adaptive behavior, sensory-motor development, communication development, intellectual development, as well as a health and development history, classroom observation and a record review. However, Parents did not sign the assessment plan until April 25, 2011, and did not return it to school until May 2, 2011.

82. It was reasonable for the District to wait a bit after the December 10, 2010 IEP team meeting to see how Student settled into Mr. Cooper's class. Because the District was closed for the winter holiday break for several weeks in late December and early January 2011, the District should have, and did, begin considering an assessment on a timely basis. Based on the evidence presented at hearing, Student did not meet his burden of proof that the District should have begun the assessment process prior to February 3, 2011.

#### *Procedural Safeguards*

83. As found above, the District was required to inform Parents of their procedural rights in connection with every IEP meeting. Student contends that the District did not provide Parents with a notice of procedural safeguards at either the October 15, 2010, or December 10, 2010 IEP team meetings.

84. The document from the October 15, 2010 meeting is an amendment to an IEP form, and there is no place on the single page for an acknowledgement that the notice of procedural safeguards was given to Father. Parents received a notice of the December 10, 2010 IEP team meeting several days before the meeting. On that notice is a statement that they can request a copy of the procedural safeguards from Mr. Cooper at any time prior to the IEP meeting.

85. The IEP team meeting of December 10, 2010, began at 8:00 a.m. in Mr. Cooper's classroom. Mr. Cooper and Mr. Peck established that parents are normally given the notice of procedural safeguards at the beginning of an annual IEP team meeting, immediately following greetings and introductions, if the latter are necessary. On the last page of the IEP form, where parents sign their consent to the IEP, is a box that can be checked to indicate receipt of the notice. This box is not checked on the last page of the IEP from December 10, 2010. However, the initial portion of the IEP team meeting was not

recorded by Parents; the recording begins as Parents and the team began reviewing the progress reports for the goals developed at the December 4, 2009 IEP team meeting. Further, the IEP meeting ended rather abruptly because children were arriving to begin class that day, and Parents announced that they wanted to take the IEP document home with them to review before signing it. The evidence supports a reasonable inference, based on the persuasive testimony of Mr. Cooper and Mr. Peck, that the District IEP team members gave Parents the notice according to standard practice but just did not obtain Parents' initials acknowledging receipt because Parents took the document home.

86. Parents lacked credibility when testifying that they never received the notice of procedural safeguards prior to February 2011. This testimony was persuasively rebutted by the testimony of several District witnesses that they did not recall deviating from that practice in any IEP team meeting with Parents, and the checked box indicating receipt of procedural safeguards is on both the October 30, 2009 assessment consent form, and the December 4, 2009 IEP. As found above, Student did not establish that the District failed to give them notice of procedural rights at the December 2010 IEP meeting. Assuming the District did not provide Parents with the notice, and committed a procedural violation, the District cured the defect in February 2011, when it delivered a notice of procedural rights with the request for assessment. Student did not establish that the violation denied him a FAPE, and it is found to be a harmless error, even if the violation occurred. Accordingly, Parents failed to meet their burden of proof that they were not provided with the notice of procedural safeguards until February 2011 for the 2010-2011 SY.

### *Eligibility*

87. In the IEP from December 10, 2010, the team again found Student eligible as a child with speech and language impairment. In the recording of that IEP meeting, nothing was said about eligibility, although, as previously noted, the recording did not begin with the beginning of the IEP team meeting. Also as previously noted, Parents did not share with the IEP team the information and reports they had received from the private assessments in previous months. Had they done so, the District might have been alerted to new information that would have suggested it should reconsider Student's eligibility category as speech and language impaired. Parents did not even use the words "autism" or "autistic" during the meeting, at least during the portion that was recorded, nor did they express any disagreement with Student being found eligible for special education under the category of speech and language impaired.

88. In January 2011, Student was privately assessed by Ms. Sullivan, and she issued a report at that time. She advised Parents that she believed Student was autistic and made several recommendations. Parents did not share that report with the District until August 2, 2011, nearly one month after the complaint in this matter had been filed.

89. In January 2011, Student was also privately assessed by Dr. Freeman, although her final report was not completed for several months. However, when Dr. Freeman met

with Parents immediately after the assessment, she told them that in her medical opinion Student was autistic. The evidence established that Parents did not share any information about the fact that any professional had opined that Student was autistic or displayed autistic-like behaviors at the parent-teacher conference on March 31, 2011, with Mr. Cooper. It was not until mid-April 2011, at an impromptu after-school meeting with Mr. Cooper and Ms. Castro, that Mother informed the District that Student had received a medical diagnosis of Autistic Disorder.

90. On February 3, 2011, the District decided to complete its own assessment of Student and offered Parents an assessment plan for their consent. Parents did not return the signed consent until May 2, 2011. Due to that delay and others, created by Parents, the District did not complete its assessment of Student until early 2012. In that assessment, Mr. Peck found, and testified, that in his opinion, Student met the California criteria for eligibility as a child with autistic-like behaviors.

91. Nevertheless, Student failed to meet his burden of proof that the failure of the December 10, 2010 IEP team to find him eligible as a child with autistic-like behaviors denied him a FAPE. Mother agreed that IEP accurately described Student's needs and the evidence established that Mr. Cooper's class was an appropriate placement for Student, and for children with his described needs, regardless of what eligibility classification he was given in the IEP. Parents failed to share information from their private assessors and service providers, did not sign the February 3, 2011 request for assessment until many months later, and failed to subsequently make Student available so Mr. Peck could complete the District's assessment in the fall of 2011. This lack of cooperation with the District certainly contributed to the District's delay in finding Student eligible for special education as a child with autism. Accordingly, Student did not establish that he was denied a FAPE for the 2010-2011 SY because he was found eligible for special education as a child with a speech and language impairment, rather than as a child with autism.

#### *2010-2011 SY Goals, Placement and LRE*

92. At the IEP team meeting on December 10, 2010, Mr. Cooper reported on Student's progress in meeting the goals from the December 4, 2009 IEP. Although Ms. Stinson and Ms. Youngdale had reported progress on some of these goals at the end of the 2009-2010 SY, Student had made major progress on only one goal, a toileting goal, according to Mr. Cooper. As found above, Student did not attend any District programs from the end of the 2009-2010 SY until November 1, 2010, a period of nearly five months, because Parents had kept him home. However, even though Student had only attended Mr. Cooper's class for 15 sessions by the time of that IEP meeting, Mr. Cooper reported some progress on most of the other goals. When Parents reviewed the previous school year's goals at the December 10, 2010 IEP team meeting, they acknowledged that Student had made progress, since beginning District programs in December 2009, although it was slow.

93. Student's expressive language goal was modified and required him to "spontaneously use one or more words with a staff member to request, greet, comment, or answer 4/5 opportunities over 2 consecutive observation days as measured by teacher/therapist written records." Based on the evidence, this goal met Student's expressive language needs since Student was not speaking in Mr. Cooper's class.

94. The receptive language goal remained the same, but the baseline said that "it remains unclear if he truly understands meaning of the words presented. Due to the gap in [Student's] educational program, this goal has been carried over from the previous IEP." Under the circumstances this goal still met Student's needs.

95. The compliance goal remained unchanged because Student was still having difficulty in Mr. Cooper's class complying with some tasks. This goal remained adequate to meet his needs because it is an important learning to learn skill.

96. The social skill goal for Student to say his name also remained unchanged from the previous school year because he still would not say his name, or at that time, anything at all. However, Mr. Cooper believed that it was in part due to him adjusting to the class. The toileting goal also remained unchanged, as did the copying shapes goal, the ball-trapping goal, and the counting goal. The word imitation goal was eliminated because, as previously noted, Student was not speaking at all in Mr. Cooper's class.

97. Because Student was not speaking at all, and because of the gap between the end of the previous school year and Student beginning school in November, District's annual goals complied with the law and met Student's unique needs related to his disability at that time.

98. As previously discussed, Mr. Cooper's class, had approximately 8 students and 2 paraprofessionals, or aides. As with the PEPers class, there was a focus on speech and language and the development of social skills in the classroom. Children with a variety of mild to moderate disabilities, including autism, could be placed in the class. The classroom had a structured routine, and utilized the TEACCH (Treatment and Education of Autistic and Related Communication Handicapped Children) program in the class. This is a program developed at the University of North Carolina, and is one of many used to teach children with autism.

99. Dr. Freeman issued a formal assessment report a few months after assessing Student in January 2011. She found him to qualify for the DSM IV diagnosis of Autistic Disorder, and made several recommendations in her report, which was thorough and exacting.<sup>29</sup> Dr. Freeman recommended that Student participate in a class "with a small

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<sup>29</sup> The Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition is published by the American Psychiatric Association, and is used by mental health professionals as an aide to diagnosing mental disorders.

student-to-teacher ratio with a teacher who is familiar with the special educational needs of children with Autistic Disorder.” In this regard, the evidence established that Mr. Cooper is a teacher with a special education credential that allows him to teach children with autism or autistic-like behaviors.

100. Dr. Freeman described the type of interventions to be used in the classroom which included the following: a) Functional spontaneous communication as a priority focus; b) Social instruction delivered throughout the day; c) Teaching of play skills focusing on play with typical peers; d) Instruction aimed at goals for cognitive development take place in a natural environment; e) Behavioral intervention strategies that would look at the context in which behaviors occurred, and proactive approach with several techniques described; and f) Functional academic skills taught. Mr. Cooper testified persuasively that all of the above interventions recommended by Student’s expert were used in his classroom.

101. Dr. Freeman also recommended that Student be in the preschool class five to six hours each day, with no more than a two week break at any given time. In addition, she recommended that Student receive another 10 to 15 hours per week of one-to-one instruction after school, and that Parents participate in a “parent training program.” This would be the optimal program for Student.

102. On Wednesdays, children in Mr. Cooper’s class would visit a pre-kindergarten class for typically developing children. Interaction with typical peers was one of Dr. Freeman’s recommendations. Although Mr. Cooper’s class was in session Monday through Friday, Student did not attend the class on Wednesday. Parents testified that they had transportation issues on Wednesdays as both worked outside the home that day, so Student was watched by grandparents on Wednesdays. However, there was no explanation as to why the grandparents could not transport him to school. Nor was there any evidence that Parents ever requested that the District transport Student to school on Wednesdays, although they knew from the IEP meeting in May 2010, that transportation was available.

103. Mother testified that it was difficult for Student to make the transition from being home on the weekend to beginning school on Mondays, but if that was the case, keeping him away from school on Wednesdays then meant he had to make the transition to stay with his grandparents on Wednesday, and another transition back to school on Thursday.

104. Because Student did not attend school on Wednesday he missed 20% of the hours of services available in Mr. Cooper’s class each week which included not only interaction with typically developing children, but also having Ms. Castro in class the entire day to provide direct speech and language services to some children, and to ensure that the program remained focused on the speech and language needs of the students, including the development of social skills.

105. Ms. Sullivan observed Student in Mr. Cooper’s class in mid-January 2011, and was critical of it in both her written report and in her testimony. However, on the day she

conducted her observation, Mr. Cooper was absent, and the class was covered by a substitute teacher. A class taught by a substitute teacher is not at all the same for students as one taught by the regular teacher. Therefore, Ms. Sullivan's observations as testified to and contained in her written report regarding her observations that day were not given much weight.

106. Dr. Freeman and Ms. Sullivan both testified that what Student needed was a program that utilized ABA methodology in the home setting for the 2009-2010 SY, and the 2010-2011 SY. Therefore, it was curious that Dr. Freeman had recommended a preschool program for Student in her written report. ABA like TEACCH, is one of many methodologies used with children on the autism spectrum. Dr. Freeman was not questioned directly about the TEACCH program, although it was clear that she believed ABA, involving the use of repetitive discrete trial training on a one-to-one basis and other techniques, was the best methodology to use when teaching children on the autism spectrum.<sup>30</sup> However, school districts are not required to use the "best" methodology when teaching children with special needs.

107. Both Ms. Sullivan and Dr. Freeman testified that prospectively, or for compensatory education purposes, Student needed placement in a preschool class of typically developing children with a one-to-one aide, and additional services totaling at least 40 hours per week, some of which could be provided in the preschool setting, to make continuing progress in all areas. It was obvious during the due process hearing that neither Ms. Sullivan, nor Dr. Freeman was knowledgeable about the District's preschool programs for children with IEPs. It appeared that they were rendering their opinions about the programs Student had participated in both school years based on a perception that they were standard preschool classes for typically developing children that were not using methodologies that would address his needs as a child with autistic-like behaviors.

108. The evidence established that Student made significant progress in Mr. Cooper's classroom during the 2010-2011 SY. In June 2011, Mr. Peck observed Student in the classroom and on the playground, where he was engaged in activities with his peers, demonstrating affection for them, and playing imaginative games such as pretending their tricycles were motor vehicles and filling them at a pretend gas station.

109. By June 2011 Student had mastered his receptive language goal and was speaking to peers, although he tended to not want to speak when adults were present. In terms of his compliance goal, he was able to attend to teacher directed activities for at least 15 minutes. He was compliant with most teacher requests, and was an active participant in most class activities. However, he had not made progress on the goal of saying his name. Student was toileting himself independently, and he was tracing his name, although not yet

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<sup>30</sup> Discrete trial training is a technique where a skill is broken-down into its component parts, and then the student is taught each step sequentially, not moving on to the next step until he has mastered the previous one.

perfectly, in regards to his fine motor goal. In regards to the gross motor goal of trapping the ball, Student was successful half the time, and engaged in this activity with peers. He was now able to count out loud to 12, and when he was administered the Woodcock-Johnson Tests of Achievement, Third Edition, on June 13, 2011, his skills were in the average range compared to same aged peers, as was his ability to apply these skills.

110. The evidence established that the District's annual goals met Student's unique needs related to his disability, whatever its label, the placement was also appropriate to meet his needs, and the classroom was the LRE for him. He clearly received educational benefit this school year.

#### *2010-2011 SY Behavior Interventions*

111. The evidence established that Student's primary issue in Mr. Cooper's class was not talking. However, this was beginning to change towards the end of the year. Other than not talking, Student also had a tendency to avoid participation in activities which might bring attention to him, but this too had changed by the end of the 2010-2011 SY, and generally Student had no behavioral problems in Mr. Cooper's class. The evidence established that Student knew the classroom routine, and was very cooperative. He did not tantrum, cry, scream, or throw things. These behaviors seemed to only occur at home with his parents, especially when they wanted him to do something he did not want to do. Student failed to establish that he required behavioral services in the school setting in order to obtain educational benefit.

112. Parents contend that the District should have provided them with behavioral services in the home. However, during the 2010-2011 SY, the only time Parents informed the District that there were behavioral problems at home were: a) at the December 2010 IEP team meeting; b) a discussion between Mother and Mr. Cooper in January 2011; c) at a parent-teacher conference at the end of March 2011; and d) at a meeting in mid-April, 2011. Only in December and April did Parents specifically describe the home behaviors of tantruming, with crying, screaming and throwing things. In the other contacts, Parents just referred to a lack of compliance or aggressive behavior, but although Mr. Cooper tried to get them to explain specifically what they meant, he did not get an answer. As a result of that last meeting in mid-April 2011, Mr. Cooper contacted Jessica Munoz, a behaviorist employed by the District, and asked that she contact Parents.<sup>31</sup>

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<sup>31</sup> Ms. Munoz has an undergraduate degree in psychology from University of California Santa Barbara, and a master's degree in educational psychology from the same institution. She received her Pupil Personnel Services credential in 1996 as a school psychologist following a one year internship with the District, and was employed by the District as a school psychologist from 1996 through the end of the 2007-2008 SY. She also has her Behavior Intervention Case Manager (BICM) certification, and has worked as a District Program/Behavior Specialist since February 2008. Although the BICM certification

113. Ms. Munoz telephoned Mother when she got the referral in early May 2011, spoke to Mother on the telephone, and sent a confirming letter. She told Mother that she would observe Student in class, and if necessary at home. She discussed with Mother the possibility that the county might provide mental health services to address behavior issues in the home, if that was necessary. However, Ms. Munoz also testified that the behaviors Mother described to her in this telephone call were not beyond those expected to occur with a child of Student's age, especially one who had difficulty communicating verbally.

114. When the District decided to use Ms. Munoz rather than Mr. Peck to assess behavioral issues, another assessment consent form was sent to Parents. However, Parents did not sign the assessment form. Mother testified that she was concerned that the District might refer Student for county mental health services for behavioral issues, calling it "weird." However, many school districts throughout California have agreements with county mental health departments to provide psychological counseling for families where behavioral issues are serious and it is believed that counseling may help.

115. Mother also testified that another reason for not returning the new assessment form to address behavioral concerns was because Parents had recently signed the February 3, 2011 assessment consent form, returned to the District on May 2, 2011, and she and Father believed that it was not necessary to now sign another consent. However, there was no evidence that Parents ever asked anyone at the District why this new consent form was necessary, or even explained to the District why they would not sign it, although they were reminded several times that it needed to be returned before Ms. Munoz could conduct her assessment. As a result, Ms. Munoz did not obtain consent to conduct a formal observation of Student, or work with Parents and District staff to develop a plan to deal with Student's reported maladaptive behaviors.

116. Student failed to establish a need for behavioral services in the classroom for the 2010-2011 school year in order to receive a FAPE. He failed to establish that his maladaptive behaviors at home or in the community with Parents were the types that the District was required to address with services for Student to obtain educational benefit in the school setting.

#### *2010-2011 SY Speech and Language*

117. Student contends that he was not provided with appropriate speech and language services for the 2010-2011 SY, because, as it was subsequently determined, he had articulation issues that were not addressed, and no effort was made to determine why he would not speak in class. Prior to the IEP team meeting on December 10, 2010, Mother had

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is not as advanced as the BCBA possessed by Ms. Sullivan, it nevertheless qualifies her as an expert in behavior in a school setting.

already been asked by Ms. Castro class to record Student at home, since Student was not talking at all at school, but Parents said he was talking at home. At the IEP team meeting Parents were again asked to record Student speaking at home, and given suggestions on how to elicit speech from him so it could be recorded. On numerous occasions after the IEP meeting Ms. Castro and Mr. Cooper asked Parents to record Student speaking at home. Ms. Castro needed this information so that she could provide him with more meaningful speech and language therapy. She also needed it to do a more thorough speech and language assessment after Parents returned the signed consent to assess form.

118. The evidence established that Parents made one attempt to record Student during the 2010-2011 SY, but when he saw that he was going to be recorded, he stopped talking. Parents testified that since Student did not speak all the time at home, it was too difficult for them to be prepared to record him when he did talk. Parents demonstrated a lack of credibility and cooperation with the District because they were able to record the IEP team meeting of December 10, 2010, without Mr. Peck and Mr. Cooper being aware that they were doing so, yet claimed to be unable to record Student, a four year old child. Parents provided no credible explanation why they were able to surreptitiously record the IEP team meeting, but were not able to record their son in their own home. Parents' testimony on this point therefore lacked credibility.

119. When Father met with Mr. Peck and Mr. Cooper in October 2010, he was informed that one of Student's two weekly speech and language therapy sessions would occur on Wednesdays. The speech and language therapist pushed into Mr. Cooper's class two days each week, and one of those days was Wednesday. This was reiterated at the December 2010 IEP team meeting. However, as previously established, Parents kept Student out of school on Wednesdays, so Student received speech and language services on only one day per week. There was no evidence, other than Mother's conclusory testimony that he received less than the required seven monthly sessions of 25 minutes each of group speech and language services.

120. In the classroom, Student communicated at snack time with picture icons. He also communicated with gestures, pointing, and nodding and shaking his head yes or no. Mr. Cooper believed that Student became anxious by having attention called to him in the classroom. Therefore, when Student did speak, Mr. Cooper and other adults would respond positively, but quietly so as to not have the attention of other adults or peers focused on Student because it made him so anxious. As the school year progressed, the evidence established that Student was speaking to his peers quietly on occasion, although he was reluctant to do so if he thought adults would hear him. He also, on occasion, spoke a few words and counted with Mr. Cooper.

121. On numerous occasions Ms. Castro asked Mother to telephone her so she could discuss Student's speech with her, or arrange a meeting with Mother to do so. Mother repeatedly failed to contact Ms. Castro. Ms. Castro testified convincingly that even if she

had learned Student was autistic, it would not have required her to alter the speech and language services she provided him.

122. The evidence established that those who heard Student speak in the home realized that he had serious articulation issues. Ms. Sullivan and Dr. Freeman opined that these articulation issues may well have been one cause of Student's anxiety level and affected his speaking in class.

123. Parents' failure to provide to the District a recording of Student speaking, during that school year, and Mother's avoidance of Ms. Castro to discuss Student's speech both impacted the nature of the speech and language therapy the District provided. Had Parents cooperated with the District in this area, and provided the District with candid and accurate information, it is quite likely that Student's articulation issues would have been discovered earlier, and the District would have had that material information to consider offering a different type of speech and language therapy than that which was provided by his IEP, and possibly even additional speech and language services.

124. Mother's testimony that she believed Student did not receive the required amount of speech and language therapy was the only evidence supporting this claim. However, even if Student had established that he did not receive the amount of speech and language therapy specified in the IEP of December 2010, the evidence was overwhelming that this was due to Parents' lack of cooperation.

*2011-2012 SY*

#### *Eligibility*

125. During the summer of 2011, after the complaint had been filed and before Student had completed ESY, Parents informed the District by a letter dated July 15, 2011, that they were withdrawing Student from the District. Parents stated they intended to obtain private ABA services for Student from a nonpublic agency, Autism Connections, and would be seeking reimbursement for these services.

126. Because Student was still a resident of the District, it still had an obligation to make a good faith effort to offer Student a special education placement and services, notwithstanding the fact that Student's complaint had been filed on July 6, 2011, and Parents had subsequently withdrawn him from the District. On August 22, 2011, Ms. Murphy wrote a letter to Parents explaining that the District would like to convene an IEP team meeting to discuss placement and services for the 2011-2012 SY, and to review the reports from Ms. Sullivan and Dr. Freeman. Parents were invited to observe the Emerging Communication and Social Skills Preschool classroom, a preschool program for children with IEPs, which offered classes five hours in length each, Monday through Friday, a total of 25 hours per week. In addition, Ms. Murphy advised Parents that the District would like to discuss services for the upcoming school year, including behavioral services. Finally, she also stated

that the District wanted to be able to complete the District's assessments that had not been completed before the end of the 2010-2011 SY because of Parents' delay in returning the consent form, as well as Mr. Peck wanting to wait until the fall to complete his testing and assessment.<sup>32</sup>

127. Shortly after receiving this letter, Mother and Ms. Sullivan arranged to visit the classroom where District was proposing to place Student.<sup>33</sup> On August 31, 2011, Ms. Murphy wrote another letter to Parents suggesting September 8 or September 9, 2011, as dates for an IEP team meeting with the District. In response to this letter, which Mother claimed to have not received until September 9, 2011, Mother informed Ms. Murphy via email that her attorney had been out of the country, and would not be available for all but a few days for the following weeks. Mother suggested that the attorneys for Student and the District arrange for a new IEP team meeting. The evidence established that following this communication, the parties were engaged in settlement negotiations and at least one mediation session for the next three months, and there was concern on Student's part that it would not be productive for an IEP team meeting to occur prior to the completion of the District's assessment.

128. Parents did not make Student available for Mr. Peck to complete his assessment until December 2011, and the District's assessment report was not completed until January 5, 2012. In this report, Mr. Peck opined that Student's eligibility category should be changed from speech and language impaired to autistic-like behaviors, based on definitions under California law.

129. Had the IEP team met in the early fall of 2011, and had the opportunity to review both Dr. Freeman's and Ms. Sullivan's reports, it is quite possible that Student's eligibility category might have been changed to autistic-like behaviors. However, there was no evidence that this change of eligibility category would have changed an offer of placement by the District. As described below, the classroom in which the District proposed to place Student was appropriate for children with autistic-like behaviors, as well as for children with speech and language impairment. Further, as discussed above in relation to the 2009-2010 and 2010-2011 SYs, it is irrelevant what his eligibility category was during the time at issue as it pertains to the 2011-2012 SY, so long as the District's offer addressed Student's unique needs and was one that would provide him with a FAPE. Student failed to meet his burden of proof in regards to this issue.

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<sup>32</sup> Mr. Peck explained that because children of preschool age can often make great developmental gains in just a few months, he wanted to observe and test Student at the beginning of the 2011-2012 SY so that the IEP team, when it met, could have the most current information about Student's needs.

<sup>33</sup> This was the first time Parents had observed a placement District proposed for Student before he began attending.

### *2011-2012 Proposed Preschool Placement*

130. Student claims that the offer of placement the District made at the beginning of the school year was not an offer of a FAPE. As discussed above, at the beginning of the 2011-2012 SY, the District offered to place Student in the Emerging Communication and Social Skills Preschool classroom taught by Kari Ann Murphree.<sup>34</sup> This classroom is similar to Mr. Cooper's class, but even more intensive. Children attend the class for five hours, five days a week, for a total of 25 hours each week. It serves children with mild to moderate autistic-like behaviors as well as those with speech and language impairment. There are 11 students in the class and three aides. Behavioral therapies and interventions are used in the class, and there is routine and structure. Ms. Murphree uses ABA and other methodologies in her classroom. She has extensive experience in providing ABA services to children, and has created data collection forms to be used in her classroom this year. She also seemed pleased that in her classroom this year she is able to often work one-to-one with her students due to the extensive paraprofessional support. Also, the children in the class are taken to a pre-kindergarten class for one to one-and-one-half hours each day so they can engage in activities with typically developing peers.

131. Mother and Ms. Sullivan testified that they did not think the class was appropriate because it was in the same classroom in which Mr. Cooper's class was held the previous school year, and Student would see this as the place where he didn't talk. However, the evidence established that Student was beginning to talk in Mr. Cooper's classroom towards the end of the previous school year. Mother and Ms. Sullivan gave no other reason as to why Ms. Murphree's class was otherwise inappropriate, other than their belief that Student required one-to-one ABA services in the home this school year. Student did not establish that the factor of a familiar classroom setting would be detrimental to him.

132. The testimony of Ms. Murphree was persuasive in establishing that the classroom itself would be an appropriate placement for a child on the autism spectrum in terms of how it was arranged, and how and what children were taught in this environment. Ms. Murphree appeared to be a well-qualified preschool teacher of children with special needs, including those on the autism spectrum, who approached her role as their teacher with skill and great enthusiasm. The program appeared to meet all of the recommendations for an appropriate preschool program for Student found in Dr. Freeman's report. Student did not

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<sup>34</sup> This is Ms. Murphree's first year with the District. However, she has 13 years of experience in Maryland and Virginia working in early education special education classrooms with children who had a variety of special needs. She has an undergraduate degree from the University of Delaware in the Young Exceptional Child in Early Childhood Education. She has a National Board Early Childhood Special Education credential which is valid in California. When she was in college she worked for the Center for Autism and Related Disorders so she is very experienced in ABA and data collection.

establish that the program the District was considering for the 2011-2012 SY would not have met his unique needs and provided him with a FAPE.

#### *2011-2012 SY Behavioral Interventions*

133. Student contends that the District did not provide him with a FAPE for the 2011-2012 SY because it did not provide him with behavioral interventions. It is assumed that Student contends that these behavioral interventions were contained in the one-to-one ABA services he received in his home from August 1, to December 23, 2011, to the extent that they were not part of the 15 hours each week of ABA services being provided by Tri-Counties for this period of time.

134. Student withdrew from the District on July 15, 2011. However, as stated in Ms. Murphy's letter of August 22, 2011, the District was trying to have Student return, and did not preclude behavioral services as part of an IEP offer for the 2011-2012 SY. The District was under no obligation to provide him with these services in the home without an IEP in place that called for those services. The operational IEP for the 2011-2012 SY during this period of time was the one from December 4, 2009, as amended on May 28, 2010, and October 15, 2010. This IEP did not require the District to provide Student with behavior intervention services in either the school setting, or the home setting. Unless this Decision were to find that Student had been denied a FAPE for any of the school years in question, and was entitled to compensatory education, there were no other grounds for the District to provide these services, or reimburse Parents for their out-of-pocket costs for these services.

135. Student did not establish that he required these services in the home setting in order to be provided with a FAPE for the 2011-2012 SY. Although Parents reported to Ms. Sullivan that Student was tantruming at least once each day in the home, when Ms. Sullivan conducted an in-home assessment of Student for four-and-one-half hours over two days in September 2011, she did not observe any tantrums. She reported that in some of the early data sheets kept by the ABA therapists coming into the home beginning August 1, 2011, there was some mention of tantruming behavior, but it faded very quickly. Ms. Sullivan did not provide any information about the frequency, duration or intensity of the tantrums, which is an indication that they were not of the frequency, duration or intensity reported by Parents.

136. The evidence established that the District's offer of 25 hours each week in Ms. Murphree's classroom would have provided him with a FAPE. If the IEP team, when convened for the 2011-2012 SY determined that he did need additional behavioral services in either the home or school setting to receive a FAPE, there was no evidence that the District would have refused to provide them based on District policy, or for some other reason.

#### *2011-2012 SY Speech and Language Therapy*

137. Student contends that the District should have provided him with speech and language services that would meet his unique needs and provide him with educational benefit, and the District's failure to do so denied him a FAPE.

138. The evidence established that Student has articulation issues that would need to be addressed by speech and language therapy. However, because Parents would not provide the District with a recording of Student until the end of 2012 as part of the evidence in this case, where these articulation issues became apparent, the District could not have known that he needed this type of speech and language service. Further, there was no evidence that after Parents withdrew Student from the District in mid-July 2011, they asked the District to continue to provide these services. Rather, they stated in the letter withdrawing him that they intended to procure services for Student themselves and would then seek reimbursement. However, the evidence established that although Parents arranged for Student to have the in-home ABA services, they did not arrange for him to have private speech and language services.

139. During the due process hearing there was testimony that the parties engaged in extensive settlement negotiations after the complaint was filed, and up to the time the due process hearing commenced. Evidence of settlement negotiations and discussions in mediation sessions are inadmissible in these proceedings.<sup>35</sup> However, these negotiations would not legally have precluded the parties from a partial settlement which obligated the District to provide speech and language services from the beginning of the 2011-2012 SY to December 23, 2011, but the parties never agreed to this, each party, perhaps, gambling on the chance that he/it would prevail in this hearing. There was no evidence that Parents requested the District to provide speech and language services, notwithstanding the ongoing dispute. Had they done so and the District refused, Student would probably prevail on this issue, but this did not occur. Accordingly, the District had no obligation to provide Student with speech and language services for this period of time.

#### *Compensatory Education*

140. In general, when a school district fails to provide FAPE to a student with a disability, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. Here, because the District did not deny Student a FAPE at any time, Student is not entitled to relief.

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<sup>35</sup> Cal. Code Regs., tit. 5, § 3086; Evid. Code §§ 1115-1128.

## LEGAL CONCLUSIONS

### *Burden of Proof*

1. Under *Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 163 L.Ed.2d 387], the party who filed the request for due process has the burden of persuasion at the due process hearing. In this case, Student filed for a due process hearing and therefore bears the burden of persuasion.

### *Elements of a FAPE*

2. Under both the IDEA and State law, students with disabilities have the right to a FAPE. (20 U.S.C. § 1400; Ed. Code, § 56000.) A FAPE means special education and related services that are available to the student at no charge to the parent or guardian, and meet the state educational standards. (20 U.S.C. § 1401(9); Ed Code, § 56040.)

3. In *Board of Educ. of Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that the IDEA does not require school districts to provide special education students the best education available, or to provide instruction or services that maximize a student's abilities. (*Id.*, at pp. 198, 201; *J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d. 938, 950-953.) The Ninth Circuit has also referred to the educational benefit standard as "meaningful educational benefit." (*N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2007) 541 F.3d 1202, 1212-1213; *Adams v. Oregon*, (9th Cir., 1999) 195 F.3d 1141, 1149.)

4. 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. (See *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.*) For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer of educational services and/or placement must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. (*Ibid*; *Rowley*, 458 U.S. 176, 188-189.)

5. The methodology used to implement an IEP is left up to the school district's discretion so long as it meets a student's needs and is reasonably calculated to provide meaningful educational benefit to the child. (*Rowley*, 458 U.S. 176, 208; *Adams, supra*, 195 F.3d at p. 1149; *Pitchford v. Salem-Keizer Sch. Dist.* (D. Or. 2001) 155 F.Supp.2d 1213, 1230-32; *T.B. v. Warwick Sch. Comm.* (1st Cir. 2004) 361 F.3d 80, 84.) Parents, no matter how well-motivated, do not have a right to compel a school district to provide a specific program or employ a specific methodology in providing education for a disabled student.

(*Rowley, supra*, at p. 208; *Student v. Corona-Norco Unified School District* (2005) Cal.Ofc.Admin.Hrngs. Case No. 2005070169.)

6. No one test exists for measuring the adequacy of educational benefits conferred under an IEP. (*Rowley, supra*, 458 U.S. 202, 203 fn. 25.) A student may derive educational benefit under *Rowley* if some of his goals and objectives are not fully met, or if he makes no progress toward some of them, as long as he makes progress toward others. A student's failure to perform at grade level is not necessarily indicative of a denial of a FAPE, as long as the student is making progress commensurate with his abilities. (*Walczak v. Florida Union Free School District* (2nd Cir. 1998) 142 F.3d 119, 130; *E.S. v. Independent School Dist.*, No. 196 (8th Cir. 1998) 135 F.3d 566, 569; *In re Conklin* (4th Cir. 1991) 946 F.2d 306, 313; *El Paso Indep. School Dist. v. Robert W.* (W.D.Tex. 1995) 898 F.Supp.442, 449-450; *Perusse v. Poway Unified School District* (S.D. Calif. July 12, 2010, No. 09 CV 1627) 2010 WL 2735759.)

#### *Assessments*

7. A local education agency (LEA) shall reassess a special education pupil at least once every three years unless the parent and the LEA agree otherwise. (Ed. Code, § 56381.) The student must be assessed in all areas related to his or her suspected disability, and no single procedure may be used as the sole criterion for determining whether the student has a disability or determining an appropriate educational program for the student. (20 U.S.C. § 1414 (b)(2); 34 C.F.R. § 300.304(b); Ed. Code, § 56320, subds. (e), (f).)

8. A school district's assessments shall be conducted by trained and knowledgeable personnel, except that individually administered tests of intellectual or emotional functioning shall be administered by a credentialed school psychologist. (Ed. Code, § 56320, subd. (b)(3).) In conducting an assessment, a district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student. No single measure or assessment shall be used as the sole criterion for determining whether a student is a child with a disability or for determining an appropriate educational program for the student. (34 C.F.R. § 300.304 (b)(2).) Tests and assessment materials must be validated for the specific purpose for which they are used; must be selected and administered so as not to be racially, culturally or sexually discriminatory; and must be provided and administered in the student's native language or other mode of communication unless this is clearly not feasible. (Ed. Code, § 56320, subd. (a); 20 U.S.C. § 1414(b)(2), (3); 34 C.F.R. § 300.304(c)(1)(i), (ii).) If a child cannot be assessed using standard assessment tools, alternative means of assessing the child may be used. (*K.S. v. Fremont Unified School District* (N.D.Cal.,2009) 679 F.Supp.2d 1046, 1051 and 1059-60.)

*Issue 1.a.: For the 2009-2010 SY, did the District deny Student a FAPE by failing to appropriately assess him in all areas of suspected disability, specifically autism, and behavioral functioning?*

9. As established by Legal Conclusions 2-8, and Factual Findings 2-22 and 108, Student failed to meet his burden of proof that the District should have assessed him in the areas of autism and behavior during the 2009-2010 SY. The District's initial assessment on October 30, 2009, consisted of using standardized developmental surveys such as the Brigance, interview of Parents, and observation of Student by Ms. Youngdale, Mr. Peck and Ms. Stinson. Attempts by Ms. Stinson to administer standardized speech and language assessments failed because Student would not cooperate with instructions. The District knew that Student was to be formally assessed by a psychologist through Tri-Counties, and there was no evidence presented that the assessment by Dr. Griffin for Tri-Counties was not thorough and accurate. Had the District found Dr. Griffin's assessment to be incomplete, or insufficient for the District to rely upon, nothing precluded the District from conducting its own assessment. However, Dr. Griffin's assessment was comprehensive and thorough, and determined to be so by the District. Parents and the District agreed with the assessment. Even if it were found that the District was required to conduct its own psychological assessment, notwithstanding Dr. Griffin's assessment, Student did not establish that the District's failure to do so constituted anything more than harmless error.

10. Both the District's assessment and Dr. Griffin's assessment were considered by the IEP team at the meeting of December 4, 2009. Although Parents told Ms. Youngdale and Ms. Stinson at the October 30, 2009 assessment meeting, that they had concerns about Student's compliance, they did not go into detail. Other than Mother describing the family's trip to Disneyland with Ms. Stinson in April 2010, there was no other evidence that Parents informed the District of problematic behaviors at home, or specifically described those behaviors. And even when Mother described these behaviors to Ms. Munoz a year later in early May of 2011, Ms. Munoz did not find these behaviors to be atypical of a child Student's age, especially one with difficulties in verbally expressing himself. Further, Student's classroom behavior in the PEPers program, other than his sporadic difficulty separating from Mother, was not problematic and did not call for further assessment for autistic-like behaviors. Accordingly, Student did not prevail on this issue.

### *Procedural Violations*

11. In *Rowley*, the Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA. (*Rowley, supra*, 458 U.S. at pp. 205-06.) However, a procedural error does not automatically require a finding that a FAPE was denied. A procedural violation results in a denial of FAPE only if it impedes the child's right to a FAPE, significantly impedes the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the parents' child, or causes a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii) Ed. Code, § 56505, subd. (f)(2).); see *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.).

### *Notice of Procedural Safeguards*

12. A notice of procedural safeguards must be given by a school district to a parent of a child with a disability a minimum of once a year and/or: A) upon initial referral for assessment or parent request for assessment; B) upon filing a request for a due process hearing; or C) upon parent request. (20 U.S.C. § 1415(d)(1)(A); 34 C.F.R. § 300.504(a) (2006). Education Code, section 56301, subdivision (d)(2), states that a school district is required to provide to parents a copy of their rights and procedural safeguards only one time a school year, except that a copy shall also be given to parents: A) upon initial referral or parental request for assessment; B) upon receipt of the first state complaint under Section 56500.2 in a school year; C) upon receipt of the first due process hearing request under Section 56502 in a school year; D) when a decision is made to make a removal that constitutes a change of placement of an individual with exceptional needs because of a violation of a code of pupil conduct in accordance with section 300.530(h) of title 34 of the Code of Federal Regulations; and E) upon request by a parent. In addition, Education Code section 56500.1, subdivision (b) requires that Parents be informed about procedural safeguards at an IEP team meeting.

13. There is no provision in either state or federal law that district personnel explain the notice of procedural safeguards to a parent in the absence of an affirmative request by the parent.

*Issue 1.b.: For the 2009-2010 SY, did the District deny Student a FAPE by failing to provide Parents with the notice of procedural safeguards at the individualized education program (IEP) team meetings on December 4, 2009, and May 28, 2010, or inform them of these safeguards as otherwise required by law?*

14. Legal Conclusions 2-6 and 11-12 and Factual Findings 23-26 establish that the District did provide the notice of procedural rights to Parents at the IEP meeting on December 4, 2009, based on Parent signatures on the IEP acknowledging receipt of this notice. In addition, Parents were also provided with this notice, again supported by signatures on the request for assessment signed by them on October 30, 2009. Further, since the District is only required to provide this notice once per year, there was no need to provide it to Parents for a third time during the 2009-2010 SY when the IEP team met on May 28, 2010. Also, the evidence via Ms. Murphy's testimony established that it was a District policy to inform parents of their rights at all IEP team meetings. If the District failed to inform Parents that they had certain procedural safeguards at the May 28, 2010 IEP team meeting, it was not a denial of FAPE since the evidence established that Parents were active participants at all IEP meetings, and that Student was not denied a FAPE as a result of this omission.

#### *Eligibility and Eligibility Categories*

15. Not every student who is impaired by a disability is eligible for special education. Some disabled students can be adequately educated in a regular education

classroom. Federal law requires special education for a “child with a disability,” who is defined in part as a child with an impairment “who, by reason thereof, needs special education and related services.” (20 U.S.C. § 1401(a)(3)(A)(ii); 34 C.F.R. 300.8(a)(i) (2006).) State law requires special education for individuals with exceptional needs, “who are defined in part as individuals whose impairment . . . requires instruction, services, or both, which cannot be provided with modification of the regular school program.” (Ed. Code, § 56026, subds. (a) and (b).)

16. Special education is defined as “specially designed instruction . . . to meet the unique needs of individuals with exceptional needs, whose educational needs cannot be met with modification of the regular instruction program . . .” (Ed. Code, § 56031.) Accordingly, “[a] pupil shall be referred for special educational instruction and services only after the resources of the regular education program have been considered and, where appropriate, utilized.” (Ed. Code, § 56303.)

17. A student is eligible in California for special education and related services if, among other things, he “exhibits any combination of the following autistic-like behaviors, to include but not limited to:

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

(5 Cal. Code Regs., § 3030, subd. (g).)<sup>36</sup>

18. Education Code section 56333 establishes the criteria for determining whether a student is eligible for special education and related services for a speech and language impairment:

In order to be eligible for special education and related services, difficulty in understanding or using spoken language shall be assessed by a language,

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<sup>36</sup> Section 56846.2 of the Education Code, which sets forth a similar but not identical definition of a “pupil with autism,” applies by its terms only to the chapter of the Code containing it, which addresses autism training and information and establishes an advisory committee. That definition is not an eligibility standard.

speech, and hearing specialist who determines that such difficulty results from any of the following disorders:

- (a) Articulation disorders, such that the pupil's production of speech significantly interferes with communication and attracts adverse attention.
- (b) Abnormal voice, characterized by persistent, defective voice quality, pitch, or loudness. An appropriate medical examination shall be conducted, where appropriate.
- (c) Fluency difficulties which result in an abnormal flow of verbal expression to such a degree that these difficulties adversely affect communication between the pupil and listener.
- (d) Inappropriate or inadequate acquisition, comprehension, or expression of spoken language such that the pupil's language performance level is found to be significantly below the language performance level of his or her peers.
- (e) Hearing loss which results in a language or speech disorder and significantly affects educational performance.

19. A student's eligibility category may have consequences for funding, the availability of outside services, statistical reporting, and other purposes, but if an IEP delivers a FAPE, the accuracy of the category under which it is delivered is not an issue for judicial review under the IDEA. (See *B.B. v. Perry Township School Corp.* (S.D.Ind. 2008, July 11, 2008, Nos. 1:07-cv-0323; 1:07-cv-0731) 2008 WL 2745094, p. 8 [nonpub. opn.].) The United States Department of Education has advised that "a child's entitlement is not to a specific disability classification or label, but to a free appropriate public education." (*Letter to Fazio* (OSEP 1994) 21 IDELR 572, 21 LRP 2759.) Student does not cite any IDEA decision affording relief from the addition or subtraction of an erroneous eligibility category when the student remained eligible for special education.

20. As long as a child remains eligible for special education and related services, the IDEA does not require that the child be placed in the most accurate disability category. The IDEA provides:

Nothing in this chapter requires that children be classified by their disability so long as each child who has a disability listed in . . . this title and who, by reason of that disability, needs special education and related services is regarded as a child with a disability . . . .

(20 U.S.C. § 1412(a)(3)(B).)

21. A properly crafted IEP addresses a student's individual needs regardless of his eligibility category. (See *Fort Osage R-1 School Dist. v. Sims* (8th Cir. 2011) 641 F.3d 996, 1004 [category "substantively immaterial"]; *Hailey M. v. Matayoshi* (D. Hawaii, Sept. 7, 2011, No. 10-00733) 2011 WL 3957206, p. 3). "The very purpose of categorizing disabled

students is to try to meet their educational needs; it is not an end to itself.” (*Pohorecki v. Anthony Wayne Local School Dist.*, 637 F.Supp.2d 547, 557 (N.D. Ohio 2009).)

*Issue 1.c.: For the 2009-2010 SY did the District deny Student a FAPE by failing to make Student eligible for special education under the category of autistic-like behaviors?*

22. Legal Conclusions 2-6 and 15-21 and Factual Findings 27-31 establish that classifying Student as a child eligible for special education and related services due to a speech and language impairment, rather than a child with autistic-like behaviors did not deny him a FAPE for this school year, or for any school year at issue in this case. Student argued that what he required for a FAPE was a strong ABA program of discreet trial training, and because he was classified as speech and language impaired, he was not provided with such a program. However, it is left up to each local educational agency to determine what methodology to use so as to meet the needs of a specific child. The IEP of December 4, 2009, stated that Student’s needs were in the areas of pre-academic, fine motor and gross motor, behavior, social, communication and self help. Mother agreed with this. The District was not required by law to have, and had no special programs solely for children on the autism spectrum. Rather, it had programs designed to meet certain specific needs, and both the PEPers and PAWS programs were designed to specifically address Student’s language and communication needs, and his social skills deficits, and to teach him learning-to-learn skills. Autistic children were appropriately placed in the PEPers program. Based on the weight of the evidence, Student did not establish that a change in his designated classification would have necessarily resulted in a change in services. Student failed to establish that finding him eligible for special education as a child with speech and language impairment led to the District placing him in a program where he could not receive educational benefit.

#### *Requirements of an IEP*

23. An IEP must contain a statement of measurable annual goals related to “meeting the child’s needs that result from the child’s disability to enable the child to be involved in and progress in the general curriculum” and “meeting each of the child’s other educational needs that result from the child’s disability.” (20 U.S.C. § 1414(d)(1)(A)(ii); Ed. Code, § 56345, subd. (a)(2).) The IEP must also contain a statement of how the child’s goals will be measured. (20 U.S.C. § 1414(d)(1)(A)(viii); Ed. Code, § 56345, subd. (a)(3).) The IEP must show a direct relationship between the present levels of performance, the goals, and the educational services to be provided. (Cal. Code Regs., tit. 5, § 3040, subd. (c).)

24. An IEP must also contain a statement of the program modifications or supports that will be provided for the student to advance appropriately toward attaining his annual goals and to be involved in and make progress in the regular education curriculum; and a statement of any individual accommodations that are necessary to measure the student’s academic achievement and functional performance. (20 U.S.C. § 1414(d)(1)(A)(i)(IV), (VI)(aa); Ed. Code, § 56345, subds. (a)(4), (6)(A).)

25. An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon, supra*, 195 F.3d 1141, 1149.) “An IEP is a snapshot, not a retrospective.” (*Id.* at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.)

### *LRE*

26. School districts must have available a continuum of program options to meet the needs of individuals with exceptional needs for special education and related services as required by the IDEA and related federal regulations. (Ed. Code, § 56360.) The continuum of program options includes, but is not limited to regular education programs, the least restrictive environment; resource specialist programs; designated instruction and services, including, speech and language, adapted physical education and occupational therapy; special classes such as special day classes; nonpublic schools; and instruction in the home, hospitals or other institutions, the most restrictive environment. (Ed. Code, § 56361.)

27. Federal and state law require school districts to offer a program in the least restrictive environment for each special education student. (See 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114, et seq. (2006).) A special education student must be educated with nondisabled peers “[t]o the maximum extent appropriate,” and may be removed from the regular education environment only when the nature or severity of the student’s disabilities is such that education in regular classes with the use of supplementary aids and services “cannot be achieved satisfactorily.” (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(i) & (ii) (2006); Ed. Code, § 56364.2, subd. (a).)

28. A placement must foster maximum interaction between disabled students and their nondisabled peers “in a manner that is appropriate to the needs of both.” (Ed. Code § 56031.) The law demonstrates “a strong preference for ‘mainstreaming’ which rises to the level of a rebuttable presumption.” (20 U.S.C. § 1412 (a)(5)(A); *Rowley, supra*, 458 U.S. at p. 181 n.4; *Poolaw v. Bishop* (9th Cir. 1995) 67 F.3d 830, 834; *Daniel R.R. v. State Bd. of Ed.* (9th Cir. 1989) 874 F.2d 1036, 1044-1045.) However, the Supreme Court has noted that IDEA’s use of the word “appropriate” reflects Congressional recognition “that some settings simply are not suitable environments for the participation of some handicapped children.” (*Rowley, supra*, 458 U.S. at 197.)

*Issue 1.d.: For the 2009-2010 SY did the District deny Student a FAPE by failing to offer goals and placement in the LRE that would meet his unique needs as a child with autism?*

29. Based on Legal Conclusions 2-6 and 23-28 and Factual Findings 32-58, Student did not establish that the District created annual goals that did not meet his unique needs, or that resulted in him being placed in a classroom program that did not meet his unique needs as a child with autistic-like behaviors, and was not the LRE for him. Student’s experts, Dr. Freeman and Ms. Sullivan were not persuasive when they criticized the goals

created by the District's December 4, 2009 IEP team, because they disagreed with each other as to why each goal was faulty. In some cases they disagreed with the baselines stated on a goal, or they complained about how a goal was an unrealistic one for Student because it did not meet his unique needs as a child with autism, and as a result he was did not receive educational benefit. However, Ms. Stinson, who was Student's experienced speech and language therapist and co-taught the PEPers class, provided persuasive testimony that the goals were appropriate for Student, because they met Student's unique needs based the information available to the IEP team at the time they were developed.

30. Student argues that placement in the PEPers program did not meet his needs, and was not the LRE for him. Rather, he claims that for the 2009-2010 SY he should have received at least 25 hours each week of one-to-one ABA services in his home that would teach him learning-to-learn skills, and for him, that was the LRE. In support of this argument, Student cites that when his next annual IEP was drafted in December 2010, virtually all of the same goals were placed in that IEP as had been in the December 4, 2009 IEP because he had not met those goals.

31. However, Student's claims concerning his lack of progress in the PEPers program were flawed for many reasons. First, Parents had an initial choice and chose the PEPers program, but were advised that this program could change if Parents and teachers agreed. However, when the District advised Parents eight weeks after Student began the PEPers program that, although he was making some progress, he was not making as much as they would have anticipated were he in the PAWS program. Parents refused to have him placed in that program. PAWS held an advantage over PEPers because it was much more intensive, meeting for 15 hours each week rather than three, and was not a parent-participation program. Second, in terms of meeting the annual goals from the December 4, 2009 IEP team meeting, the evidence established that Student did not have the full 12 months, or nine-and-one-half months of school time taking into consideration summer break, to work on the goals. He attended PEPers from early December 2009 to the end of the 2009-2010 SY, and then did not begin the PAWS program until November 1. This was because Parents kept Student out of school for nearly two and one half months at the beginning of the 2010-2011 SY. Therefore, he did not have as long to work on his goals as would have been expected. Finally, although PEPers' parents were given activities to work on with their children at home that were related to the program and goals, based on Mother's testimony that she received "no help" from the program, it does not appear that she engaged with Student in any of these home activities that were offered.

32. Student's failure to meet his annual goals from the December 4, 2009 IEP team meeting does not necessarily mean that he did not receive educational benefit. The evidence established that the PEPers program was still appropriate in that Student did acquire learning-to-learn skills from the program, and did make some progress on some goals during that school year. He also had the advantage of being with children his own age to improve his socialization skills. Finally, on the continuum of educational placements, the PEPers program was much less restrictive than a one-to-one ABA program at home. Accordingly,

Student failed to demonstrate the annual goals for the 2009-2010 SY were flawed to the extent that he was denied a FAPE, and that placement in the PEPers program did not meet his unique needs and denied him a FAPE. Lastly, his preferred placement of one-to-one ABA services was not the LRE for him.

### *Behavioral Interventions*

33. If a student's behavior impedes learning, but does not constitute a serious behavior problem, the IEP team must consider behavior interventions as defined by California law. These less serious behaviors require the IEP team to consider and, if necessary, develop positive behavioral interventions, strategies and supports. (20 U.S.C. §1414(d)(3)(B)(i); 34 C.F.R. §300.346(a)(2)(i), (b); Ed. Code, § 56341.1, subd. (b)(1).) An IEP that does not appropriately address behavior that impedes a child's learning denies a student a FAPE. (*Park v. Anaheim Union High Sch. Dist.* (9th Cir. 2005) 464 F.3d 1025; *Neosho R V Sch. Dist., v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028; *Escambia County Bd. of Educ. V. Benton* (S.D. Ala. 2005) 406 F.Supp.2d 1248.)

*Issue I.e.:* For the 2009-2010 SY, did the District deny Student a FAPE by failing to appropriately address his behavioral issues such as crying, lack of compliance, tantrums, separation issues and refusal to participate in classroom activities by not providing him with a BSP?

34. Legal Conclusions 2-6 and 33 and Factual Findings 59-62 establish that Student was not denied a FAPE because the District failed to address his behavioral issues with a BSP, or other behavioral interventions. The evidence established that other than his separation anxiety which resulted in him crying when Mother left the area he was in, and reluctance to participate in nonpreferred classroom activities, Student did not demonstrate any tantruming or noncompliance in the PEPers program. There was some improvement in his classroom behavior during the course of the year. Certainly these behaviors were not so extreme as to require a BSP. The District adequately dealt with Student's separation issues. The tantruming and lack of compliance described by Parents simply did not occur in school although the evidence established that these behaviors occurred when he was with Parents at home or in the community. Further, Parents did not describe most of these behaviors that concerned them to District staff, other than Mother meeting with Ms. Stinson following the Disneyland trip, so the District could not provide them with assistance, or a referral to a behaviorist if deemed necessary, to address these behaviors. Accordingly, Student failed to meet his burden of proof in regards to this issue.

### *Failure to Provide Appropriate Speech and Language Services*

35. In California, related services are called designated instructional services (DIS). (Ed. Code, § 56363.) DIS includes speech-language services and other services that

may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26)(A); Ed. Code, § 56363, subd. (a); *Irving Independent School Dist. v. Tatro* (1984) 468 U.S. 883, 891 *Union School District v. B. Smith* (9th Cir. 1994) 15 F. 3d 1519, 1527.) [104 S.Ct. 3371; 82 L.Ed.2d. 664].) DIS services shall be provided “when the instruction and services are necessary for the pupil to benefit educationally from his or her instructional program.” (Ed. Code, § 56363, subd. (a).)

*Issue 1.f.: For the 2009-2010 SY did the District deny Student a FAPE by failing to provide him with appropriate speech and language services?*

36. Based on Legal Conclusions 2-6 and 35 and Factual Findings 63-65, Student did not establish that he was denied a FAPE because the District failed to provide him with appropriate speech and language services. Student did not establish that the speech and language services offered by the District were inappropriate in terms of frequency, duration, or manner of providing them, and did not meet Student’s needs based on the knowledge the District possessed about Student at the time the IEP was developed. Nor was there evidence, other than Mother’s unsupported, conclusionary testimony, that the speech and language services provided by Ms. Stinson were not the amount of services called for in the IEP. Accordingly, Student did not prevail on this issue.

*ESY*

37. ESY services are included in the IEP if the IEP team determines, on an individual basis, that the services are necessary for the provision of a FAPE. (Ed. Code, § 56345, subd. (b)(3).) ESY services are provided where interruption of the pupil’s Educational program may cause regression, when coupled with limited recoupment capacity, render it unlikely that the pupil will attain the level of self-sufficiency and independence that would otherwise be expected. (Cal. Code. Regs, tit. 5 § 3043.)

*Issue 1.g.: For the 2009-2010 SY did the District deny Student a FAPE by failing to offer him any placement or services for ESY 2010?*

38. Student failed to establish that the District should have offered him ESY services for the summer of 2010, based on Legal Conclusions 2-6 and 37 and Factual Findings 66-67. ESY services are offered when there is a fear that a child in special education will regress in the period of time between the end of the regular school year and June, and the beginning of the regular school year in August or September. In December 2009, the IEP team decided that Student did not require ESY. Further, Student did not show that he was such a child at the end of the regular 2009-2010 SY, and therefore required ESY. Accordingly, Student did not prevail on this issue.

*Issue 2.a.: For the 2010-2011 SY, did the District deny Student a FAPE by failing to appropriately assess him in all areas of suspected disability, specifically autism, and*

*behavioral functioning?*<sup>37</sup>

39. Based on Legal Conclusions 2-8 and Factual Findings 68-82, the evidence did not establish that the District denied Student a FAPE for the 2010-2011 SY, up to February 3, 2011, by failing to appropriately assess him in all areas of suspected disability, specifically autism and behavior. Because Parents kept him out of school for over two months at the beginning of the school year, the District had no opportunity to observe Student to determine whether he needed to be assessed. At the time of the December 10, 2010 IEP team meeting, Student had only attended 15 sessions of Mr. Cooper's class. Mr. Cooper was really just beginning to know Student, and develop a relationship with him. Although Parents described serious behavior issues at home during the IEP team meeting, none of those behaviors had presented themselves at school by the time of that meeting. Nor did Parents, at either the October 15, 2010 IEP team meeting, or at the December 10, 2010 IEP team meeting, share the information that they had Student privately assessed by a speech and language therapist, an occupational therapist, and a neurologist, and had privately obtained behavioral services. Although they had received written reports from some of these providers, those reports also were not provided to the District. Had Parents done so, the District might have seen the need for further assessments of its own before early February 2011, and/or convened another IEP team meeting to review the private assessments and see if Student's IEP needed to be modified. Finally, the District offered an assessment in February 2011. However, because Parents waited nearly three months before they returned the consent for assessment, the District's assessment was delayed until the fall of 2011. Based on the foregoing, Student did not prevail on this issue.

*Issue 2.b.: For the 2010-2011 SY, did the District deny Student a FAPE by failing to provide Parents with the notice of procedural safeguards at the IEP team meetings on October 15, 2010, and December 10, 2010, or inform them of these safeguards as otherwise required by law?*

40. Legal Conclusions 2-6 and 11-12 and Factual Findings 83-86, do not support a ruling that the District failed to provide Parents with the notice of procedural rights at the IEP team meetings on October 15, 2010, and December 10, 2010. There was no evidence that the District provided Father with the notice of procedural safeguards at the October 15, 2010 IEP team meeting. However, the requirement was that Parents be informed about those procedural safeguards, not that they be provided with the notice of procedural safeguards themselves, and it was the District's policy to do this. If the District neither provided Father with the notice of procedural safeguards, nor did not inform him of them at the IEP team meeting of October 15, 2010, this was at best a procedural violation, but Student did not establish that this denied him meaningful participation in the IEP process, nor did it deny Student a FAPE.

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<sup>37</sup> The period of time encompassed by this issue ended on February 3, 2011 when the District asked Parents to consent to an assessment.

41. It is more likely than not that Parents were provided with the notice of procedural safeguards IEP team meeting on December 10, 2010. Parents' testimony in this regard was not credible. It was the habit of Mr. Peck to provide parents with the notice of procedural safeguards at the beginning of an annual IEP team meeting. Although there is nothing about this on the recording of the meeting made by Parents, the recorder was not started by Father until after the meeting was underway, after the time when this would have occurred. Further, although the IEP document itself does not indicate at the appropriate location on the form that Parents were provided with the notice of procedural rights, the evidence established that they were. The most relevant evidence in this regard was the IEP team meeting recording and transcript made by Parents, which showed that the meeting, which was in Mr. Cooper's classroom, ended hastily because children were arriving, and only at that time did Parents advise Mr. Peck and Mr. Cooper that they would not sign the IEP, but would take it home. Because the box indicating receipt of the notice of procedural rights was towards the very end of the last page of the IEP, it is likely that Mr. Peck forgot to check the box. There is only one place for Parents' signatures to acknowledge this receipt which is the same place they sign to either accept, or not accept the IEP. In any case, because the IDEA requires that the notice of procedural rights be given to parents only once during a school year, and Parents received it with the request for assessment, the District complied with that portion legal requirement. Accordingly, Student did not prevail on this issue.

*Issue 2.c.: For the 2010-2011 SY, did the District deny Student a FAPE by failing to make Student eligible for special education under the category of autistic-like behaviors?*

42. Legal Conclusions 2-6 and 15-21 and Factual Findings 87-91 establish that, as with the 2009-2010 SY, Student was not denied a FAPE because he was made eligible for special education under the category of speech and language impairment, rather than autistic-like behaviors. The IEP team chooses a placement and services for a child based on his unique needs, his goals, and the related services that he requires, not his eligibility category. As was the case with the PEPers class the previous school year, the PAWS class was appropriate for children with both speech and language impairment, and those on the autism spectrum, and these were the children who attended Mr. Cooper's class. The evidence established that Mr. Cooper utilized methodologies that were within the range of acceptable teaching practices for his class, and there is no reason to question the District's methodology. Further, because Parents did not inform the District of the private assessments they had obtained over the previous summer, the team did not have new information to consider, which might have caused it to reconsider Student's eligibility category. Student did not establish that reclassifying him would have made a difference in his educational program. Student did not demonstrate that miscategorizing him denied him a FAPE.

*Issue 2.d.: For the 2010-2011 SY did the District deny Student a FAPE by failing to offer him goals and placement in the LRE that would meet his unique needs as a child with autism?*

43. Based on Legal Conclusions 2-6 and 23-28 and Factual Findings 92-110, the evidence established that the goals formulated at the December 10, 2010 IEP team meeting, met Student's unique needs as they were known to the District team members at the time of that meeting. Placement in Mr. Cooper's classroom was one that would aid Student in progressing on his goals, as he did for the most part, and it provided him with educational benefit and learning to learn skills. Further, Mr. Cooper's class met all of the requirements Dr. Freeman stated were necessary for a preschool class for a child with autism. Mr. Cooper's class was the LRE for Student for the 2010-2011 SY, not the private one-to-one ABA services in the home that Parents would have preferred. Student did not prevail on this issue.

*Issue 2.e.: For the 2010-2011 SY, did the District deny Student a FAPE by failing appropriately address his behavioral issues such as shutting down in class, refusing to speak to staff, tantrums, noncompliance, and rarely participating in classroom activities, by not providing him with a BSP?*

44. Legal Conclusions 2-6 and 33 and Factual Findings 111-116 establish that Student was not denied a FAPE for the 2010-2011 SY because the District failed to appropriately address his behavioral issues. There was no evidence that Student ever had a tantrum in the school setting. He was generally compliant and participated in all classroom activities at the end of the year, even those that were non-preferred. In regards to Student's home behaviors, the evidence established that Parents complained about his behaviors at the IEP team meeting on December 10, 2010, possibly one time in January 2011, at the parent-teacher conference at the end of March 2011, and in mid-April. However, other than the discussion at the meeting in December and the meeting in April, they did not describe the behaviors, although Mr. Cooper kept asking them to do so. As a result of the mid-April discussion, a referral was made to Ms. Munoz. However, when the District tried to get Parents to sign consent for Ms. Munoz to observe Student to determine if some sort of behavioral intervention was necessary, or a referral for other services such as mental health, Parents never gave their consent. Accordingly, Student failed to meet his burden of proof regarding this issue.

*Issue 2.f.: For the 2010-2011 SY, did the District deny Student a FAPE by failing to provide him with appropriate speech and language services?*

45. As established by Legal Conclusions 2-6 and 35 and Factual Findings 117-124, Student did not establish a failure of the District to provide him with appropriate speech and language services for the 2010-2011 SY. As with this allegation in relation to the 2009-2010 SY, there was no evidence other than Mother's testimony that Student did not receive the speech and language therapy specified in his IEP. Parents' lack of cooperation with the District, i.e., refusal to record Student speaking at home, and failure to respond to Ms. Castro's requests for additional information about his speech at home left the District with a dearth of information about the specific type of speech and language services Student

required. Further, the lack of Wednesday attendance, due to Parents refusal to have him attend that day, deprived him of additional speech and language services, since speech and language was embedded in the program. Accordingly, Student did not prevail in regards to this issue.

*Issue 3.a: From the beginning of the 2011-2012 SY to December 23, 2011, did the District deny Student a FAPE by failing to make Student eligible for special education under the category of autistic-like behaviors?*

46. Based on Legal Conclusions 2-6 and 15-21 and Factual Findings 125-129, the evidence established that the District did not deny Student a FAPE by failing to make him eligible for special education and related services as a child with a speech and language impairment, rather than as a child on the autism spectrum. Parents had removed him from school, and did not cooperate in making Student available so the District's assessment could be completed until December 2011. Further, Parents would not participate in IEP team meetings requested by the District during the fall of 2011, at which time the assessments by Dr. Freeman and Ms. Sullivan could have been reviewed. Finally, Student did not establish that the District's proposal that he attend Ms. Murphree's class if he returned to the District as one of their Students was an inappropriate placement for a child with autistic-like behaviors. Therefore, Student failed to prove that his eligibility category at the beginning of the 2011-2012 SY resulted in a denial of FAPE for that school year.

*Issue 3.b.: From the beginning of the 2011-2012 SY to December 23, 2011, did the District deny Student a FAPE by failing to offer him appropriate goals and placement in the LRE that would meet his unique needs as a child with autism?*

47. Legal Conclusions 2-6 and 23-28 and Factual Findings 130-132 establish that the District, did offer him an appropriate placement in Ms. Murphree's preschool class for the 2011-2012 SY. As with Student's placement in Mr. Cooper's class, it was a program with all the components Dr. Freeman recommended in her report, and it was a much less restrictive environment on the continuum of placements than the ABA home program Parents obtained for him. The reason for rejecting that placement offered by Mother and Ms. Sullivan, that it was the place where he did not talk, was not valid. By the end of the 2010-2011 SY, it was a place where he talked. Accordingly, Student did not prevail on this issue.

*Issue 3.c.: From the beginning of the 2011-2012 SY to December 23, 2011, did the District deny Student a FAPE by failing to address maladaptive behaviors?*

48. Legal Conclusions 2-6 and 33 and Factual Findings 133-136 establish that the District did not deny Student a FAPE because it failed to address his maladaptive behaviors for the 2011-2012 SY. Had Parents participated in an IEP team meeting in the fall of 2011, the evidence established that the District was willing to consider an offer of behavioral services. However, Parents did not give the District the opportunity to do this. Further, based on the testimony and assessment by Ms. Sullivan in September 2011, there was some

question as to whether Student had the same type of tantruming behavior testified to by Parents. Had this behavior occurred in school or in the home setting when he was receiving instruction, it certainly would have interfered with him receiving educational benefit, and conceivably necessitated behavioral services to address these behaviors. However, this was not established. Accordingly, Student did not prevail on this issue.

*Issue 3.d.: From the beginning of the 2011-2012 SY to December 23, 2011, did the District deny Student a FAPE by failing to provide him with appropriate speech and language services?*

49. Legal Conclusions 2-6 and 35 and Factual Findings 137-149 establish that Student never requested that the District provide him with speech and language services during the period of time in the latter part of the 2011-2012 SY when he was not attending school and receiving the private ABA services in the home. Because the IEP of December 4, 2009, was arguably in place during this time, Student was entitled to these services, and there was no evidence that the District refused to provide these services. Accordingly, Student did not meet his burden of proof in regards to this issue.

#### *Compensatory Education and Reimbursement*

50. In general, when a school district fails to provide FAPE to a student with a disability, the student is entitled to relief that is “appropriate” in light of the purposes of the IDEA. (*Sch. Comm. of Burlington v. Dep’t of Educ.* (1985) 471 U.S. 359, 369-371 [105 S.Ct. 1996, 85 L.Ed.2d 385].) Here, because the District did not deny Student a FAPE at any time, Student is not entitled to relief.

### ORDER

Student’s requests for relief are denied.

### PREVAILING PARTY

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

## NOTICE OF APPEAL RIGHTS

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

Dated: June 1, 2012

/s/

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REBECCA FREIE  
Administrative Law Judge  
Office of Administrative Hearings