

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

VALLECITO UNION SCHOOL
DISTRICT.

OAH CASE NO. 2011070801

DECISION

Administrative Law Judge Peter Paul Castillo (ALJ), Office of Administrative Hearings (OAH), State of California, heard this matter in Angels Camp, California, on November 1–3 and 16–18, 2011, and in Sacramento, California, on December 2, 2011.

Student was represented by Christian M. Knox, Attorney at Law. Student’s Mother and Student’s Advocate, Cathy Stone-Carlson, were present on all hearing days.

Vallecito Union School District (District) was represented by Eliza McArthur, Attorney at Law. Robin Searway, Director of Calaveras County Office of Education (CCOE), Special Education Local Planning Area (SELPA), and Phyllis Parisi, District Superintendent and Principal of Albert Michelson Elementary School, attended all portions of the hearing.

Student filed her due process hearing request (complaint) on July 22, 2011. On September 7, 2011, OAH granted Student’s request for a continuance of the hearing dates. At hearing, oral and documentary evidence was received. At the close of the hearing, the matter was continued to December 14, 2011, for submission of closing briefs. On December 9, 2011, OAH granted the District’s request for an extension of time to file closing briefs to December 19, 2011. The parties submitted their closing briefs on December 19, 2011, and the matter was submitted for decision.¹

¹ To maintain a clear record, the closing briefs have been marked as exhibits. Student’s brief has been marked as Exhibit S-41, and the District’s brief has been marked as Exhibit D-66.

ISSUES²

Issue No. 1: Did District deny Student a free appropriate public education (FAPE) during the 2009-2010 school year (SY), including the extended school year (ESY) by:

- a. Failing to assess Student's behavioral needs;
- b. Failing to provide measurable goals in the area of behavior;
- c. Failing to provide Student with appropriate behavior support services, such as applied behavior analysis (ABA);
- d. Failing to provide appropriate transportation service by not providing a one-to-one aide; and
- e. Failing to provide appropriate mainstreaming opportunities for second grade reading and math?

Issue No. 2: Did District deny Student a FAPE for SY 2010-2011, including ESY, by:

- a. Failing to assess Student's behavioral needs;
- b. Failing to provide measurable goals in the area of behavior;
- c. Failing to provide an appropriate behavior support plan (BSP) and behavior services;
- d. Failing to provide appropriate transportation service by not providing a one-to-one aide;
- e. Failing to provide a separate, structured social skills program; and
- f. Failing to provide appropriate mainstreaming opportunities for third grade reading and math?

Issue No. 3: Did District fail to offer Student a FAPE for SY 2011-2012, by:

- a. Failing to assess Student's behavioral needs;
- b. Failing to provide measurable goals in the area of behavior;
- c. Failing to provide an appropriate BSP and behavior services;
- d. Failing to provide appropriate transportation service by not providing a one-to-one aide;

² These issues are those framed in the October 11, 2011 Order Following Prehearing Conference and as further clarified at hearing. The ALJ has reorganized the issues for this Decision.

- e. Failing to provide a separate, structured social skills program;
- f. Failing to provide appropriate mainstreaming opportunities for fourth grade reading and math; and
- g. Failing to offer placement in the least restrictive environment (LRE) because the classroom focused upon the development of functional skills rather than the development of academic skills?

PROPOSED REMEDY

Student seeks an order finding that the District denied her a FAPE and did not properly assess her. Student requests compensatory education to include a social skills training program, one-to-one instruction, access to typically developing peers with proper instructional aide support, and reimbursement to Parents for transportation and Student's home ABA program. Student also seeks retention in third grade and placement in a specific type of special day class or a home program with ABA trained one-to-one support.

CONTENTIONS OF PARTIES

Student contended that the District failed to address her behavioral needs during SY's 2009-2010 and 2010-2011, which prevented her from obtaining meaningful educational benefit as to her academics, social skills and mainstreaming. Specifically, Student asserted that she had behavioral problems at school, such as tantrums, removing her clothes, elopement, and noncompliance, which the District did not adequately address and her problem behaviors increased. Student argued that the District needed to develop a BSP targeted at improving her behaviors, and its failure to do so prevented her from accessing the curriculum, participating in mainstreaming activities, and not being safely transported to school. In addition, Student contended that the District failed to provide her with social skills training and supports she needed for mainstreaming in general education math and reading.

For SY 2011-2012, Student asserted that the District's individualized education program (IEP) offer failed to adequately address her behavioral needs and that the proposed was inadequate. As with the prior school years, Student argued that the District did not offer her adequate mainstream opportunities or services to improve her social skills, which limited her ability to successfully interact with general education students. Regarding transportation, Student contended that she required a one-to-one aide on the bus due to her disruptive behaviors, such as standing up when the bus was moving. Finally, Student asserted that the District underestimated her cognitive ability because the District considered her intellectually disabled and her fourth grade placement in a functional life skills special day class (SDC) was beneath her functional abilities.

The District contended that it met Student's unique needs in its structured SDC, which used various ABA instructional methods, and that her behavior improved during her second and third grade. Additionally, Student made adequate academic progress as the District focused on her academic deficits as her behavior improved. As to transportation, the District asserted that Student did not exhibit significant behavior problems on the bus that endangered her safety or required a one-on-one aide. The District also contended that it provided Student with adequate mainstreaming opportunities and worked on her social skills in the classroom. Finally, as to the District's offer for fourth grade, although the proposed SDC was located at a different school, there was little difference between Ms. Sweetland's SDC and the proposed Mark Twain, as both met Student's unique needs.

FACTUAL FINDINGS

Jurisdiction and Factual Background

1. Student is presently 9 years old, and resides within the geographic boundaries of the District with her Parents. Until May of 2011, Student resided within the geographic boundaries of the Mark Twain Union Elementary School District.³ Student is eligible for special education services under the eligibility category of autistic-like behaviors. Student began to receive special education services at the age of three. From kindergarten through third grade, including for the ESY, Student attended Darlene Sweetland's kindergarten through third grade SDC operated by the CCOE, at Albert Michelson Elementary School (Michelson), a District school. Presently, Student attends a home ABA program pursuant to a unilateral parental placement.

SY 2009-2010

2. Ms. Sweetland began teaching at Michelson when Student entered kindergarten. While Ms. Sweetland's SDC is on a District campus, CCOE designed, developed and operated the SDC. Student was in second grade during SY 2009-2010. Ms. Sweetland's SDC incorporated various ABA instructional methodologies, including discrete trial training (DTT),⁴ Floor Time,⁵ and the Treatment and Education of Autistic and

³ Student's complaint did not contain any allegations against the Mark Twain Union Elementary School District, and the District did not contend that the Mark Twain Union Elementary School District, and not it, was the responsible school district.

⁴ DTT involves repetitive, one-to-one drills, in which the instructor attempts to teach the student a particular skill or behavior.

⁵ Floor Time involves engaging with the autistic child on the floor to work on areas of developmental milestones.

related Communication Handicapped Children (TEACCH) method.⁶ Ms. Sweetland also employed visual schedules for students to plan their day and plan how to complete certain activities. For nonverbal children, the SDC used the Picture Exchange Communication Systems (PECS) to allow the students to communicate.⁷ Ms. Sweetland and her staff collected daily data on students' behavioral issues, progress on goals and social interactions. Ms. Sweetland and her classroom staff had extensive training in these methodologies, data collection and providing services to autistic children.

Behavioral Issues

3. A school district provides a FAPE to a student if its program or placement is designed to address the student's unique educational needs and reasonably calculated to provide meaningful educational benefit in the least restrictive environment.

4. Behavior intervention is the implementation of procedures to produce lasting positive changes in the student's behavior, and includes the design, evaluation, implementation, and modification of the student's individual or group instruction or environment, including behavioral instruction, to produce significant improvement in the student's behavior. The IEP team must consider and, if necessary, develop positive behavioral interventions, strategies and supports to address behaviors that impede a child's learning, or that of others, including, if needed, a BSP. An IEP that does not appropriately address behavior that impedes a child's learning denies that student a FAPE.

5. Student contended that the District failed to address her behavioral needs, which led to an increase in problem behaviors, such as tantrums, freezing up and bolting; and that her increasing behavior problems prevented her from receiving a meaningful educational benefit because her behaviors interfered with academic progress and prevented her from mainstreaming with her typically developing peers. The District contended that Student's behavior improved during SY 2009-2010 due to the behavioral supports imbedded in Ms. Sweetland's SDC and the class's work on improving Student's communication deficits, and that she made meaningful progress on her academics and was appropriately mainstreamed.

6. At the start of second grade, Student's behavior problems in school consisted of tantrums, laying down on the ground and freezing up, noncompliance, and bolting. Student had significant expressive and receptive speech and language deficits, as her expressive language was often one-word or simple rote requests. However, her ability to

⁶ TEACCH involves structured teaching, organizing the physical environment, developing schedules and work systems, and utilizing visual materials to develop skills and to assist students in gaining independence.

⁷ PECS is designed to develop early nonverbal communication through the use of icons, pictures or photographs to facilitate communication.

understand was higher than her expressive language, but still not at an age appropriate level. The District reasoned that a main cause of Student's behavior problems was her inability to communicate her needs to others. Therefore, at the start of second grade, the District's February 26, 2009 IEP,⁸ goals focused on improving Student's communication skills, such as following directions, participating in turn-taking conversations, and using longer sentences. The February 26, 2009 IEP did not have any goals specifically dedicated to Student's behavior problems or a behavior support plan as the District's February 2009 behavioral assessment, conducted by Practical Behavior Solutions (PBS), did not find that Student had significant behavioral problems that required a BSP. Ms. Sweetland worked on Student's behaviors through positive reinforcement of appropriate behaviors, 'planned ignoring' Student's tantrums and then redirecting her, and working with Student on verbalizing her requests. The IEP did not include any consultation services from a behaviorist, nor was there evidence that Ms. Sweetland consulted with a CCOE behaviorist about Student.

7. Ms. Sweetland and her aides kept data on Student's behavior. They primarily collected frequency data, counting the number of a particular incidents, and descriptive information about Student's day. The data collected was not 'antecedent-behavior-consequence' (ABC) data, which is more analytical in looking for the causes of a targeted behavior and its consequences. Ms. Sweetland had most of the data collected during the daily hour-and-a-half of direct instructional time, during which Ms. Sweetland and her aides worked with Student individually or in small groups on academic instruction. Ms. Sweetland also targeted data collection on times of day when Student had specific behavior problems that Ms. Sweetland wanted to address. At the end of the school day, Ms. Sweetland and her aides would discuss the data for all students, any particular problems, and brainstorm as to the cause of a particular issue and develop strategies to work on the problem.

8. For their testimony as the District's expert witnesses, Kristine E. Strong, Ph.D., and Patricia Schetter, reviewed and analyzed the data collected in Ms. Sweetland's class on Student's behavior during SY's 2009-2010 and 2010-2011. They also analyzed the instructional strategies Ms. Sweetland used based on their interview with her, classroom observation and review of documents. In addition, Ms. Schetter graphed Student's behavioral incidents for SY 2010-2011, focusing on tantrums, disobedience and bolting. They also reviewed prior assessments and IEPs. Dr. Strong and Ms. Schetter concluded and testified that Student's behavior had improved during both SY's 2009-2010 and 2010-2011 and that she did not need a BSP during those years. Student's challenge to Dr. Strong's and Ms. Schetter's analysis focused on the quality and quantity of the data originally collected.

9. Dr. Strong has a bachelor of arts in psychology, master of art in school psychology and a Ph.D. in education. Dr. Strong has been a licensed educational

⁸ Student did not assert that any of her claims challenged the validity of the February 26, 2009 IEP, which occurred before July 22, 2009, the applicable two-year statute of limitations of claims. (Ed. Code, § 56505, subd. (1).) Therefore, this decision does not address the adequacy of the February 26, 2009 IEP.

psychologist for over 15 years and has assessed and worked with numerous autistic children. Dr. Strong is also a school psychologist with experience in assessing and developing educational programs for autistic children. Dr. Strong is also a consultant for a non-public agency operated by Ms. Schetter, in which Dr. Strong had developed curriculum to certify educators who work with autistic children. Dr. Strong also taught classes for the University of California, Davis Extension Program focused on autism. Dr. Strong has additionally written numerous published articles and provided training on autism.

10. Ms. Schetter has a bachelor and master of arts in psychology. Ms. Schetter is a Board Certified Behavior Analyst (BCBA) and is credentialed for school counseling. She has extensive experience working with autistic children as a program specialist for two SELPAs, which included developing and evaluating special education programs. Presently, Ms. Schetter is the director of a non-public agency focusing on autism that provides training, reviews and coordinates student and district programs, student assessments; and also develops, writes and edits professional publications regarding best practices for working with autistic students. Additionally, Ms. Schetter is the coordinator of Autism Education Initiatives at the Medical Investigation of Neurodevelopmental Disorders (M.I.N.D.) Institute of the University of California Davis.

11. While Dr. Strong's and Ms. Schetter's analyses and observations occurred in September and October 2011, their opinions as to the appropriateness of Ms. Sweetland's SDC is credible and reliable, in large part because of the quality and consistency of the structure of Ms. Sweetland's SDC. Dr. Strong and Ms. Schetter were convincing that Ms. Sweetland's SDC employed scientifically researched and validated instructional methodologies for autistic children. In addition, Student's experts did not challenge the instructional strategies Ms. Sweetland used or their effectiveness for autistic students. Dr. Strong and Ms. Schetter persuasively established, based on their experience and education, the essential elements for a successful program and that Ms. Sweetland's SDC incorporated those strategies and methodologies.

12. Ms. Sweetland was convincing that Student's behavior improved during SY 2009-2010. While Student continued to tantrum, disobey and bolt, the severity and number of the behaviors decreased. Ms. Sweetland and her aides were constantly aware to look for signs that Student might have a behavior incident, such as pencil tapping, humming or disengagement, and to take steps to de-escalate Student's behaviors, such as sensory supports like soft tickles. Ms. Sweetland did not attempt to downplay the severity of incidents, nor was she defensive or evasive during her testimony, which gave credence to her testimony about the improvement in Student's behaviors.

13. At hearing, Student focused on specific incidents in an attempt to prove that the number and intensity of Student's behavioral problems had increased during that school year. In the most serious incident, in the Spring of 2010, Ms. Sweetland and her staff held Student on the hallway ground by her clothing after Student bolted and attempted to remove her clothing while she and her class were leaving at the end of the school day. This incident lasted 10 minutes, which Mother witnessed while at school waiting for Student's brothers to

be discharged for the day. Ms. Sweetland properly documented the incident and was prepared to convene an IEP team meeting to discuss the incident, but Mother informed Ms. Sweetland that an IEP team meeting was not needed.⁹ Additionally, the brief narrative in the April 8, 2009 IEP as to Student's present levels of performance was merely descriptive of her behavioral problems and was not an indication that the IEP team had concluded the behaviors had not improved. The fact that Student had an isolated, severe incident did not undercut the fact that overall Student's behavioral problems decreased during SY 2009-2010.

14. Ms. Sweetland's testimony as to the improvement of Student's behavior corroborated Dr. Strong's and Ms. Schetter's analyses of Student's data. While the data collected did not encompass Student's entire school day and the data type and methodology varied over the school year, Dr. Strong and Ms. Schetter established that the data collected represented a sufficiently accurate sample of Student's behaviors to form an opinion. Based on the data collected, Student's behaviors improved as the duration and intensity of her behavior problems decreased during the school year. Any discrepancies in the number of incidents Dr. Strong and Ms. Schetter considered, was not significant enough to undercut the validity of their opinions regarding Student's behavior.

15. Student's experts, Caitlin Conklin and Ted G. Sneed, Ph.D., both opined that the District was not meeting Student's behavioral needs during second and third grade. Ms. Conklin based her opinion primarily on the fact that the District failed to provide Student with a BSP until the May/June 2011 IEP. Dr. Sneed based his opinion primarily on his October 2011 observation of Ms. Sweetland's SDC.

16. Ms. Conklin presently operates a non-public agency, Home B.A.S.E. Behavior Consultants, that provides ABA services to autistic children in their homes and at school. Ms. Conklin has overseen the home ABA program that Student has been in since the start of SY 2011-2012. Ms. Conklin possesses a BCBA certificate, and has bachelor's in education and anthropology, master's in applied anthropology and a graduate certificate in ABA. Ms. Conklin has extensive experience working with autistic children as she worked her way up at another non-public agency from in-home tutor to senior behavior consultant and director of early intensive behavioral treatment. Ms. Conklin worked for the CCOE as behavior specialist during SY 2006-2007 through SY 2007-2008, during which she had knowledge of Ms. Sweetland's SDC. Ms. Conklin did not work with Student or assess her when she worked for the CCOE.

17. Dr. Sneed observed Student's home program and Ms. Sweetland's SDC in October 2011. Dr. Sneed has a bachelor, master of arts and a Ph.D. in psychology, with emphasis on educational psychology. Dr. Sneed possesses clinical psychologist and

⁹ A serious behavioral incident like the hallway incident is subject to specific reporting and IEP team meeting requirement pursuant to Education Code section 56520, et seq., which is commonly known as the Hughes Bill. Student did not alleged in the complaint that the District violated any Hughes Bill provisions.

educational psychologist licenses. Dr. Sneed has extensive experience working with, assessing, and developing educational programs for autistic children as a school psychologist, program specialist and special education director. Presently, Dr. Sneed is in private practice as an educational psychologist.

18. Ms. Conklin, through her work at the CCOE, had direct knowledge of the structured SDC program Ms. Sweetland used, including the methodologies. Ms. Conklin's opinion that the District had not met Student's needs was not supported by any evidence that the classroom placement, staff and supports did not meet Student's unique behavioral needs. Dr. Sneed based his opinion that Ms. Sweetland's class was not appropriate on his observation of the class, from which he concluded that the students in that class were too low-functioning and disruptive; not that Ms. Sweetland could not meet Student's unique behavioral needs. While both Ms. Conklin and Dr. Sneed reviewed Student's IEPs and assessment information, neither opined that Student had not made meaningful educational progress as to the improvement of her behavior. Whether Student could have benefited from a BSP or was higher-functioning than other students in Ms. Sweetland's class did not establish that Student was denied educational benefit in that classroom. Based on their more thorough analysis of IEPs, assessments and collected data, Dr. Strong and Ms. Schetter accurately determined that Student made meaningful progress as to her behavioral needs in Ms. Sweetland's class. Accordingly, Student's behavior problems decreased during the school year due to behavioral supports embedded in Ms. Sweetland's SDC.

Academic Progress

19. Student asserted that her lack of academic progress established that the District failed to adequately address her behavior needs and that she therefore did not receive meaningful educational benefit. The District contended that, in addition to improvement in Student's behaviors, she also made meaningful educational progress based on her progress on goals, academic assessments and classroom performance.

20. Ms. Sweetland established that, in the February 2009 academic assessment, Student was far below the first grade level in language arts and math. However, she had specific areas of strength in math, in which she was at the first grade level. Ms. Sweetland's assessment was based on information obtained through working with Student during normal instruction. In reading, Student's strength was sight words, she had difficulty decoding words and comprehending what she read, and enjoyed adults reading to her. Student had difficulty writing numbers and letters. Student's strengths in math involved knowing her numbers to 100, value of coins, and identifying shapes, which primarily involved memorization. Student had difficulty with performing analysis and computation.

21. In Ms. Sweetland's April 2010 academic assessment, Student was still below first grade standards in language arts and math. However, Student demonstrated progress on academic skills involving both memorization and visual learning, compared to learning by oral instruction. In language arts, Student showed improvement in decoding as she began to make the connection between letters and sounds. Student made progress with sight word

accuracy, but still had difficulty with reading comprehension and performing math that required analysis or computation, such as addition and subtraction. Finally, while Student did not meet all her academic goals in language arts and math, she did make meaningful progress, as established by Ms. Sweetland's, Dr. Strong's, and Ms. Schetter's analysis.

22. Both Dr. Strong and Ms. Schetter have extensive experience in evaluating the effectiveness of educational programs for autistic children and knowledge of the various unique educational needs that autistic children generally have. While Student attempted to demonstrate that she had not made meaningful educational progress on all of her goals, both Dr. Strong and Ms. Schetter were convincing that Student had in fact made adequate progress. Dr. Strong and Ms. Schetter based their opinions on their review of Student's IEPs, including her progress on goals, and Ms. Sweetland's academic assessments. In contrast, Student's experts, Ms. Conklin and Dr. Sneed, did not offer an opinion as to Student's academic progress, even though both opined that, overall, the District's educational program did not adequately address Student's needs. Therefore, while Student contended that the District failed to address her behavioral needs, as evidenced by her lack of academic progress, Student failed to present sufficient evidence to support this contention.

Mainstreaming and Social Skills

23. A special education student must be educated with non-disabled peers to the maximum extent appropriate, and may be removed from the general education environment only when the nature or severity of the student's disabilities is such that education in general education classes, with the use of supplementary aids and services, cannot be achieved satisfactorily. The Individuals with Disabilities Education Improvement Act (IDEA) requires that a student with a disability be placed in the LRE in which the student can be educated satisfactorily. The environment is least restrictive when it maximizes a student's opportunity to mix with typically developing peers while still obtaining educational benefit. Whether a student is placed in the LRE, requires the consideration of four factors: (1) the educational benefits of placement full-time in a less restrictive setting; (2) the non-academic benefits of such placement; (3) the effect the student would have on the teacher and children in the less restrictive class, and (4) the costs of the less restrictive setting.¹⁰ Student contended that the District for SY 2009-2010 and in its April 8, 2010 IEP offer for SY 2009-2010 needed to mainstream Student in academic classes. The District asserted that it provided the LRE for Student because she required a functional life skills program, and not a general education or academic special education program.

24. Student challenged the mainstreaming the District provided for all three SYs, as she contended that the District should have mainstreamed her in general education academic classes. Student also argued that the District failed to address her social skills deficits. The District asserted that Student would not have received adequate benefit from

¹⁰ Neither the District nor Student made any argument concerning the cost, so that subject is not addressed here.

academic mainstreaming because she needed the intensive services provided in Ms. Sweetland's class due to her language arts and math deficits, and that she would have been isolated in a general education class with typically developing peers working on different curriculum.

25. Student's February 2009 IEP provided for mainstreaming opportunities for 20 percent of her school day for SY 2009-2010. The IEP stated that Student's severe speech and language and social skills deficits limited her ability to interact with her typically developing peers. Student's mainstreaming opportunities included lunch, recess, school assemblies, library, field trips, and music. During SY 2009-2010, the District provided Student with these mainstreaming opportunities.

Educational and Non-Education Benefit and Disruption

26. As to Student's ability for mainstreaming in academic classes, she did not establish that she was ready for this or that she would obtain adequate educational or non-educational benefit. Student's arguments were inconsistent. Student contended that her behaviors during SY 2009-2010 were more significant than that reflected in the data collected by Ms. Sweetland and her aides, which would imply that additional mainstreaming in a general education class, with many more students and a noisier environment, would not be appropriate until her disruptive behaviors decreased. Additionally, Student claimed that she did not make academic progress in the SDC, which creates the inference that she required more intensive academic support than that which could be provided in a general education class. Finally, Student's experts, Ms. Conklin or Dr. Sneed were not persuasive that the District should have mainstreamed Student more by placing her in general education classes during academic instruction.

27. In contrast, Dr. Strong and Ms. Schetter were convincing that Student was not ready for mainstreaming for academic general education instruction. Dr. Strong and Ms. Schetter based their opinions on Student's documented academic deficits, in addition to her behaviors, and were persuasive that Student would not obtain sufficient benefit because the general education students would be working on curriculum that she was not ready to do. As to non-education benefits, Student would be isolated working on a separate curriculum. Additionally, the noise and commotion of a larger classroom would likely lead to behavior problems due to Student's sensory sensitivity, as noted in occupational therapy assessments and IEP notes. Finally, Student did not demonstrate the nature of the behavioral supports that she would need to be mainstreamed in general education reading and math, or that these supports would have permitted Student to obtain educational or non-education benefits in that setting without disrupting the general education class.

Mainstreaming Opportunities

28. While Student was not prepared for mainstreaming opportunities in general educational reading and math, the District did attempt to mainstream Student during lunch, recess, school assemblies and music. Student's deficits, including her speech and language,

social skills and sensory defensiveness, limited her ability to interact with typically developing peers. The District worked with Student to increase the time she would sit and listen to stories during library time. Ms. Sweetland discussed the various methods to increase the contact between typically developing peers and her students, such as using reverse mainstreaming, in which a typically developing peer comes into the SDC, or sits at the SDC class table during lunch.

29. However, because of Student's behavioral problems, Ms. Sweetland limited Student's interaction with her typically developing peers and there was little-to-no reverse mainstreaming in her SDC with Student or other attempts to foster social interaction between Student and her typically developing peers. Ms. Sweetland presumed that Student was not ready for these social interactions because of her significant behavioral and speech and language deficits, as evidenced by Student not being able to participate in the winter performance with general education students due to her screaming, hand movements and not being able to be calmed. The evidenced established that due Student's behavioral deficits, her mainstream opportunities were limited.

30. However, the District had little information on mainstreaming attempts with Student, whether the attempts succeeded, and, if not, the supports and services Student needed to work towards success. Accordingly, while Student was not ready for mainstreaming opportunities in general education reading and math classes, the District failed to analyze the reasons that limited Student's interaction with typically developing peers. Merely having Student present with typically developing peers during lunch, recess and other instances specified on the IEP is not adequate as the District needed to be more proactive to foster Student's social interaction. For example, the District should have made more of an effort to have Student interact with general education students in controlled situations that minimized factors that could trigger behavioral problems. Therefore, the District should have provided a more structured social skills program, which Student's SDC teacher and staff could have implemented, and its failure was a denial of FAPE.

Transportation

31. Student's IEP provided for her to be bussed to and from home to school. Another school district provided the transportation and there were eight to 12 students on the bus ranging from elementary to high school ages. Student asserted that the District needed to provide her with a one-to-one aide on the bus as she regularly unfastened her seat belt and walked about the bus while it was moving. The District contended that Student infrequently unfastened her seat belt, but did not walk about the bus while it was in motion and that the bus driver could prompt Student to refasten her belt and sit back down.

32. Student attempted to demonstrate the safety risks with an October 20, 2009 letter to Parents from Patricia Reid, the Director of Transportation. In the letter, Ms. Reid recommended securing Student in a restraint harness because she was too big to use the built-in child seats and unbuckled the regular seat belts when in a child booster seat. Further, Ms. Reid stated that Student got up while the bus was moving and in one instance walked to

the back of the bus to the emergency door. However, Ms. Reid, when she occasionally filled in as a substitute driver, never observed Student move around the bus after unfastening her seatbelt as Student would sit down and refasten her seat belt after Ms. Reid prompted her. Ms. Reid gathered most of the information in the letter from Margaret Catherine Landis, the regular school bus driver.

33. Ms. Landis recalled the incident in Ms. Reid's October 20, 2009 letter and credibly testified that Student never got up and walked about when the bus was in motion. The incident in the letter occurred when the bus was parked in front of Student's home while they were waiting for Mother. Ms. Landis was persuasive that Student did unfasten her seat belt, and occasionally stood up, while the school bus was in motion, but Ms. Landis was able to get Student to sit down and refasten her seat belt with a verbal prompt.

34. Mother agreed that the District could use the child restraint harness, and requested the District's assistance in asking the Valley Mountain Regional Center to pay for a child restraint harness for her vehicle. With the child restraint harness, the child's arms and legs go through straps that attach to a harness, which zips in the back. The child restraint harness is secured to the bus seat and the child can move his or her arms and legs while seated. An adult needs to place the child in the child restraint harness and release the child. Student used the child restraint harness for several months and did not like the straps. Student only undid the arm straps once, but never undid the straps on her legs. Because of Student's dislike of the straps on the child restraint harness, the District ceased using the restraint harness and Student used a seat belt. On occasion during the remainder of SY 2009-2010, Student did unfasten her seat belt, but Ms. Landis was able to get Student to sit down and refasten her belt with verbal prompting.

35. Based on the foregoing, while Student did sometimes unfasten her seat belt and once got her arms out of the child restraint harness, Student did not establish the need for a one-to-one aide on the bus. School bus drivers were able to get Student to sit down with verbal prompting. Additionally, Student did not stand up and attempt to get out of the bus while it was moving. Accordingly, Student did not require a one-to-one aide to be safely transported to and from school.

April 8, 2010 IEP

36. A district is required to identify a student's unique educational needs and to provide special education and related services designed to meet those needs. An IEP must include a statement of measurable annual goals that are designed to meet the student's needs resulting from his or her disability, and a statement of how the student's progress toward the annual goals will be measured. Assessments of educational needs must be conducted at least every three years in all areas related to any suspected disability that a student with special needs may have.

37. At the IEP team meeting on April 8, 2010, the District discussed Student's present levels of academic and functional performance, her performance on goals, and

Ms. Sweetland's academic assessment. At the IEP team meeting, the District offered Ms. Sweetland's SDC, with 20 percent of Student's school time in mainstream activities, and ESY services. The District offered as related services speech and language and occupational therapy, and transportation to and from school. The District offered goals in the area of writing, reading, math, social skills, sensory regulation, speech and language, and occupation therapy. Mother consented to the IEP at the conclusion of the IEP team meeting.

38. Student contended that the April 8, 2010 IEP did not provide her with a FAPE because it did not adequately address her behavior needs since the District had not assessed her behaviors, and the IEP did not include any behavior services, behavior goals or a BSP. Additionally, Student challenged the lack of sufficient mainstreaming opportunities. The District asserted that the IEP was reasonably calculated to permit Student to obtain a meaningful educational benefit as it met her behavioral needs and provided adequate mainstreaming opportunities.

Behavior

39. As described in paragraphs 6 through 18 above, Ms. Sweetland's SDC program contained adequate supports to meet Student's behavioral needs. Ms. Sweetland and her staff used various ABA methodologies to work on teaching Student skills to improve her behaviors. Student's experts did not opine that the instructional methodologies used in Ms. Sweetland's SDC were not adequate to meet Student's unique behavior needs.

40. While Student's behavioral problems, especially her tantrums, freezing and noncompliance, had improved, they still existed and interfered with her ability to access her curriculum and participate in mainstream activities. The District designed several of the goals to assist Student to improve her behaviors, such as working on communication deficits that prevented her from expressing her needs, sensory self-regulation so as not to get overstimulated and cooperative play. However, none of the goals specifically designed to address Student's noncompliance and tantrums; additionally, the District had not recently assessed Student to determine the reasons for these behaviors and how to reduce them. The District's February 2009 behavioral assessment by PBS only looked at the severity of Student's behaviors with little analysis as to their causes.

41. In April and May 2011, the District assessed Student's behaviors and developed a BSP, discussed later in paragraphs 77 through 85 below. The District had Genesis Behavior Center (Genesis) conduct a functional behavior assessment (FBA), and, based on the FBA, Genesis developed a BSP and two behavior goals to address noncompliance and tantrums. Although Genesis' assessment and the development of the BSP occurred a year after the April 2010 IEP offer, the FBA is relevant to evaluate whether the District should have assessed Student and developed a BSP for the April 8, 2010 IEP.

42. The District asserted that even though it developed a BSP in May 2011, it did not have to develop a BSP in April 2010 because the severity of Student's behaviors did not warrant a BSP. Additionally, the District contended that the behavior strategies

Ms. Sweetland used during SY 2009-2010 were basically the same as those used during SY 2010-2011, and that Student's behaviors had continuously improved. The District contended, through its experts, Dr. Strong and Ms. Schetter that Student only required a BSP in May 2011 because of the upcoming transition to a different class for fourth grade and a need to memorialize the successful behavior strategies that Ms. Sweetland used in her SDC. However, Amalie Holly, Genesis Program Director, who performed the FBA and developed the BSP and behavior goals, disagreed.

43. Ms. Holly has extensive experience and training with autistic children. Ms. Holly possesses a BCBA and has Bachelor's of Arts and Master's of Science in Psychology. As a program director at Genesis since 2008, Ms. Holly performs data analysis, assessments, staff training, program monitoring and program development. Ms. Holly worked as a behaviorist for eight years with the Stanislaus County Office of Education, which included duties as an autism specialist and behavior intervention case manager, assessing children, developing educational programs and training staff.

44. Ms. Holly observed Ms. Sweetland's SDC as part of the May 2011 assessment and reviewed prior IEPs and the February 2009 PBS behavioral assessment. Ms. Holly was impressed by the behavioral strategies Ms. Sweetland used and incorporated those into the BSP. Ms. Holly did not observe any detrimental behavior strategies used by Ms. Sweetland.

45. Ms. Holly was persuasive that she developed Student's BSP and proposed goals not because Student was transitioning to a new classroom, but based on her unique needs regardless of whether she remained in Ms. Sweetland's SDC. Ms. Holly also recommended, and the District offered in its May/June 2011 IEP, 10 hours a month of behavior intervention services to monitor the BSP implementation and Student's progress. Ms. Holly was convincing, based on the data collected by Genesis and her analysis, that Student required a BSP because her noncompliance and tantrums significantly impeded Student's ability to access her curriculum and mainstreaming opportunities. Finally, Ms. Holly recommended the BSP, behavioral goals, and behavior intervention services based on Student's May 2011 present levels, which had appreciably less behavioral problems than in April 2010.

46. While Dr. Strong and Ms. Schetter were correct that Student's behaviors had improved throughout SY 2009-2010 due to the many behavioral strategies Ms. Sweetland had developed and used for Student, they incorrectly surmised that Student only needed a BSP, including behavioral goals, because Student was going to switch classrooms. While the BSP would ensure consistency so the fourth grade teacher would use the same successful behavior strategies Ms. Sweetland used, a BSP in April 2010 would also have ensured consistency if, for some reason, Ms. Sweetland was not Student's teacher for SY 2010-2011.. If Student required a BSP in May 2011 because of her unique behavioral needs that interfered with her ability to access her curriculum and to access mainstream opportunities, she logically needed a BSP and behavior goals during SY 2009-2010 and in the April 2010 IEP when her behavioral problems were more severe.

47. As stated in paragraphs 6 through 18 above, Student's behaviors improved due to the behavioral strategies Ms. Sweetland implemented. While Student made meaningful academic progress, despite her behavior problems, Student's behaviors continually prevented her from expanding her mainstreaming opportunities in unstructured settings or when more demands were placed on her. Accordingly, the District should have conducted an FBA during SY 2009-2010 and developed a BSP and behavior goals that targeted her noncompliance and tantrums for Student to obtain a meaningful educational benefit and District's failure denied her a FAPE.

Social Skills

48. The parties do not dispute that Student had significant social skills deficits related to her speech and language and behavioral deficits. The parties dispute whether the District needed to offer Student a structured social skills program. Student contended that she required such a program to increase her ability to interact with her classmates and typically developing peers. At the April 2010 IEP meeting, while Mother did not request a structured social skills program, she requested more mainstreaming opportunities for her daughter. The District asserted that Student was not ready to benefit from a structured social skills program because she lacked the prerequisite skills, and her needs could be met through her IEP goals and instruction in her SDC.

49. Student's April 2010 IEP included a social skills goal for Student to participate in structured peer play, which was a progression from the prior turn-taking goal that she had previously met. Additionally, the speech and language goals to improve her ability to initiate requests and to understand spatial concepts would assist her social skills to participate in and understand conversations. Finally, the self-regulation goal would permit Student to remain engaged longer with her peers.

50. While the goals were important to improve Student's social skills, along with the instructional strategies Ms. Sweetland employed, these focused primarily on her ability to interact with her SDC peers, not typically developing peers. As noted in the mainstreaming discussion above in paragraphs 28 through 30, while Student had mainstreaming opportunities, during which Ms. Sweetland or her aides could have worked with Student on improving her social skills; however, there existed an aura of overprotectiveness. Ms. Sweetland and her staff could have implemented a structured social skills curriculum to foster additional interaction between Student and her typically developing peers, but seemed overly worried about protecting Student. District staff did not present evidence of facilitating Student's interactions with typically developing peers in either structured or unstructured situations.

51. Student contended that she required a separate social skills program, such as an afterschool program or pull-out service during the school day. However, Student presented insufficient evidence that Student required that level of service to improve her social skills, and that Ms. Sweetland and her staff could not meet her unique needs through more structured instruction by during her mainstreaming opportunities. Accordingly,

Student's April 2010 IEP did not require a separate social skills program for her to obtain a meaningful educational benefit.

SY 2010-2011

52. Student contended that during the SY 2010-2011 in third grade, her behaviors continued to worsen as her tantrums increased, and she experienced a new behavior of removing her clothes, which started at the end of SY 2009-2010. Additionally, Student asserted that her behaviors also worsened on the bus to the point that Mother needed to transport her so she could safely get to school. Student argued that the District still failed to ensure that Student received adequate mainstreaming opportunities, especially in general education reading and math. The District asserted that it met Student's unique needs as her behaviors continued to improve in Ms. Sweetland's structured SDC, which permitted Student to make meaningful academic progress, and participate in more mainstreaming opportunities. As to transportation, the District contended that Student overstated incidents of her unfastening her seat belt.

Behavior

53. As noted previously, Dr. Strong and Ms. Schetter established the essential elements for a successful classroom for autistic children with deficits similar to Student. Dr. Strong and Ms. Schetter established how they determined that Ms. Sweetland's SDC contained these elements. Ms. Conklin and Dr. Sneed did not opine that Ms. Sweetland's SDC was not appropriately designed to meet Student's unique behavioral needs.

54. Regarding whether Student's behaviors improved, Dr. Strong's and Ms. Schetter's review of the data collected by Ms. Sweetland and her staff supported their opinions that Student's behaviors improved during her third grade. The reviewed data represented a sampling of Student's full school day, and did not include the data collected by Genesis in April and May 2011. Student did not establish that the data used by Dr. Strong and Ms. Schetter was not an accurate and representative sampling of Student's behaviors. Dr. Strong and Ms. Schetter also adequately explained the peaks and valleys of Student's behavioral incidents as related to particular incidents in her life, or how she felt physically or mentally on a given day, or as possible extinction bursts (when a non-preferred behavior is extinguished). Neither, Ms. Conklin or Dr. Sneed provided evidence to establish that Student's behavior problems increased during SY 2010-2011, or that Dr. Strong and Ms. Schetter were not correct in their conclusions.

55. Student attempted to demonstrate that her behaviors worsened based on incidents in which Ms. Sweetland and her aides physically restrained Student for attempting to remove her clothes on the playground, or sat Student in a quiet chair after she attempted to bolt from the SDC. As to Student's clothing removal, Ms. Sweetland had several theories for Student's conduct, including tactile sensitivity. However, the District did not conduct any formal data collection and analysis to determine a possible cause, which was serious in that Student attempted to remove her clothing several times on the playground during recess and

in the multi-purpose room. However, despite the District's failure to analyze the reasons for Student's new behavior, Ms. Sweetland and her staff were effective in responding to this new behavior using the behavior management strategies employed in her SDC. Eventually the number and intensity of these incidents decreased so it was not a significant behavior by the March 31, 2011 IEP team meeting.

56. In the other incident, when Genesis was conducting the FBA, Student attempted to bolt from the classroom, but prevented by staff. Because Student was in an agitated state and tantruming, staff had her sit in a quiet chair until she calmed down and could return to the class. The incident lasted 23 minutes. Staff did not physically restrain Student and Student participated in the remainder of the school day after calming down. While serious, Student did not establish that the District did not meet her behavioral needs, as this was an isolated incident that Ms. Sweetland and her staff properly managed.

57. Dr. Strong's and Ms. Schetter's analysis of Student's behavioral data established that incidents of Student's behavior problems in fact decreased during SY 2010-2011. While Student did have some significant behavioral incidents, these incidents were infrequent: Student's focus on those particular incidents overlooked the fact that based on a properly representative sampling and information from Ms. Sweetland, Student's behaviors did improve as to the number and severity of incidents. Additionally, Student did not establish that Ms. Sweetland's SDC did not include instructional and behavioral strategies that were effective and appropriate for Student. Accordingly, Student did not establish that Ms. Sweetland's SDC was not appropriate to meet Student's unique needs or that Student's behavior problems increased in intensity and in number during third grade.

Social Skills and Mainstreaming

58. Student continued to have difficulty attending school assemblies because of the noise. Student would ask to leave after attending for several minutes. As to the weekly library time, Student's ability to attend and participate improved. One of Student's problems was difficulty standing in line to check out books, which the District worked on with Student and which improved. Student went to the library when Kathleen Grover's general education third grade class went. Ms. Grover observed Student with her aide at the library and interacting with Ms. Grover's students. With her aide, Student would search for books on the library computer, and then go and find the book. In about a quarter of the library visits, Student would initiate contact with a typically developing peer, and in a little more than ten percent of the visits would ask for a general education student to sit next to her while the students read.

59. During this school year, Ms. Sweetland and her aides included Student in more activities during lunch and recess with typically developing peers. Student would participate in games, and especially enjoyed dodge ball, and the aides would introduce Student to other students who interested her, especially girls wearing nice skirts. The school had a gardening program and although Student did not participate with general education students, the aides introduced Student to the projects as she visited the projects and met the adults who ran the

program to know more about the projects. At lunch, typically developing peers were invited to the SDC lunch table, but Student did not seem interested in interacting with them. Therefore, the District did implement and facilitate more mainstreaming opportunities in SY 2010-2011 as Student's behavior improved.

Transportation

60. Student continued to unfasten her seat belt and occasionally stand up while riding on the school bus. Student did not walk about the bus, as Ms. Landis was able to observe Student and verbally prompt her to sit down. Towards the end of December 2010, Parents decided that Student would not ride the bus and began to drive her to school after the holiday break in January 2011. Parents informed the District that the reason that Student would no longer ride the bus was their concerns for Student's safety.

61. Ms. Landis was convincing that there was no increase in Student's behaviors on the bus or increase in any safety threat from those experienced during the prior school year. Ms. Landis was able to have Student sit down with verbal prompting. Ms. Landis knew from Mother that Student also unfastened her seat belt in the family vehicle. However, as the incidents continued, the District did little to analyze why Student repeatedly unfastened her seat belt and what could be done to prevent this conduct. Although the safety concern was not as severe as Student contended, it still existed because Student regularly unfastened her seat belt, and required Ms. Landis to prompt Student to refasten her seat belt. While unfastened, there was a period, until Ms. Landis noticed and prompted her to refasten, in which Student could be hurt if the bus stopped quickly. While the District eventually had Genesis conduct a FBA in May and June 2011, the District denied Student a FAPE because should have at least conducted an informal analysis before Student stopped riding the bus about why she unfastened her seat belt because this behavior continued at about the same rate as the prior school year.

February/March 2011 IEP

62. The District convened Student's triennial IEP team meeting on February 28, 2011 and March 31, 2011, to discuss the results of Student's triennial psychoeducational, academic, speech and language, occupational therapy assessments. At the IEP team meeting, the team members discussed Student's progress on her April 8, 2010 goals. The District did not make any offer of goals, services or placement at these IEP team meetings, as that was planned for a subsequent annual IEP team meeting.

63. For purposes of the issues in this hearing, the relevant assessments are the psychoeducational and academic assessments. Student challenged the psychoeducational

assessment and contended that this assessment labeled her as intellectually disabled,¹¹ and that the District consequently recommended a functional life skills program based on their underestimation of Student's cognitive ability. The issue regarding the academic assessment is the amount of progress Student had made since April 2010.

Psychoeducational Assessment

64. Lisa Valdez-Shaw conducted the psychoeducational assessment in February 2011. Ms. Valdez-Shaw has been a school psychologist with CCOE for five years, and has her credential for this position, which she obtained in 2006. Prior to being a school psychologist, Ms. Valdez-Shaw was a school counselor at another district. As a school psychologist, Ms. Valdez-Shaw has conducted numerous assessments regarding students' cognitive ability, including autistic children.

65. For the assessment, Ms. Valdez-Shaw administered the Differential Ability Scales, Second Edition (DAS-II), Adaptive Behavior Assessment System, Second Edition (ABAS-II), and Gilliam Autism Rating Scale (GARS). She also observed Student in her classroom, at lunch and recess. Ms. Valdez-Shaw reviewed Student's educational records, including teacher and parent reports and the 2005 and 2008 psychoeducational assessments.

66. To assess Student's cognitive ability, Ms. Valdez-Shaw appropriately administered the DAS-II because it provided for visual prompting and easier verbal direction. She was aware of Student's speech and language deficits and that she responded better to visual prompts. Based on the DAS-II, Student had significant deficits on testing that involved expressive and receptive language, naming vocabulary, and understanding instructions, as she was in the .1 percentile in these areas. However, Student scored much higher on the composite nonverbal reasoning, measuring perception and relationship between figures and matching pictures based on a common element or concept, placing in the 18th percentile. Student's spatial results were in the second percentile, in part due to her occupational therapy deficits as the test required fine motor skill with copying, and Student had difficulty performing the more complex block-pattern designs and reproducing multiple-shape design copying.

67. On the ABAS-II, both Mother and Ms. Sweetland rated Student in the extremely low range across most of the functional domains, such as communication, functional academics, leisure and social activities. Mother rated Student higher as to her health and safety, below average, and self-care, average. However, the final overall results were extremely low as to Student's general adaptive abilities. Based on Student's low

¹¹ In 2010, Congress deleted references to "mental retardation" in the IDEA, and replaced it with "intellectual disabilities." (Pub.L. 111-256, 124 Stat. 2643.) This decision will conform to this change in the IDEA, and use "intellectual disabilities" and not "mental retardation." (Pub.L. 111-256, § 4; [requirement that States change terminology for individuals covered by provisions of this law].)

scores, Ms. Valdez-Shaw appropriately expressed concerns about Student's need to learn skills that would foster her independence.

68. Ms. Valdez-Shaw observed little social interaction between Student and typically developing peers. The most interaction occurred with turn-taking while using the playground slide. When playing with a classmate, Student needed many verbal prompts to ask her classmate for the toy, and for Student to remain engaged with playing.

69. Ms. Valdez-Shaw recommended that Student attend a structured SDC, like Ms. Sweetland's SDC, to obtain functional life skills, due to the severity of Student's cognitive, social skills, behavior and adaptive skills deficits. Student interpreted Ms. Valdez-Shaw's recommendation to imply that Ms. Valdez-Shaw believed Student to be intellectually disabled. However, Ms. Valdez-Shaw never stated in her report and testimony that Student was intellectually disabled. Mother expressed her objection to Ms. Valdez-Shaw's assessment at the IEP team meeting and the District subsequently agreed to have another psychologist assess Student's cognitive abilities and functional skills.

70. Ms. Valdez-Shaw made appropriate recommendations as Student lacked functional skills, such as knowing to look both ways when crossing a street, doing basic household chores and social interactions. While Student needed significant academic intervention due to her deficits, she also needed a functional life skills program because she could not perform tasks that typically developing peers could and that she would need to become more independent. Thus, Student failed to demonstrate that Ms. Valdez-Shaw based her recommendations on a mistaken belief that Student was intellectually disabled.

Academic Assessment and Goal Progress

71. As with the prior academic assessments, Ms. Sweetland gathered the information in her report through working with Student during regular instruction. Ms. Sweetland noted that Student's behavioral problems interfered with her ability to socialize, mainstream, and access the curriculum. Also interfering with her ability to mainstream and participate in general education activities was her sensitivity to sound. Student did not like change in her schedule and needed visual schedules to avoid surprises so she would know what was happening next. Student's ability to attend independently had improved markedly from first grade as her attention length had increased to 20 minutes of independent work.

72. Student's phonemic awareness had improved as she could blend and segment additional word sound combinations. Student math skills improved as she was meeting all first grade standards in nearly all areas. In language arts, Student was still below first grade in her writing brief narratives and mid-first grade level in reading sight words, decoding words and spelling. Her reading comprehension had improved as she could match pictures that corresponded to a sentence she read.

73. As to her goals, Student's sight word goal was for her to read 175 words by April 28, 2011, with 80 percent accuracy, up from 75 words. By February 28, 2011, Student was reading 152 sight words with 98 percent accuracy. For decoding words, Student was close to meeting this goal as to her ability to combine sound elements for a variety of letter patterns and word length and combinations had improved. For math, Student had partially met the goal; while she could do 10 addition and subtraction problems up to the number 20, she could not do a combination of addition and subtraction problems. For counting coins, Student had nearly mastered this goal of counting different combinations with 80 percent accuracy as she was up to 75 percent mastery. Student nearly met the counting goal of independently counting by two to 20 with 100 percent accuracy as she could count to 20 by twos, but still needed prompting.

74. Student continued to make steady academic progress as her ability to work independently increased, along with her language skills. Dr. Strong and Ms. Schetter were convincing, based on their review of Student's records, that she had made meaningful progress since the April 2008 IEP. Accordingly, despite the continuation of Student's behavior problems, she continued to make adequate educational progress.

May 5 and 29, 2011 and June 30, 2011 (May/June 2011) IEP Offer

75. At the March 31, 2011 IEP team meeting, the District agreed for Genesis to conduct an FBA to address maladaptive behaviors and determine whether a need existed for a BSP or a behavior intervention plan (BIP).¹² Additionally, Genesis would conduct the Assessment of Basic Language and Learning Skills-Revised (ABLLS-R),¹³ focusing on Student's functional communication. Finally, Genesis would perform an FBA as to behavior issues regarding bus transportation.

76. After the March 31, 2011 IEP team meeting, Parents agreed with the District's offer that Corrina Lindblöm, CCOE school psychologist, would obtain additional information regarding Student's functioning levels.

Genesis Assessments

FBA

¹² A BIP is used for students who have more serious behavioral problems that significantly interferes with the implementation of the goals and objectives of the individual's IEP than cannot be met with a BSP. The development and monitoring of a BIP is governed by the Hughes Bill.

¹³ The ABLLS-R is used to assess language and learning skills in children with language and learning deficits and is commonly used in the development of behavioral programs for autistic children.

77. At the May 29, 2011 IEP team meeting, Ms. Holly presented the FBA and ABLLS-R reports. The FBA consisted of collection of frequency of behavior data, ABC data collection, school based observations by Ms. Holly and Emily Orth, Genesis Behavior Consultant, file review and interviews with Ms. Sweetland and Mother. Ms. Orth collected the ABC data, and Ms. Sweetland the frequency data used in the FBA. Ms. Orth did an initial analysis of the collected data and wrote proposed goals and recommendations, and Ms. Holly finalized the report after reviewing the data. Ms. Holly conducted the ABLLS-R.

78. The targeted behaviors analyzed in the FBA were noncompliance, tantrums and bolting. The FBA defined noncompliance as refusing to perform or to respond to an adult directive, or vocal protests after the second request. Tantrums were screaming or dropping to the ground. In 12 days of data collection, for bolting there was only incident, in which Student was redirected in nine seconds. Based on this low frequency and low historical frequency, Ms. Holly appropriately determined that Student did not require a bolting goal. For noncompliance, the frequency average was 1.5 times a day, with incidents lasting between three seconds to five minutes. For tantrums, the average was 1.17 a day, lasting between one to 25 minutes.

79. Student attempted to show that the Genesis data did not accurately document Student's behavioral problems as to the number and severity of incidents. However, Ms. Holly and Ms. Orth convincingly explained the legitimacy of the data collection procedures by explaining the methodology used and that the data collected corresponded with historical information. Student did not present any credible evidence to challenge the data collected. Student's focus on one incident that lasted 23 minutes, in which Student tantrumed and was placed in a quiet chair, was considered as part of the FBA because, although Ms. Orth did not observe the incident, Ms. Sweetland informed her of the incident.

80. As to noncompliance and tantrums, the FBA hypothesized that Student engaged in these targeted behaviors to avoid or escape from non-preferred situations or tasks, especially sensory experiences like loud noise or people too close her. Also, Student engaged in these behaviors to obtain preferred items. The antecedents to Student's behaviors were requests to perform a non-preferred activity, transitioning to a new activity, unexpected changes in routine, loud noises, physical crowding and seeing a preferred item.

81. Student challenged Genesis' contention that Student engaged in maladaptive behaviors to avoid or escape from non-preferred tasks, based on Ms. Conklin's assessment. Ms. Conklin conducted her assessment during the summer of 2011 in Student's home primarily to develop a home ABA program as Parents had already decided that Student would not attend the program offered at Mark Twain Elementary School (Mark Twain) for SY 2011-2012. Ms. Conklin hypothesized that Student's behaviors were due to sensory defensiveness and seeking out communication. However, there is not much difference in the conclusions reached by Ms. Conklin and Ms. Holly, as Ms. Holly found that Student's escape needs related to her sensory needs and inability to communicate her needs, and made recommendations to address both. Additionally, while Ms. Conklin's assessment was

thorough, its value was limited since Ms. Conklin assessed Student at home, not at school, and its primary purpose was to design a home ABA program, and not to ensure Student's success at school.

82. The consequences of Student's behaviors were the loss of academic instruction time; need to prompt Student to comply, redirection, planned ignoring or removal to a quieter area. The proposed replacement behaviors were for Student to use functional communication to appropriately request not to perform a non-preferred activity or to gain access to a preferred item. The FBA recommended prompting Student, including using visual supports, to use functional communication and to continue to warn Student about changes in her schedule or that she may be entering a situation that might be overstimulating. The consequence of the replacement behaviors was to increase academic success and ability to interact with typically developing peers.

83. The BSP's prevention strategies, replacement behaviors, teaching strategies, reinforcement and reactive strategies were primarily those used in Ms. Sweetland's class. The preventive strategies included continued use of visual schedules, warning Student of sensory issues, creating frequent opportunities for Student to make choices, checking during the day with Student to ensure that she knows what she may earn for positive behavior and visual reminders when she will gain access to reinforcers. New strategies were to give Student scheduled warnings prior to ending a preferred activity or transitioning, and to use standardized positive phrases when Student requests an item or activity that will not be immediately provided to her.

84. For replacement behaviors, the BSP formalized the existing practices of Student attempting to communicate to express her requests and using headphones to block out noise while doing independent work. The BSP recommended that staff create situations or be cognizant of situations for Student to practice her replacement behaviors to request a preferred item, ask for additional time with a preferred activity or ask for help. The BSP set up a schedule for staff to provide Student with positive reinforcement when Student refrained from noncompliance or tantrums or when she made an appropriate request and then to phase out the reinforcements as Student's behaviors improved. For reactive strategies, if Student was noncompliant or tantrumed, the BSP provided for continuation of the strategies Ms. Sweetland used, such as repeating instructions and assisting her to follow instructions with prompting, informing Student that she could lose access to preferred items, and planned ignoring, if safe, with minimal verbal reminders for tantrums.

85. The proposed noncompliance goal was that, by May 2012, Student's noncompliance would decrease to one incident per 10 days, with an average duration of 45 seconds. For tantrums, the proposed goal was one incident every ten days and the average length of the tantrum five minutes. Student did not challenge the appropriateness of the proposed goals.

ABLLS-R

86. The ABLLS-R assessment found that Student attempted to communicate verbally through vocalization, but would use physical gestures, such as leading someone by the hand. In stressful situations, Student had difficulty verbally expressing her wishes. Her communication was limited by her deficits in vocal imitation and requesting help, although her ability to spontaneously request was improving. While Student could accurately label objects, familiar people and body parts, she had difficulty using pronouns to label persons. Student had difficulty labeling her own emotional state, which the District was working on as a goal in the April 2010 IEP. Student could fill in words from familiar songs and phrases and answer simple relationship questions, such as what goes with feet, and personal information. However, Student had difficulty initiating or maintaining a conversation in which she had to use more novel information and not just repeat information she already knew. Student's use of grammar was accurate when using the present tense, but she had difficulty when using the future or past tenses.

87. Ms. Holly proposed functional communication goals for Student to appropriately make requests, answer questions involving 'who,' label new objects from expanding categories of items, appropriately use pronouns, and make requests when she wanted additional time with a preferred item or activity. The purpose of these goals was to improve Student's behaviors by improving her communication abilities.

88. Ms. Holly also recommended that, for the next school year, Student should be in a high structured classroom with a predictable schedule that has both small and large group instruction. The staff needed to have training in ABA principals and a strong focus on communication skills. While Student needed the availability of one-to-one assistance, Student also needed daily access to typically developing peers to model appropriate social and behavioral skills. Ms. Holly's proposed classroom fit the description of the structured SDC that CCOE created with Ms. Sweetland's class. The report also recommended a behavior consultant to ensure consistency, provide any needed training, monitor the program, and troubleshoot, if needed.

89. As to the validity of the ABLLS-R assessment, Student did not present evidence to challenge Ms. Holly's assessment. Indeed, Ms. Conklin's subsequent assessment came to similar results as to Student's need for an educational program that worked on her functional communication needs to improve her behaviors. Ms. Conklin based her recommendation that Student attend a home program on her disagreement with the District's proposed SDC for SY 2011-2012, and not any disagreement that Student should be in an appropriately designed SDC with mainstreaming opportunities.

Transportation

90. The bus assessment consisted of data collection for one day by Ms. Orth, and the remaining 16 days by classroom aide Kirsten Berry, who rode the bus with Student. The data collection began at the end of SY 2010-2011 and continued through the 2011 ESY with

bus trips to and from school, and during ESY to the pool. The assessment examined inappropriate sitting, unbuckling her seat belt, standing while the bus was in motion and attempting to sit in a seat assigned to another student while the bus was not in motion.

91. The assessment found an extremely low incidence of standing while the bus was moving, once every 12 bus rides. Student unbuckled her seat belt while the bus was in motion nearly every other bus ride and every third bus ride attempted to change seats. As to not sitting appropriately, this occurred 1.35 times per bus trip. As to unbuckling, all but one of the incidents occurred while the bus was stopped, and in the one incident when the bus was in motion, Student stood up. The bus driver easily redirected Student to sit properly and refasten her seat belt.

92. The report hypothesized that Student's behaviors on the bus were designed to gain access to some preferred item or activity and to avoid non-preferred situations. The antecedents to Student's behaviors were seeing a preferred item, such as Mother when the bus took her home, changes in bus routine, including a different driver, or loud noises. A consequence of Student's behavior issues on the bus involved safety issues and need to prompt Student to comply. The replacement behaviors in the report were for Student to use appropriate functional communication to request preferred items or activities or to express problems, and for Student to comply with driver instructions. Reinforcement of positive behaviors would need to come from the bus driver on a schedule.

93. The proposed bus BSP was to use visual supports to inform Student of any changes to the bus routine and reinforcers for following the rules. The supports could be in the front of the bus for all the students on the bus. Ms. Orth also recommended creating a social story with Student on proper bus riding, including role playing, and using more positive prompting, instead of using 'no', for Student to follow directions, and ensuring that Student understood the directions; and creating a positive reinforcement schedule, at least every 10 minutes, for the bus driver to praise Student and other students for appropriate bus riding. If Student did not comply with the bus rules, the driver needs to give Student short, firm instructions to comply. If Student complies with the instruction, the bus driver would need to praise Student. The Genesis assessment did not recommend a one-to-one aide for Student on the bus because Student's bus behaviors did not present a significant risk due to the ability of the bus drivers to prompt Student to comply.

94. The transportation report contained a goal for Student to sit appropriately in her seat in three out of four bus rides and to remain belted in five out of six bus rides. The school bus drivers would need training to ensure that they complied with the bus BSP, but Student would not need a one-to-one aide.

Ms. Lindblöm's Assessment

95. Ms. Lindblöm's assessment was designed to obtain additional information regarding Student's current levels of functioning and the results were presented at the June 30, 2011 IEP team meeting. Student's challenge to Ms. Lindblöm assessment, as with

Ms. Valdez-Shaw's assessment, focused on her findings that Student was lower functioning or intellectually disabled. The District contended that Ms. Lindblöm's assessment accurately reflected Student's present functioning levels.

96. Ms. Lindblöm has been a school psychologist with CCOE for the past four-and-a-half years, with a year break in private practices as a licensed educational psychologist focused on children with autism and attention deficit hyperactivity disorder. Ms. Lindblöm has a Bachelor's in psychology and a Master's in school psychology. She is a licensed educational psychologist and has her school psychologist credential. Based on her experience, education and training, Ms. Lindblöm was qualified to assess Student.

97. Ms. Lindblöm administered the Test of Nonverbal Intelligence, Third Edition (TONI-3), Vineland Adaptive Behavior Scales, Second Edition (Vineland-II), and Autism Diagnostic Observation Schedule (ADOS). Ms. Lindblöm also reviewed Student's educational records and observed her at school three times and at her home twice, which included parental interview.

98. Ms. Lindblöm's results regarding Student's current levels of functioning are commensurate with Ms. Valdez-Shaw's assessment. Ms. Lindblöm appropriately administered the TONI-3 due to Student's verbal deficits as the TONI-3 seeks to measure cognitive ability through nonverbal means. On the TONI-3, Student's cognitive score was 86, which placed her in the below average range in the 17th percentile. Ms. Lindblöm administered the TONI-3 in an ideal situation as Student was in a quiet, well-lit room. This permitted Student to remain on task and gave an accurate representation of her abilities, which was not intellectually disabled.

99. On the Vineland-II, Ms. Lindblöm could not count Parent's scores on their questionnaire. Even though Ms. Lindblöm went over the parent questionnaire with Parents, they failed to answer too many questions as they deferred to Ms. Sweetland as to Student's daily living skills. Mother attempted to explain why she and her husband failed to answer the questions, but her responses were not plausible. The questions asked in the Vineland-II parent questionnaire are designed to be answered by parents, as teachers have their own questions. Therefore, due to Parents' failure to answer sufficient questions, the only comprehensive score was Ms. Sweetland's with an overall score of 61, placing Student in the low range. Ms. Sweetland had Student in the low range in communication, daily living skills, and socialization domains, and higher, in the moderately low range, for motor skills. In the domains that Parents completed, their scores were higher as communication, socialization and motor skills were in the moderately low range.

100. Ms. Lindblöm administered the ADOS to examine Student's strengths and weaknesses in areas where autistic children often have deficits. The ADOS results confirmed Student's deficits with communication and reciprocal social interaction; however, Student did enjoy playing with Ms. Lindblöm and could follow her eye gaze. An area of strength was Student playing appropriately, for the most part, with toys and not engaging in excessive self-stimulatory behaviors. Student's communication during the home visit with

her brothers was consistent with the ADOS results as she rarely initiated social interaction, and the reciprocal interaction was Student and her brother reenacting movie lines. Student also displayed similar noncompliance at home, as she did in Ms. Sweetland's class when she did not get a preferred item.

101. Ms. Lindblöm's assessment results mirrored those of Ms. Valdez-Shaw as Student's functioning and cognitive ability were below average compared to her typically developing peers. Student had significant communication deficits, but demonstrated strengths with imaginative play, joint attention and enjoying herself when playing with others in preferred activities. Ms. Lindblöm recommended that Student continue attending a structured SDC with mainstreaming opportunities, especially structured play at recess. Ms. Lindblöm also recommended that the IEP consider social skills interventions, such as social stories and social scripts. Finally, Ms. Lindblöm emphasized the need for consistency between District personnel and Parents in responding to Student's maladaptive behaviors and to facilitate generalization across environments.

102. Student's criticism that Ms. Lindblöm underestimated Student's abilities were not supported by the evidence and undercut her challenge to Ms. Lindblöm's assessment as the Genesis assessments corroborated Ms. Lindblöm's findings as to Student's functioning. Ms. Lindblöm appropriately recommended a structured SDC because of the severity of Student's deficits and her need to learn functional communication skills. Accordingly, Ms. Lindblöm appropriately assessed Student and obtained accurate results about Student's deficits and functioning levels.

District's May/June 2011 IEP Offer

Behavior Goals and Services

103. Student challenged the District's proposed behavioral goals and services as too little and too late because she needed a more intensive program and had not received a meaningful educational benefit in the prior two school years based on the District's failure to address her behavioral deficits. The District asserted that its offer met Student's unique needs as it was based on accurate information provided by the Genesis and District assessments and input from District personnel.

104. The District offered Student the BSP and two behavioral goals in the Genesis FBA. The District also offered the two transportation goals and bus BSP. The District's proposed IEP included the functional communication, sensory regulation and social interaction goals in the Genesis ABLLS-R assessment report. The District also offered 10 hours of behavior intervention services per month for data analysis, staff collaboration and team meetings to monitor Student's behavioral progress with the BSP at school and while bused. Additionally, the District's offer included 10 hours of training regarding the BSP implementation at school and on the bus.

105. The District developed its proposed behavioral goals and services based on accurate information in the Genesis and District assessments and information as to Student's present levels of performance from Ms. Sweetland. Although Student had a couple of serious behavioral incidents in SY 2010-2011, that led to restraints, these incidents were aberrations as Student's behaviors continued to improve and the number of behavioral incidents declined. Dr. Strong and Ms. Schetter were convincing as to their opinions regarding Student's improving behaviors and explanation that these two incidents did not overshadow the long-term data that established continued improvement. Additionally, neither of Student's experts provided any data analysis that contradicted Dr. Strong's and Ms. Schetter's analysis.

106. Regarding the District's proposed transportation BSP and goals, Student challenged whether the bus drivers could implement the BSP, and claimed that implementation required her to have a one-to-one aide on the bus. However, the evidence established that at the start of SY 2011-2012, Ms. Orth trained the bus drivers on the BSP and goals, and the data that they needed to keep. Ms. Orth was convincing that the bus drivers could implement the BSP and keep the needed data based on her interaction with the bus drivers during the training and her knowledge of the driver duties. Additionally, Ms. Landis established that the bus drivers could implement the BSP and safely drive the bus and document the data at the end of the bus trip. While Student attempted to demonstrate that Ms. Landis and the other school bus drivers did not have the ability to implement the BSP, Ms. Landis established that Student underestimated the drivers' abilities.

107. Student did not establish that the District's proposed behavior and transportation goals and services were not reasonably calculated to meet Student's unique needs. The Genesis assessment contained accurate information as to Student's behavioral deficits, the reasons for Student's maladaptive behaviors and steps for the District to take to improve her behaviors. Student's focus on Ms. Conklin's assessment and recommendations was misplaced as she developed a home program after Parents decided not to accept the District's placement offer for SY 2011-2012, and her assessment did not examine how to meet Student's behavioral needs at school or on the bus. Accordingly, Student failed to prove that the District's proposed BSP, behavioral goals and services were not reasonably calculated to provide Student with a FAPE.

Social Skills and Mainstreaming

108. The proposed IEP did not include social skills services as a separate related service. The District did offer a social skills and mainstreaming goal for Student to participate in structured social skills interaction with typically developing peers for a 20-minute period with less than three adult prompts, and a goal for turn-taking in class. The District's proposed speech and language goals would assist Student in communicating with her classmates and typically developing peers. The District continued the same offer of Student spending 80 percent of school out of the regular class and 20 percent mainstreaming in recess, lunch, library, school assemblies, music and field trips.

109. The District's proposed goals were adequate to assist Student to interact appropriately with typically developing peers. While Genesis' and Ms. Lindblöm's assessment reports called for a structured program for mainstreaming, Student did not establish that she required a separate social skills program. The District provided more structured mainstreaming opportunities in SY 2010-2011 with Ms. Sweetland's SDC as Student's ability to successfully interact with typically developing peers improved. The proposed structured SDC for SY 2011-2012 offered a continuation of this social skills curriculum.

110. The evidence established that Student was ready to benefit from a structured social skills program as her interest in interacting with typically developing peers had increased. However, Student did not establish that she required a separate service to meet her social skills deficits versus having her teacher and aides implement a structured social skills program. Therefore, Student did not establish that the District needed to offer her a separate, structured social skills program to provide her with a FAPE.

Placement Offer

111. The District offered the structured SDC at Mark Twain, operated by CCOE, for students in grades four through eight. Student objected to the District's placement offer, contending that it would not meet Student's needs because of the age range of the SDC, variety of disabling condition for the students, and their lower cognitive functioning. Also, Student objected that the SDC did not have the appropriate behavioral supports to meet her needs, and was designed to provide functional skills, rather than academic instruction. Student also requested the District to retain her in Ms. Sweetland's SDC to repeat third grade because the District's failure to provide her with a FAPE caused her not to be ready for fourth grade. The District argued that the Mark Twain SDC contained all the needed supports as its structured designed was basically the same as the Michelson SDC, and that Student was ready to advance to fourth grade.

112. The teacher for the Mark Twain classroom when the District made its offer and for the start of SY 2011-2012 was Arnette Cratty. Ms. Cratty retired about a month into SY 2011-2012 and substitutes taught the class, until CCOE hired Molly Teale, who began at the start of October 2011.

113. The structured SDC at Mark Twain followed and used the various ABA strategies that were used in the Michelson SDC. CCOE designed both programs to be complimentary and to provide a smooth transition for students. Ms. Cratty had extensive experience and training in educating autistic pupils like Student. While Dr. Sneed did not observe the Mark Twain SDC when Ms. Cratty taught the class, his criticisms of the SDC when he observed Ms. Teale in late-October 2011, are presumed to be the same because of the similarity of the SDC program structure and students.

114. Student attempted to show that Ms. Teale could not meet Student's unique needs. However, Ms. Teale had extensive experience working with autistic children in her

position as a behavior specialist for three years and teaching a similar structured SDC for four years in another school district. Additionally, she had extensive training in various ABA instructional methods, such as PECS, DTT, sensory integration, Floor Time and peer mediated strategies. Dr. Sneed noted Ms. Teale's knowledge of ABA methodology and strategies to address Student's behavioral problems. Accordingly, Ms. Teale was more than qualified to be Student's teacher.

115. Dr. Sneed observed Ms. Teale's SDC in October 2011 and was critical of the SDC because of the program's focus on functional skills and because, in his opinion, the pupils in the class were too low functioning compared to Student, with too wide of a range of both age and disabling conditions. Dr. Sneed also criticized the layout of the SDC for not having space for Student to work independently and away from others. Dr. Sneed did not observe the class aides use ABA strategies during their work with students. Dr. Sneed complimented Ms. Teale for her extensive ABA knowledge, but had concerns about the class being a work in progress as Ms. Teale put her stamp on the program. Finally, Dr. Sneed was critical of the lack of social interaction during his playground observation between the SDC and general education students.

116. Dr. Sneed also based his opinion that the Mark Twain SDC was not appropriate due to its focus on functional life skills, such as learning how to do laundry and cleaning, on his review of the District's prior assessments, Ms. Conklin's assessment, his observation of Student in her home program, and his assessment results. While Dr. Sneed attempted to demonstrate that his assessment findings and observations found Student to be of a higher functioning ability than the two recent District assessment, the results were similar due to false assumptions that Dr. Sneed made.

117. As noted above, Dr. Sneed contended that the District assessments found Student intellectually disabled, when in fact the assessments did not. While Dr. Sneed was rightly concerned that Student's cognitive scores could be depressed due to her language and behavioral deficits, the District assessors took these concerns into consideration by focusing testing on Student's visual skills, and conducting the testing in ideal situations. Additionally, Dr. Sneed downplayed Student's need to learn functional skills as he failed to acknowledge the significant deficits noted by both Ms. Sweetland and Parents. Further, he did not acknowledge that the Mark Twain SDC incorporated academic instruction into its functional program and that academic instruction governed by Student's IEP goals.

118. Additionally, during his observation of Student's home program, he observed Student working on second grade curriculum with her home instructional aide on a computer. However, he failed to acknowledge the extensive prompting Student's aide had to provide. As noted by Dr. Strong in her observation of Student in her home program, Student needed a high level of support and could not independently access the computerized curriculum. Student had a very high error rate and obtained the correct answers through extensive prompting by the aide. Unfortunately, the home ABA program was fostering Student's dependence on her aide, and not giving her the independence she needed.

119. Dr. Strong also observed Ms. Teale's classroom. Dr. Strong's opinion as to its appropriateness was more credible than Dr. Sneed's because of Dr. Strong's accurate knowledge of Student's previous rates of academic growth and present levels of functioning. As with Ms. Sweetland's SDC, Dr. Strong found that the Mark Twain SDC contained necessary evidence-based practices. Ms. Teale established that she was continuing the instructional methodology CCOE established for the structured SDC, and that the aides were already using under Ms. Cratty, and Ms. Teale's knowledge of Ms. Cratty's SDC practices from visiting the class in her prior role as a behavior specialist with CCOE. Additionally, Ms. Teale was convincing that she would base her instruction on Student's IEP and that, while functional skills would be part of her instruction with Student, academic instruction was part of the curriculum.

120. Student's position is further undercut by Mother's request for Student to repeat third grade in Ms. Sweetland's class, and Parents' reluctance to consider the Mark Twain program during the IEP process. While the Mark Twain SDC worked more on functional life skills than the Michelson program, the basic program designs were similar, considering the ages of the students, such as the need for older student to have more functional skills to foster independence. Both programs had experienced teachers and aides, well versed and trained in ABA methodology. Student did not establish any discernable difference between the Michelson and Mark Twain programs that would support a finding that the Michelson SDC could meet Student's unique needs and the Mark Twain SDC would not.

121. Student attempted to show that the District's proposed placement at Mark Twain was inadequate to meet her unique needs. However, the evidence established the appropriateness of Mark Twain as the structured SDC that CCOE designed, which included the evidence-based instructional practices Student required and was a logical extension of the Michelson structured SDC. Student, to obtain a meaningful educational benefit, required functional life skills due to her significant adaptive skills deficits in addition to instruction to meet her academic needs. Accordingly, Student did not establish that the District's placement offer of the structured SDC at Mark Twain was not reasonably calculated to provide her with a FAPE.

122. As to the May/June 2011 IEP, Student failed to demonstrate that the District's IEP failed to adequately address her behavioral needs as the District's proposed goals and services were based on accurate assessment information and reasonably calculated to permit Student obtain a meaningful educational benefit. Further, Student did not establish that she required a one-to-one aide on the bus or a separate social skills program. The District did not base its offer of a structured SDC at Mark Twain on a mistaken belief that Student was intellectually disabled. Moreover, the Mark Twain SDC contained appropriate instructional and behavioral methodologies to meet Student's unique needs. Therefore, Student failed to establish that the District's offer for SY 2011-2012 denied her a FAPE and that she required a home ABA program.

LEGAL CONCLUSIONS

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

Elements of a FAPE

2. Under the IDEA and state law, children with disabilities have the right to a FAPE. (20 U.S.C. § 1400(d); Ed. Code, § 56000.) A FAPE means special education and related services that are available to the child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(a)(9); Ed. Code 56031.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(a)(29).)

3. In *Board of Educ. of the Hendrick Hudson Cent. 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 p. 198.) School districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instruction and related services individually designed to provide educational benefit to the student. (*Id.* at p. 201; *J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d. 938, 950-953.) The Ninth Circuit has 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 (*Hellgate*); *Adams v. State of Oregon* (9th Cir. 1999) 195 F.2d 1141, 1149. (*Adams*).)

4. There are two parts to the legal analysis of a school district's compliance with the IDEA. First, the tribunal must determine whether the district has complied with the procedures set forth in the IDEA. (*Rowley, supra*, 458 U.S. at pp. 206-207.) Second, the tribunal must decide whether the IEP developed through those procedures was designed to meet the child's unique needs, and was reasonably calculated to enable the child to receive educational benefit. (*Ibid.*) An IEP is not to be judged in hindsight; its reasonableness is evaluated in light of the information available at the time it was implemented. (*J.G. v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801; *Adams, supra*, 195 F.3d at p. 1149.)

5. 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).)

6. 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. (See *Rowley*, 458 U.S. at p. 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.)

7. In *Rowley*, the Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA. (*Rowley, supra*, at pp. 205-06.) However, a procedural error does not automatically require a finding that a FAPE was denied. Since July 1, 2005, the IDEA has codified the pre-existing rule that a procedural violation results in a denial of a FAPE only if the violation: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see, Ed. Code, § 56505, subd. (f)(2); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

8. 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).)

9. A failure to implement a student's IEP will constitute a violation of the student's right to a FAPE if the failure was material. There is no statutory requirement that a District must perfectly adhere to an IEP and, therefore, minor implementation failures will not be deemed a denial of FAPE. (*Van Duyn, et al. v. Baker School District 5J* (9th Cir. 2007) 502 F.3d 811, 820-822.)

Assessments

10. A reassessment of a student shall be conducted if a school district determines that the educational or related service needs, including improved academic achievement and functional performance of the student, warrant a reassessment, or if the student's parent or teacher requests a reassessment. (34 C.F.R. § 300.106(a)(2006);¹⁴ Ed. Code, § 56381, subd. (a)(1).) A reassessment shall occur not more frequently than once a year, unless a parent and the school district agree otherwise, and shall occur at least once every three years, unless the parent and the school district agree, in writing, that a reassessment is unnecessary. (34 C.F.R. § 300.106(d); Ed. Code, § 56381, subd. (a)(2).)

11. School districts are required to have an IEP in place for each eligible child at the beginning of each school year. (34 C.F.R. 300.323(a); Ed. Code, § 56344, subd. (c).) An

¹⁴ All subsequent references to the Code of Federal Regulations are to the 2006 version.

IEP must be reviewed at least annually to determine whether the annual goals are being met, and at that time, the school district must revise the IEP as appropriate to address any lack of expected progress, new assessments, information provided by parents, the child's anticipated needs, or any other matter. (34 C.F.R. 300.324(b)(1); Ed. Code, § 56343, subd. (d).) In general, when developing an IEP, the IEP team must consider: the strengths of the child; the concerns of the parents for enhancing the education of their child; the results of the initial or most recent evaluation of the child; and the academic, developmental, and functional needs of the child. (Ed. Code, § 56341.1, subd. (a).) The IEP must also contain a description "of the manner in which the progress of the pupil toward meeting the annual goals...will be measured and when periodic reports on the progress the pupil is making...will be provided" (34 C.F.R. § 300.320(a)(3); Ed. Code, § 56345, subd. (a)(3).)

Issue No. 1a: Did District deny Student a FAPE during SY 2009-2010, including the ESY, by failing to assess Student's behavioral needs?

Issue No. 2a: Did District deny Student a FAPE during SY 2010-2011, including the ESY, by failing to assess Student's behavior needs?

Issue No. 3a: Did District deny Student a FAPE during SY 2010-2011 by failing to assess Student's behavior needs?

12. Pursuant to Factual Findings 39 through 47 and Legal Conclusions 1 through 11, the District needed to conduct a behavioral assessment before the FBA and ABLLS-R assessments that Genesis conducted in May 2011. The information about how Student's behavior interfered with her ability to access both the academic curriculum and mainstreaming opportunities, as noted in Ms. Sweetland's 2010 and 2011 academic assessments. Student's present levels of performance and the data collected by Ms. Sweetland, established that even though Student's behavior was improving, her behavioral problems still significantly interfered with her ability to access her curriculum and participate in mainstream activities. The March 2009 PSB report, which District contended established that a further behavioral assessment was not needed, was not an assessment, but rather an observation summary that failed to analyze the impact of Student's behavior on her ability to access her curriculum or interact with typically developing peers. By the time of the April 2010 IEP, the District should have assessed Student's behavior to develop a BSP and behavioral goals.

13. Pursuant to Factual Findings 77 through 89 and Legal Conclusions 1 through 11, the District appropriately assessed Student's behavioral needs with the assessments that Genesis conducted in May 2011. Student did not establish that the Genesis assessment was not properly conducted or that the information and conclusions about the reasons for Student's maladaptive behaviors were not accurate. Ms. Holly and Ms. Orth established the appropriateness of the proposed BSPs and goals for both school and the bus. Accordingly, the District appropriately assessed Student's behavior needs with the Genesis assessments in May and June 2011.

Behavioral Needs

14. In the case of a child whose behavior impedes his or her learning or that of others, the IEP team must consider, when appropriate, “strategies, including positive behavioral interventions, strategies, and supports to address that behavior.” (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324; Ed. Code, § 56341.1, subd. (b)(1).) As noted by the comments to the 2006 federal implementing regulations, “[D]ecisions [as to the interventions, supports, and strategies to be implemented] should be made on an individual basis by the child’s IEP team.” (64 Fed.Reg. 12620 (2006).) California law defines behavioral interventions as the “systematic implementation of procedures that result in lasting positive changes in the individual’s behavior,” including the “design, implementation, and evaluation of individual or group instructional and environmental modifications . . . designed to provide the individual with greater access to a variety of community settings, social contacts and public events; and ensure the individual’s right to placement in the least restrictive environment as outlined in the individual’s IEP.” (Cal. Code Regs., tit. 5, § 3001, subd. (d).) An IEP that does not appropriately address behaviors that impede a child’s learning denies a student a FAPE. (*Neosho R-V School Dist. v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028-1029.) A school district is not required to address a student’s behavior problems that occur outside of school when the student demonstrates educational progress in the classroom. (*San Rafael Elem. Sch. Dist. v. Cal. Special Educ. Hearing Office* (N.D.Cal. 2007) 482 F.Supp.2d 1152, 1160.) A school district is required to address behavioral problems extraneous to the academic setting only to the extent they affect the student’s educational progress. (*Id.* at p. 1162.)

Issue No. 1b: Did District deny Student a FAPE during SY 2009-2010, including the ESY, by failing to provide measurable goals in the area of behavior?

Issue No. 2b: Did District deny Student a FAPE during SY 2010-2011, including the ESY, by failing to provide measurable goals in the area of behavior?

Issue No. 3b: Did District deny Student a FAPE during SY 2011-2012 by failing to provide measurable goals in the area of behavior?

15. Pursuant to Factual Findings 39 through 47 and Legal Conclusions 1 through 9 and 14, Student required behavior goals in her April 2010 IEP. Ms. Sweetland’s April 2010 academic assessment and the present levels performance at the 2010 IEP team meeting established that Student’s behaviors significantly interfered with her ability to access her academic curriculum as her maladaptive behaviors were often triggered by the demands placed on her during academic instruction. Additionally, Student’s maladaptive behaviors prevented her from accessing mainstream opportunities. While the behavioral supports in Ms. Sweetland’s SDC were appropriate to meet Student’s behavioral needs and she made meaningful academic progress, the frequency and severity of Student’s noncompliant behaviors and tantrums necessitated the development of behavior goals. Student’s behaviors were worse in April 2010 than in May/June 2011, when the District proposed behavior goals after the Genesis assessments. The District’s failure to offer behavioral goals and services in

the April 2010 IEP therefore prevented Student from appropriately accessing her mainstreaming opportunities and denied her a FAPE.

16. Pursuant to Factual Findings 103 through 107 and Legal Conclusions 1 through 9 and 14, the District offered adequate behavioral goals in the May/June 2011 IEP. Ms. Holly appropriately recommended, and the District adopted and offered, goals to reduce the frequency and severity of noncompliant and tantrum behaviors. Additionally, the goals Ms. Holly based on the ABLLS-R assessment were reasonably calculated to address Student's functional communication deficits that prevented Student from expressing her needs that would often lead into a maladaptive behavior, such as expressing her sensory discomfort because of loud noises or people being too close to her. Accordingly, Student did not establish that the District failed in the May/June 2011 IEP to propose measurable behavior goals that met Student's unique needs.

Issue No. 1c: Did District deny Student a FAPE during SY 2009-2010, including the ESY, by failing to provide Student with appropriate behavior support services, such as ABA?

Issue No. 2e: Did District deny Student a FAPE during SY 2010-2011, including the ESY, by failing to provide an appropriate BSP and services?

Issue No. 3c: Did District deny Student a FAPE during SY 2011-2012 by failing to provide an appropriate BSP and services?

17. Pursuant to Factual Findings 6 through 22 and Legal Conclusions 1 through 9 and 14, Student did not establish that the structured SDCs at Michelson and Mark Twain did not have appropriate behavioral supports to meet her unique needs for each school year at issue. Dr. Strong and Ms. Schetter established that these classrooms used evidence-based practices that have been found effective for children with autistic-like behaviors. Student's experts', Dr. Sneed and Ms. Conklin, did not challenge the appropriateness of the behavioral supports provided in the classrooms but criticized the classes on other grounds

18. Pursuant to Factual Findings 39 through 47 and Legal Conclusions 1 through 9 and 14, regarding Student's need for a BSP, the District should have offered Student in the April 8, 2010 IEP a BSP with the behavior intervention services to ensure his progress. Ms. Holly was convincing that based on the May 2011 Genesis FBA that Student required a BSP based on her level of behavioral deficits and their impact on her academic progress and ability to successfully interact with typically developing peers. Dr. Strong and Ms. Schetter established that Student's behavior had improved between the April 2010 and May 2011 IEP team meetings and Ms. Holly established the need for a BSP in May 2011, with Student's lower level of maladaptive behavior incidents. It therefore logically concluded that Student needed a BSP during SY 2009-2010 and in April 2010 IEP when her incidents of maladaptive behaviors were greater. Dr. Strong's and Ms. Schetter's opinions that Student required a BSP in May 2011, only because she was transitioning to a new classroom and because of the need to document the successful behavioral interventions Ms. Sweetland used for the new teacher to continue in SY 2011-2012, ignored the fact that Student needed a BSP

not just for transitions, but to meet her daily needs in class. Ms. Holly was convincing that she developed the BSP based on Student's present behavioral needs and would not have developed the BSP purely because of Student's transition to a new class.

19. As to the appropriateness of the May 2011 BSP, pursuant to Factual Findings 103 through 107 and Legal Conclusions 1 through 9 and 14, the BSP was appropriately designed to meet Student's unique needs. As established in Legal Conclusion 13, the Genesis FBA contained accurate information as to the frequency of Student's targeted maladaptive behaviors and properly hypothesized as to reason for these behaviors. The BSP appropriately targeted Student's noncompliance and tantrums with behavioral strategies and replacement behaviors, along with 10 hours a month of behavior intervention services to monitor Student's progress, analyze data, collaborate with staff and Parents and make any needed changes. Therefore, Student did not establish that the District's proposed BSP and behavior services in the May/June 2011 IEP were not adequate to meet Student's unique needs and to permit to obtain a meaningful educational benefit.

LRE

20. Federal and state law require a school district to provide special education in the LRE. A special education student must be educated with nondisabled peers "to the maximum extent appropriate," and may be removed from the general education environment only when the nature or severity of the student's disabilities is such that education in general education classes with the use of supplementary aids and services "cannot be achieved satisfactorily." (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(ii).) In light of this preference, and in order to determine whether a child can be placed in a general education setting, the Ninth Circuit, in *Sacramento City Unified Sch. Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1403, adopted a balancing test that requires the consideration of four factors: (1) the educational benefits of placement full-time in a less restrictive class; (2) the non-academic benefits of such placement; (3) the effect the student would have on the teacher and children in the less restrictive class; and (4) the costs of mainstreaming the student. However, if it is determined that a child cannot be educated in a general education environment, then the analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R. v. State Board of Ed.* (5th Cir. 1989) 874 F.2d at 1036, 1050.)

21. A specific educational placement means that unique combination of facilities, personnel, location or equipment necessary to provide instructional services to an individual with exceptional needs, as specified in the student's IEP, in any one or a combination of public, private, home and hospital, or residential settings. (Cal. Code Regs., tit. 5, § 3042.) The continuum of program options includes, but is not limited to: regular education; resource specialist programs; designated instruction and services; special classes; nonpublic, nonsectarian schools; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; and instruction using telecommunication instruction in the home or instructions in hospitals or institutions. (Ed. Code, § 56361.)

Issue No. 1e: Did District deny Student a FAPE during SY 2009-2010, including the ESY, by failing to provide appropriate mainstreaming opportunities for second grade reading and math?

Issue No. 2f: Did District deny Student a FAPE during SY 2010-2011, including the ESY, by failing to provide appropriate mainstreaming opportunities for third grad reading and math?

Issue No. 3f: Did District deny Student a FAPE during SY 2011-2012 by failing to provide appropriate mainstreaming opportunities for fourth grade reading and math?

22. Pursuant to Factual Findings 3 through 27, 58 and 59 and Legal Conclusions 1 through 9, 20, 21, 58, 59, 108, 109 and 110, the District did not deny a Student a FAPE by failing to mainstream Student into general education reading and math classes during second, third or fourth grade. As to any educational benefit, Dr. Strong and Ms. Schetter established that even though Student had received a meaningful academic benefit she continued to have significant academic deficits, as shown in the academic assessments Ms. Sweetland conducted, and would not be able to access the general education curriculum. Additionally, Student needed the intensive supports provided in the structured SDCs to access the reading and math curriculum, even if it was modified. As to non-academic benefits, due to her academic and social skills deficits, Student would primarily be instructed by an aide, alone from the other children. Therefore, Student would not get the benefit from being in a general education classroom as she would not generally interact with non-disabled peers or participate in classroom discussion or activities. As to Student's possible classroom disruption, the increased academic demands of the general education instruction, along with the added noise of a larger classroom, would probably lead to maladaptive behavior that would disrupt the class. Even if the District had provided a BSP and behavioral goals, the severity of her reading and math deficits, along with the additional demands of the general education classroom, would most likely lead to more maladaptive behavior than that which occurred in the SDC. Finally, neither party raised cost of mainstreaming Student as an issue. Accordingly, a balancing of the four factors in the LRE analysis does not support Student's contention that, given appropriate behavioral supports, the District should have offered to mainstream her in general education reading and math. Due to the severity of her academic deficits and need for intensive support, such a placement would result in isolating Student from her typically developing peers in class. Additionally, the academic and sensory demands placed on Student would likely lead to disruptive classroom behaviors. The evidence established that District provided sufficient mainstreaming opportunities for Student, although some of them could have been better facilitated, as determined below. Overall, Student did not establish that the lack of more mainstreaming opportunities in core academic classes denied her a FAPE.

23. However, pursuant to Factual Findings 28, 29, 30, 38, 49, 50, 51, 58, 59, 108, 109, 110 and 111, due to Student's behavioral deficits, the District denied Student a FAPE in SY 2009-2010 by failing to adequately mainstream Student with her typically developing

peers. During SY 2010-2011, the District did adequately mainstream Student with SDC personnel, and made an adequate offer for SY 2011-2012 in the May/June 2011 IEP.

Issue No. 2e: Did District deny Student a FAPE during SY 2010-2011, including the ESY, by failing to provide a separate, structured social skills program?

Issue No. 3e: Did District deny Student a FAPE during SY 2011-2012 by failing to provide a separate, structured social skills program?

24. Pursuant to Factual Findings 3 through 18, 23, 24, 25, 48 through 51, 58, 59, 108, 109 and 110 and Legal Conclusions 1 through 9, Student had significant social skills deficits that inhibited her ability to interact with her classmates and typically developing peers. The District developed speech and language and occupational therapy goals to work on social skills deficits along with turn taking goals. Ms. Sweetland's April 2010 and February 2011 academic assessments documented the impact of Student's social skills deficits as to her inability to successfully interact with her classmates and typically developing peers. Especially in SY 2009-2010, while Student's IEPs provided for 20 percent mainstreaming opportunities, the District failed to take adequate steps at Michelson to ensure that Student interacted with typically developing peers during the mainstreaming opportunities by not providing adequate structured interaction. However, Student failed to present sufficient evidence that she required a separate, structured social skills program to address her social skills deficits versus fidelity by classroom staff to create structured interaction with typically developing peers. While it is important to take advantage of unstructured settings to foster natural social interaction, because of the severity of Student's social skills deficits, she needed structured intervention, which need not be a specialized service or program, but fidelity from the classroom staff to foster social interaction. Regarding Mark Twain, Ms. Teale was convincing as to the structured social skills program she would implement for Student to ensure social interaction on the playground and during reverse mainstreaming situations in which typically developing peers go into her classroom to interact with her students. Accordingly, Student did not establish that she required a separate, structured social skills program to meet her unique needs, and the District's lack of such a program did not deny her a FAPE.

Issue No. 3g: Did the District deny Student a FAPE during SY 2011-2012 by failing to offer placement in the LRE because the classroom offered to Student is focused upon the development of functional skills rather than the development of academic skills?

25. Pursuant to Factual Findings 64 through 70, 95 through 102 and 111 through 122 and Legal Conclusions 1 through 9, 20 and 21, the District's offer of placement for SY 2011-2012 in the structured SDC at Mark Twain was a placement in the LRE. As to the first element of the LRE analysis, educational benefit, Student did not demonstrate that her academic abilities were as high as contended, based on her academic work in her home program, because Student could not independently access and complete the computerized instruction without the constant assistance of her one-to-one aide. Dr. Strong and Ms. Schetter were convincing that even though Student had made meaningful education

academic progress, she still had significant deficits that required intensive remediation and that the Mark Twain SDC contained the needed evidence-based practices for Student to succeed. The Mark Twain SDC did work on functional skills, which Student needed based on her significant adaptive skill deficits established in the two District 2011 psychoeducational assessments. Additionally, Ms. Teale was convincing that the work on functional skills would not diminish working with Student on her academic skills and IEP goals. Finally, Student incorrectly contended that the District offered a functional skills program because the District believed Student to be intellectually disabled. There is no such discussion in the May/June 2011 IEP team meetings or in the two psychoeducational assessments conducted by the District that would support that contention. Therefore, Student needed the structured SDC at Mark Twain to receive a meaningful educational benefit, which she could not obtain in a lesser restrictive setting.

26. As to non-academic benefits, the program in the Mark Twain SDC was properly designed to ensure mainstreaming opportunities with typically developing peers. Additionally, Dr. Sneed did not establish that the other pupils in the class were too low functioning for Student, as he overestimated Student's cognitive and functional abilities. In contrast, the District's two 2011-psychoeducational assessments accurately described Student's abilities and appropriately recommended placement in a class like the structured SDC at Mark Twain. As to the third element, as noted in the discussion as to mainstreaming into general education reading and math, Student could be disruptive due to the increased academic demands and sensory issues involved in a larger classroom.

27. Finally, as to Student's home program, it is a much more restrictive setting as Student has no interaction with classmates, and is isolated with her aide. Student does not require this isolated program to make academic progress as she received a meaningful academic benefit in the structured SDC at Michelson. Additionally, Student's behavioral deficits were not so severe as to warrant a home program to work on these deficits. The evidence showed that Student's behavioral needs could be met at Mark Twain with the BSP, behavioral goals and behavior intervention services in the May/June 2011 IEP. Accordingly, a weighing of the LRE elements does not support Student's contention that the District's offer of the structured SDC at Mark Twain was not the LRE for Student.

Transportation

28. California law defines special education as instruction designed to meet the unique needs of individuals with exceptional needs coupled with related services as needed to enable the student to benefit fully from instruction. (Ed. Code, § 56031.) The term "related services" includes transportation and such developmental, corrective, and other supportive services as may be required to assist a child to benefit from special education. (20 U.S.C. § 1401(26).)

29. The IDEA regulations define transportation as: (i) travel to and from school and between schools; (ii) travel in and around school buildings; and (iii) specialized equipment (such as special or adapted buses, lifts, and ramps), if required to provide

transportation for a child with a disability. (34 C.F.R. § 300.34(c)(16).) The IDEA does not explicitly define transportation as door-to-door services. Decisions regarding such services are left to the discretion of the IEP team. (Analysis of Comments and Changes to 2006 IDEA Part B Regulations, 71 Fed.Reg. 46576 (August 14, 2006).)

Issue No. 1d: Did District deny Student a FAPE during SY 2009-2010, including the ESY, by failing to provide appropriate transportation service by not providing a one-to-one aide?

Issue No. 2d: Did District deny Student a FAPE during SY 2010-2011, including the ESY, by failing to provide appropriate transportation service by not providing a one-to-one aide?

Issue No. 3d: Did District deny Student a FAPE during SY 2011-2012 by failing to provide appropriate transportation service by not providing a one-to-one aide?

30. Pursuant to Factual Findings 31, 32, 33, 60, 61, and 90 through 94 and Legal Conclusions 1 through 9, 28 and 29, Student did not establish that she required a one-to-one aide to be safely transported. Although the Genesis bus assessment was conducted in June 2011, the data, conclusions and recommendations are relevant to all three school years at issue as there was no testimony that Student's behavior in not sitting properly, unfastening her seat belt, and standing was significantly different in SY 2009-2010 and SY 2010-2011. The Genesis assessment established that while Student required a BSP and goals, her behaviors were not severe to require a one-to-one aide. Additionally, Ms. Orth, Ms. Reid and Ms. Landis established that the bus drivers could implement the BSP, provide the needed positive reinforcement and record data and progress on goals. Also, Student did not establish that she would get up and walk around the bus while it was in motion. Because of Student's repeated unfastening of her seat belt, which continued at about the same rate during SY 2009-2010 and the start of SY 2010-2011, which posed a safety hazard, even though the bus drivers could prompt Student to refasten the seat belt, the District should have taken further action to determine the cause of why Student unfastened her seat belt so that behavior strategies could be implemented. The District's failure to conduct any analysis of why Student kept unfastening her seatbelt and to develop a plan to reduce this behavior denied Student a FAPE.

Relief

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

32. Appropriate equitable relief, including compensatory education, can be awarded in a due process hearing. (*Burlington, supra*, 471 U.S. at p. 374; *Puyallup, supra*, 31 F.3d at p. 1496.) The right to compensatory education does not create an obligation to automatically provide day-for-day or session-for-session replacement for the opportunities missed. (*Park, supra*, 464 F.3d at p. 1033 (citing *Puyallup, supra*, 31 F.3d at p. 1496).) An

award to compensate for past violations must rely on an individualized analysis, just as an IEP focuses on the individual student's needs. (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (*Ibid.*) The award may consist of additional training for special education staff. (See *Park, ex rel. Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1034.)

33. Pursuant to Legal Conclusions 12, 15 and 17, the District denied Student a FAPE by failing to develop a BSP and behavioral goals in the April 2010 IEP, until the time of its offer in the May/June 2011 IEP. Additionally, pursuant to Legal Conclusion 23, the District failed to ensure adequate mainstreaming in SY 2009-2010. Student requests that the home program be awarded as compensatory education. However, pursuant to Legal Conclusion 27, Student's home program is too restrictive a placement because Student's needs could be met in the Mark Twain structured SDC. Additionally, Student's behavioral deficits are not so severe that she requires individualized instruction in a home program. Student requires behavior supports and services in a school based setting so she can more easily generalize the skills taught. Therefore, from the date of the decision through December 31, 2012, the District shall provide as a push-in service one hour a week of direct behavioral intervention services to work on Student's behavioral goals and social skills goals related to mainstreaming, during the school year and ESY. The behavioral intervention services shall be provided by an ABA trained tutor or aide supervised by a BCBA.

34. Regarding the District's failure to meet Student's transportation needs, Legal Conclusion 30, while she did not require a one-to-one aide on the school bus, the District still should have conducted, by December 2010, an analysis of the reasons why Student kept unfastening her seat belt and developed strategies to teach her not to do this, such as a visual schedule. Therefore, Parents are entitled to reimbursement for one round trip a day from their home to Michelson.

35. Parents may receive reimbursement for a unilateral placement if it is appropriate. (34 C.F.R. § 300.148(c); *Florence County Sch. Dist. Four v. Carter* (1993) 510 U.S. 7, 15-16 [114 S.Ct. 361, 126 L.Ed.2d 284] (*Carter*).) The appropriateness of the private placement is governed by equitable considerations. (*Carter, supra*, 510 U.S. at pp. 15-16.) The placement need not provide the specific educational programming necessitated by the IDEA. (*Alamo Heights Indep. Sch. Dist. v. State Board of Educ.* (5th Cir. 1986) 790 F.2d 1153, 1161.)

36. A unilateral placement does not have to offer every service needed to maximize a student's potential. However, the unilateral placement does have to provide specialized instruction designed to meet the student's needs as well as any support services the student needs to benefit from that instruction. (*Gagliardo v. Arlington Cent. Sch. Dist.* (2d Cir. 2007) 489 F.3d 105, 112.) In *Gagliardo*, the private school offered the intensive reading and writing instruction that the student required, but it was unable to meet the student's need for treatment of his anxiety disorder. The Second Circuit held that the

alternative chosen by parents was inadequate and that reimbursement was not appropriate. (*Id.* at pp. 113-114; see also, *Teague Indep. Sch. Dist. v. Todd L.* (5th Cir. 1993) 999 F.2d 127, 132-133.) A claim for reimbursement may fail if the student makes limited to marginal academic progress in the private placement. (*Corpus Christi Indep. Sch. Dist. v. Christopher N.* (S.D.Tex. 2006) 45 IDELR 221, 106 LRP 27898.)

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

38. Student requested reimbursement for her home based program and for the unilateral parental placement as compensatory education because the District's offer for SY 2011-2012 did not provide her with a FAPE. Regarding compensatory education, the District's failure to provide FAPE as to Student's behaviors and transportation limited Student's ability to access her curriculum and interact with typically developing peers. The skills Student requires are school based so she can succeed and the home program only further isolates Student and degrades her ability to learn in a group and interact with her classmates and typically developing peers. Therefore, Student is entitled to compensatory education, but it needs to be provided at the school site through the push-in services in Legal Conclusion 33.

39. The District's May/June 2011 IEP provided Student with a FAPE. Therefore, Student did not establish any grounds for relief that the District should reimburse Parents for the unilateral home program.

ORDER

1. As compensatory education, beginning immediately in January 2012, through December 31, 2012, the District shall provide, as a push-in service, one hour a week of direct behavioral intervention services to work with Student on her behavioral goals and social skills goals related to mainstreaming, both during the school years and during the 2012 ESY. The behavioral intervention services shall be provided by an ABA-trained tutor or aide, and supervised by a BCBA.

2. Within 60 days of this decision, the District shall reimburse Parents for the period from the first day of school of January 2011 through the end of SY 2010-2011, for one round trip for each school day that Student attended school, at the 2011 Internal Revenue Service mileage reimburse rate.

3. All other Student's request 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. Student prevailed on Issues 1a, 1b, 2b and partially on Issues 1e and 2d. The District prevailed on Issues 1c, 1d, 2a, 2c, 2e, 2f, 3a, 3b, 3c, 3d, 3e, 3f, and 3g and partially on Issues 1e and 2d.

RIGHT TO APPEAL THIS DECISION

This is a final administrative Decision, and all parties are bound by this Decision. The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this Decision. (Ed. Code, § 56505, subd. (k).)

Dated: January 9, 2012

/s/

PETER PAUL CASTILLO
Administrative Law Judge
Office of Administrative Hearings