

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
SPECIAL EDUCATION DIVISION  
STATE OF CALIFORNIA

In the Matter of:

STUDENT,

Petitioner,

v.

ARCADIA UNIFIED SCHOOL DISTRICT,

Respondent.

OAH CASE NO. N 2007080097

**DECISION**

Elsa H. Jones, Administrative Law Judge, Office of Administrative Hearings, Special Education Division, heard this matter on December 13, 14, 17, 18, and 19, 2007, and January 10, 2008, in Arcadia, California.

Student was represented by Mandy S.L. Favaloro, Attorney at Law, and N. Jane DuBovy, Attorney at Law, of A2Z Educational Advocates. On the afternoon of December 17, 2007, Jennifer Williams, Attorney at Law, also of A2Z Educational Advocates, attended the hearing in place of Ms. DuBovy.

Student's mother (Mother) was also present on Student's behalf. Kayo Alexander, a certified Japanese interpreter, was present on December 13, 2007, the afternoon of December 14, 2007, December 17, 2007, and December 18, 2007, to interpret the proceedings for Mother. Ted Miyagi, a certified Japanese interpreter, was present on the morning of December 14, 2007, to interpret the proceedings for Mother. Sadaaki Matsutani, a certified Japanese interpreter, was present on December 19, 2007, and January 10, 2008, to interpret the proceedings for Mother.

Respondent Arcadia Unified School District (District) was represented by Angela Gordon, Attorney at Law, of Fagen Friedman & Fulfroost LLP. David Muñoz, Ph.D., Director of Special Education for the District, was also present on District's behalf.

Sworn testimony and documentary evidence were received at the hearing. At the conclusion of the hearing, the parties stipulated on the record that closing briefs would be filed by January 31, 2008, and to waive the 45-day period provided for decision provided in Education Code section 56505, subdivision (f)(3). The parties further stipulated that the decision would be issued on February 29, 2008. OAH received the parties' closing briefs on February 1, 2008, and the matter was submitted.

## ISSUES

1. Did the District deny Student a free appropriate public education (FAPE) as of April 16, 2007, by failing to provide prior written notice to Student's parents regarding the discontinuation of Student's access to Cyberlink Brainfingers (Brainfingers) at school?

2. Did the District deny Student a FAPE from April 16, 2007, through the date of filing of the due process complaint, by failing to include Student's parents in the process by which the decision was made to discontinue Student's access to Brainfingers at school, including failing to discuss the issue at an Individualized Education Program (IEP) meeting before the decision was made to discontinue Brainfingers and before Student's access to Brainfingers was discontinued?

3. Did the District deny Student a FAPE from fall 2005 through the date of filing of the due process complaint, by denying Student access to Brainfingers or any other appropriate assistive technology (AT) in the form of an alternative augmentative communication (AAC) device?

## REMEDIES REQUESTED

Student seeks revision of his Individualized Educational Program (IEP), to include Brainfingers as an AT/AAC device that is necessary to provide Student with a FAPE and to provide that he have access to the device at home and at school. Student seeks compensatory education as a result of being deprived of Brainfingers. Student seeks access to Brainfingers for at least two or three hours per week, by a trained provider, including access at home and at school, at District expense. Additionally, Student requests that the District provide the service provider his or her own Brainfingers system. Student also requests that the District provide reimbursement to Student's parents for the cost of the Brainfingers system they purchased for Student to use at home. Student also seeks training on Brainfingers by Andrew Junker, Ph.D., pursuant to a specific training program, for all people assisting Student, including his parents, at District's expense. Further, Student requests that the trained provider shall be trained by Dr. Junker, pursuant to a specified training regimen, and that the trained provider undergo training for as long as he or she provides services to Student regarding Brainfingers, all at District's expense.

## CONTENTIONS OF THE PARTIES

Student contends that use of Brainfingers at home and at school is required to provide him a FAPE. He further contends that the District's unilateral decision to remove Brainfingers from his classroom in April 2007 violated the procedural safeguards of the IDEA and thereby constituted a procedural denial of a FAPE. He also contends that the District's failure to provide him with any appropriate assistive technology for communication purposes during the time period from fall 2005 through the present denied him a FAPE.

District contends that it provided Student a FAPE. District contends that Student cannot learn to use Brainfingers effectively, and that use of Brainfingers is not necessary for Student to communicate or to access his education. District further contends that the choice of AT devices and educational methodology, such as Brainfingers, is solely within the purview of the District, and therefore it was entitled to unilaterally decide to remove Brainfingers from Student's classroom without prior written notice. District also contends that Brainfingers is not a peer-reviewed technology and therefore the District is not obligated to offer it. District further contends that Student was continuously provided with assistive technology for communication purposes since fall 2005.

## FINDINGS OF FACT

### *General Background and Jurisdictional Matters*

1. Student was born on October 5, 1988. He is 19 years old and has resided in the District at all relevant times. Mother is his court-appointed conservator. He is eligible for special education as a student with multiple disabilities.

2. In May 1991, when Student was two years and seven months old, he had a near-drowning experience which resulted in severe brain damage and severe developmental disabilities. His medical history includes anoxic encephalopathy, spastic quadriplegia and seizure disorder, tracheostomy, and mild neuropathic scoliosis. Student had spinal fusion surgery in February 2003, when he was 14 years old, and a month later had a pneumothorax and pneumonia. He also was hospitalized with pneumonia in March 2006, when he was 17 years old. Student takes medication for the seizure disorder, but he still suffers from approximately 20 to 30 seizures a day. The severity of his seizures has varied over the years. Most recently, most of Student's seizures have been of a relatively short duration, lasting approximately three minutes, but ranging from approximately one minute to five minutes. After the seizure passes he requires three to five minutes to recover movement and three to five minutes to recover the ability to communicate, depending upon the severity of the seizure. He fatigues easily, and when he is fatigued or stressed, the number of his seizures increases.

3. Student is wheelchair-bound, and needs nearly complete assistance in most activities of daily living and self-care. He is fed through a gastrostomy tube, and he requires suctioning. He is prone to infections. He has 24-hour nursing services due to his medical needs.

4. Student is in the profoundly developmentally delayed range of cognitive and social/adaptive skills based on the Southern California Ordinal Scales of Development. He functions in the profound range of mental retardation, with a cognitive level estimated at anywhere from less than 12 months to 18 months. His motor skills are minimal. Volitional movement is difficult for him. Student performs most manual tasks with hand-over-hand assistance.

5. Student is non-verbal. He has some receptive language capacity. That level is difficult to determine due to his seizure activity and his disabilities. Those who work closely with him can identify a "yes" response, which varies according to the person. Sometimes it is an eye gaze, sometimes a smile, sometimes a lip movement or swallowing, sometimes it is another indicator. The "yes" response is not entirely reliable. For example, Student also smiles when he is having a seizure. Student does not have an identifiable "no" response. Some of those who work with him consider the absence of a "yes" response to a question to be a "no" response, but his absence of a response may also merely be a non-response. He can respond to verbal cues. He has a delayed response time of 10 to 20 seconds. Student recognizes some voices, such as Mother's and his nurse's. He enjoys listening to music. He requires verbal cuing to focus on tasks.

6. Student is legally blind. His vision is affected by several factors. His left eye turns outward and his right eye is his dominant eye. His vision is approximately 20/400. Significantly, the severe brain damage he suffered as a result of his near-drowning accident included damage in his visual cortex area and damage to the optical nerve pathway. This has resulted in cortical vision impairment, which means that the visual centers of his brain do not process visual information normally. This condition affects his central vision to a greater degree than his peripheral vision.

#### *Summary of Student's Educational History in the District*

7. Due to his fragile physical condition, Student's special education program in the District immediately prior to July 2005 had consisted of home hospital instruction through the District and the Los Angeles County Office of Education (LACOE). He has received physical therapy from a non-public agency (NPA), paid for partly by the District. At all relevant times, Student's curriculum has consisted of the curriculum adopted by California's Special Education Administrators of County Offices (SEACO), as modified by the LACOE adapted core curriculum. The core curriculum is based on state standards, and modifies the standard curriculum based upon the child's functional level. District has classified Student as an English Language Learner, whose primary language is Japanese. He is taught in English.

8. At the IEP meetings held on December 14, 2004, and June 16, 2005, Mother requested that Student attend school so that he could socialize with his peers. The IEP team at the meeting on June 16, 2005, agreed that Student's education would include a classroom component in addition to his home hospital instruction. Thereafter, Student attended a special day class at Lincoln Principal's Administrative Unit (Lincoln), a LACOE facility. At all relevant times, the student population at Lincoln consisted entirely of special education students.

9. Student began attending Lincoln during July 2005, one day per week for one hour, accompanied by mother and the home duty nurse. He followed this schedule for four weeks. The IEP team, whose members included Dr. Muñoz, the District's Director of Special Education, met on September 22, 2005, and agreed that Student would attend Lincoln on Mondays, Wednesdays, and Fridays during the school year, while receiving home hospital instruction for one hour per week on Tuesdays and Thursdays. As part of the discussion regarding Student's attendance at Lincoln, the team discussed Student's seizures, Dr. Carter, a LACOE medical consultant, informed the IEP team members at the meeting regarding seizures. He advised the team that after three minutes of seizure, brain cell injury occurs, and after five minutes, brain cell death occurs. The team decided that a health care assistant or nurse would be required to accompany Student on the school bus and at school. Mother requested that a conference be arranged with Student's classroom teacher at Lincoln to discuss technology and voice output software.

10. At an IEP team meeting of February 28, 2006, the team agreed that Student would receive 30 minutes of group speech and language instruction one time per week, on an informal basis, to the extent it coincided with the times he was at Lincoln. At Mother's request, the team changed the group speech and language instruction from informal to formal in an addendum IEP dated March 17, 2006. At that time, the team specified that the group speech and language instruction would occur four times per month and added a communication goal to Student's IEP. At an IEP meeting on January 11, 2007, Mother requested that Student receive home hospital teaching four days a week during the winter months. Mother was concerned that Student would contract an illness if he attended Lincoln during the colder weather. The IEP team agreed that Student's attendance at Lincoln would decrease to one day per week for one hour, beginning February 1, 2007, until April 2007, and that his home hospital instruction would increase to one hour, four times per week. The team decided that, as of April 9, 2007, Student would again attend Lincoln on Mondays, Wednesdays, and Fridays, for one hour each day, and his home hospital instruction would then decrease to one hour every Tuesday and Thursday.

*Whether District was Required to Provide Student Access to Brainfingers to Provide a FAPE*

11. The issue of whether District was required to provide Student access to Brainfingers to provide a FAPE to Student is a theme that connects each of the three issues presented for decision at hearing. The determination of this issue provides a foundation for discussion of those three issues. A school district provides a FAPE if the school district's program was designed to address the student's unique educational needs, was reasonably

calculated to provide the student with some educational benefit, and comported with the student's IEP. If the school district's program meets these requirements, then the district has provided a FAPE even if the student's parents preferred another program or methodology, and even if parents' preferred program would have resulted in greater educational benefit. Educational benefit in a particular program is measured by the degree to which the student is making progress on the goals set forth in the IEP. An IEP is evaluated in light of information available to the IEP team at the time it was developed; it is not judged in hindsight.

12. An IEP team must consider whether the student requires assistive technology and, if so, the nature and amount of such services must be set forth in the IEP. If assistive technology is required to meet the student's unique needs, and to provide the student with an educational benefit, then the district's failure to provide it is a denial of a FAPE.

*Student's Access to AT Devices, including Switches, Computers, and ACC*

13. One focus of Student's education in the District since at least December 2000, when Student was 12 years old, has been training Student in the use of a switch. Switches enable a severely disabled person to independently access devices, such as voice-output devices, as well as television, radio, CD players, appliances, and other apparatus. Additionally, use of a switch can help Student access his curriculum, such as using reading programs and conducting research on a computer.

14. On December 6, 2000, Student was initially evaluated by Cynthia Cottier, a private speech-language pathologist and certified augmentative communications specialist retained by the District. Ms. Cottier received her B.A. in Speech Communications and Disorders in 1976 from the University of Southern California. She received her M.A. in Communicative Disorders in 1980 from California State University, Long Beach, and her M.Ed. in Special Education in 1991 from California State University, Los Angeles. Ms. Cottier has been a practicing speech and language therapist since 1980. A purpose of her evaluation was to determine what type of switch Student could use. At that time, Ms. Cottier recommended that Student use a grasp switch, a switch that, when squeezed, would activate a computer, a radio, or another appliance or apparatus.

15. On February 27, 2002, Ms. Cottier was again retained by the District to re-evaluate Student, because Student's switch-activation skills had improved and Student appeared able to increase his use of AT. In January 2004, the District retained another consultation from Ms. Cottier because Mother had observed that Student was having more difficulty using the grasp switch. At that consultation, Ms. Cottier noted that Student's physical status had changed and he was having difficulty squeezing the grasp switch with enough force to activate it. Student was also having difficulty releasing the switch. Therefore, Ms. Cottier recommended use of a twitch switch, a very sensitive switch, which can be activated by the slightest touch.

16. Thereafter, in September 2004, the District requested Ms. Cottier to provide monthly consultation sessions because Student's physical ability to operate the twitch switch had diminished, and it was necessary to re-consider its use. The switch required too much motor planning to use, and Student was unable to reliably use it as a primary communication activator.

17. Ms. Cottier began the monthly consultations in October 2004. At that time, she and Student's speech-language pathologist noted that Student habitually held his right hand up by his right shoulder and lifted his fingers when attempting to activate a switch. They therefore agreed that a proximity switch, specifically the Bubble Touch Sensitive Switch (bubble switch) was appropriate and functional if placed just above Student's right shoulder. In a written report dated December 11, 2004, Ms. Cottier noted that not enough time had passed for identifiable progress to have occurred in Student's use of the switch. She also noted that Student demonstrated purposeful intent to activate the switch, but that his physical condition made it difficult for him to activate the switch in a timely manner.

18. Ms. Cottier reported on Student's progress with the bubble switch in a report dated June 10, 2005. Ms. Cottier noted Student's history of using switches and his difficulty consistently activating switches because of his fluctuating physical capabilities. Moreover, Student's wheelchair positioning changed from day-to-day, requiring alterations in the position of particular switches. The bubble switch was chosen to avoid this positional difficulty, and because it could be activated with only a light touch or proximity (via body heat). Ms. Cottier reported that Student demonstrated the ability to activate the switch up to 15-20 times within a 15-minute period. However, at other times, he could not activate the switch more than 2-3 times during a 60-minute period. Ms. Cottier reported that other service providers had also noticed Student's inconsistent ability to activate the switch. Ms. Cottier considered whether Student should activate the switch by dropping his fingers rather than raising them, but concluded that would not be appropriate because Student drops his fingers when he is tired. Therefore, the number of errors in switch use would increase. Also, she noted that the only way to definitely determine whether Student was intentionally attempting to use the switch was if he used a motor movement such as raising his fingers. Ms. Cottier noted that there was no perfect solution for Student, and that service providers must be intuitive to Student's needs and make accommodations in accordance with Student's physical status on that particular day. She also recommended that when academic or substantive information was obtained from Student, more reliable methods, such as eye gaze and/or facial expressions, should be used, and the switch should be used for less cognitively-demanding activities.

19. Ms. Cottier also reported on Student's use of a computer. Her report noted that a desktop computer had been previously provided by District, and she thought it had been loaded with *Speaking Dynamically Pro* software, as Ms. Cottier had previously recommended. Mother had returned the computer because it became non-operational. Mother had a laptop that Student could use, but a USB interface was required. Ms. Cottier recommended that the District provide the USB interface, as well as another CD of the *Speaking Dynamically Pro* software. She also described the computer displays that she had

created for the computer to allow Student to select between two choices, such as “listen to music/watch TV,” “and get out of his chair/work longer.” Additionally, Ms. Cottier noted that she had developed a two-switch system for Student to use for electronic auditory scanning, since he was having difficulty employing motor planning to activate a switch in a timely manner to make reliable selections, even at a slow scan speed. One switch was designed to let Student move through the selections at his own pace, and was activated by raising his fingers, and the other switch was placed near his hand for use in making his selection.

20. Ms. Cottier evaluated the two-switch system in her report dated December 2, 2005. She reported that Student was having difficulty using this system because of his variable physical condition, and that use of even sensitive proximity switches such as bubble switches was fatiguing. Further, Student was positioned differently each time he was placed in his wheelchair, and thus the switches had to be repositioned often, which led to difficulty in accurately activating the switches. Student’s frequent seizures and coughing often caused the switches to be activated in error, as did Student’s tendency to drop his fingers when he was tired, or when he had seizures or coughing episodes. She again noted that Student’s success at communication efforts depended upon teachers and caregivers being aware of and accommodating Student’s day-to-day physical status, and using eye gaze and facial expressions to obtain academic or cognitively demanding information from Student. She also noted that Student had been provided with a laptop computer and the *Speaking Dynamically Pro* software. She reported that Student was not using the location displays she had created for true communication, but she hoped that his school attendance would generate ideas for other displays or activities that might be more successful. She recommended continuing to work towards developing a functional and reliable communication system, and noted that the school had qualified staff to provide the necessary services to develop Student’s communication system, and traditional as well as “more unique technology” that might be appropriate for Student. She recommended that the school staff provide consistent services at the school site and that her services be decreased.

21. The District consistently followed Ms. Cottier’s recommendations regarding the types of switches Student should use, and provided all of the switches and technology that she requested for Student. All of Student’s IEPs in evidence, including his December 14, 2004, IEP and his December 8, 2005, IEP reflect his successful use of switches to complete various communication, recreation/leisure, and daily living skills goals. These IEPs included references to a “sensitive switch mechanism,” a “switch mechanism,” and a “mercury switch,” which were used to activate various appliances and devices, including voice output devices. A mercury switch is similar to a twitch switch, in that it involves only a slight movement to activate the switch.

#### *Student’s Access to Brainfingers at Home and at Lincoln*

22. Danise Marler has been Student’s special education classroom teacher since he began attending Lincoln in 2005. Ms. Marler holds a Clear Level II Education Specialist Instruction Credential in Moderate/Severe Disabilities. She received her B.A. in Child

Development and her M.A. in Special Education (Moderate/ Severe/Multiple Disabilities) from California State University, Northridge. In 2004, Ms. Marler had written her master's thesis on the use of Brainfingers by students with multiple disabilities. At some point in 2004 or 2005, Meg Tan, Lincoln's principal, gave Ms. Marler permission to use Brainfingers in the classroom.

23. Brainfingers is a system of computer hardware and software that provides hands-free access to a computer. It was invented by Andrew Junker, Ph.D., an electrical and control engineer and former Air Force officer who resides in Ohio. Dr. Junker received his B.S.E. in Electrical Engineering from the University of Connecticut in 1965, his M.S. in Control Engineering from the University of Connecticut in 1967, and his Ph.D. in Control Theory and Neural Physiology, from the Electrical Engineering Department, University of Connecticut in 1987. Dr. Junker's company, Brain Actuated Technologies, Inc. (BAT), sells Brainfingers and provides training and consultation regarding its use. Brainfingers was not initially developed for use by special education students, and Dr. Junker has no training or background in special education or the abilities and needs of severely disabled children. Dr. Junker is currently involved in promoting Brainfingers as a video gaming device. Brainfingers uses specialized software, but once one is trained in Brainfingers, one can also use Brainfingers with universal software. Consequently, Brainfingers can potentially enable physically disabled users to use a computer and access the internet just as an able-bodied person might do.

24. The Brainfingers hardware includes a headband, which is connected to an interface box, which is, in turn, connected to a computer which is loaded with Brainfingers software. The headband contains metal sensors, which detect electrical signals generated by facial muscle movement, eye movement, and brainwave activity. The sensors transmit these electrical signals to the interface box, where they are amplified and digitized. They are transmitted through the box to the computer, where the Brainfingers software further amplifies and decodes the signals into eleven separate frequency bands.

25. The training software for Brainfingers includes a variety of computer games and activities designed to teach the user how to control the user's facial muscles, eye movements, and brainwaves so as to click and move the computer cursor. After the user places the headband, adjustments are made to the computer program to coordinate it with the brainwaves, eye movements, and muscle movements of the user. The training games include Pong, in which the user moves a virtual paddle vertically to hit a virtual ball to the computer's "side" of the screen; the "grow game" in which a circle containing a variety of colored bands is enlarged and diminished and the user attempts to limit the growth of the circle to a particular colored band; and several timed mazes in which the user attempts to maneuver the cursor through the mazes. During certain games, the computer will chime when the user successfully maneuvers the cursor. The games can be made more difficult or more simple by adjusting functional aspects of the games, such as increasing or decreasing the speed of the Pong ball. Due to Student's disabilities, someone must be present when Student uses Brainfingers to properly set up the system, place the headband on Student's head, and adjust the Brainfingers software to the appropriate sensitivities. Someone must

also be present while Student plays the training games to adjust such factors as the speed of the Pong ball, or other variables to make the games simpler or more difficult for Student, and to provide Student prompts and direction.

26. Brainfingers can be used with universal software, such as reading programs, and other academic computer programs. It can provide numerous choices on one screen. It can provide access to the internet, including internet communications, video games, and radio and television stations.

27. The provider who works with Student on Brainfingers would require a minimum of 10 hours of training to learn how to use the device and its specialized software. Thereafter, the provider would require additional training to learn to teach Student how to use universal software. Ongoing training of Student's provider and ongoing consultation by Dr. Junker, or someone similarly familiar with Brainfingers would be needed for as long as Student used Brainfingers.

28. In approximately 2005, Mother requested that Ms. Marler begin working with Student on Brainfingers when Student was present in Ms. Marler's classroom. Ms. Marler was only able to devote approximately 30 minutes to one hour per week working with Student on Brainfingers, when he was attending her class three times per week. Ms. Marler could not devote more time to this task, due to the brief amount of time Student spent at Lincoln, his seizure activity and fatigue, her other classroom obligations, and Student's other classroom activities. Student's other activities included interacting with the other students, doing arts and crafts, and participating in assemblies.

29. At the March 17, 2006, addendum IEP meeting, discussed above, Mother requested that one of Student's one-hour sessions at Lincoln be extended for 30 minutes, so that he could have more time to work on Brainfingers. Ms. Marler reported that Student could not use Brainfingers when he had seizures, appeared fatigued after each one-hour session, and expressed her concern that he would regress if he were taxed too much physically. Therefore, the team declined at that time Mother's request to extend his time at Lincoln.

#### *Student's Triennial Assessments*

30. At Student's triennial IEP meeting on December 4, 2006, when Student was 18 years old, Mother requested that the District obtain Brainfingers for Student to use at home. Mother's request was motivated by the limited amount of time available for Student to work on Brainfingers at Lincoln, and her desire that he use his time at Lincoln to interact with his peers.

31. Prior to the triennial IEP meeting, the District had conducted a triennial psychoeducational assessment. Diana Hampton, the school psychologist; Ms. Marler; Dayle Chakerian Armstrong, Student's physical therapist; and Ms. Hanawalt, Student's speech and language teacher at Lincoln, assessed Student prior to the triennial IEP meeting.

32. The psychoeducational report prepared by Ms. Hampton noted Student's health history, his medications, and the services the District provided at home and at school. The report listed Student's results from the last triennial assessment in November 2003. On the Vineland Adaptive Behavior Scales, with Mother and his day nurse as informant, Student was functioning between a low of 1 month in the Socialization Domain, to a high of 11 months in the Communication Domain. On the Southern California Ordinal Scales—Cognition, his Functional Level was 1-4 months, with a Basal Level of 1 month and a Ceiling Level of 4 months. On the Southern California Ordinal Scales—Social Affective, his scores were the same as his Cognition scores. On the Fairview Development Scale his score was 3 months.

33. The testing performed on November 14, 2006, and November 21, 2006, revealed that Student received the same Functional Level scores as at the previous triennial on the Cognition and Social Affective portions of the Southern California Ordinal Scales. Ms. Hampton noted that, due to Student's medical condition, he did not participate in formal cognitive measures and the information gained about his current functional level in the areas of intellectual and cognitive ability were based on observation, and interviews with Ms. Marler, Ms. Edberg (Student's home hospital teacher), Ms. Hanawalt, a parent interview, and information from previous assessment reports.

34. Ms. Hampton, the school psychologist, reported that Student was observed in his home on November 14 and November 21, 2006, with Mother, his nurse, and Ms. Edberg present. Ms. Hampton reported that Student used a sensitive string switch, which Student pulled with his right hand to make a drum produce sounds or to turn on a vocal device. With hand-over-hand guidance, Student could touch objects, use a stamp, and cut and paste a poem onto a piece of paper. Ms. Hampton reported that Student was working to increase his ability to use switches to activate a voice output device and electrical appliances/devices. He used a grasp switch and gained information visually, which helped him to distinguish between objects on his own by manipulating them. He responded to verbal cues, such as, "[Student], look." Ten to 20 seconds would elapse after such cues for Student to respond and focus on the task presented by the teacher. Sometimes, Student did not respond to the verbal cue, or he would yawn to show his lack of interest. Ms. Hampton reported that this was important, because it demonstrated an awareness of objects, and that Student focused on Ms. Hampton. Ms. Hampton concluded that Student appeared to be able to locate visually the source of sounds. Ms. Hampton noted that Student's ability to perform tasks was interrupted by seizures. Mother reported that Student's learning opportunities occur between his seizures.

35. Ms. Hampton noted Student's use of Brainfingers at school. She noted that Mother liked the Brainfingers program because Mother had seen progress in Student's development with use of the device. Through use of Brainfingers, Student had been exposed to communication software, academic software, and turning the pages of e-books on the computer. Ms. Hampton noted that Student had used the device a total of 10 times during the 2006-2007 school year, but his seizures and fatigue limited the amount of time he was able to use Brainfingers. Ms. Marler reported to her that Student accessed Brainfingers for

one hour on one occasion. Ms. Marler used verbal cuing or pointing to assist Student when he used Brainfingers.

36. Ms. Hampton noted that Student was fatigued after seizures, and must be permitted to rest after each one. She noted that he would sometimes initiate a response and activate a switch device, and he activated the string switch twice without hand-over-hand guidance. She noted that Student would need adapted materials, and adapted instructional strategies, such as hand-over-hand guidance, cueing, prompting, and repeated trials, to master content. Even though Student may have mastered certain skills, adult presence, if not full adult assistance, was required for Student to participate in normal settings. Ms. Hampton reported that the skills Student has previously acquired would be lost without regular practice, and strategies should be developed to insure that skills learned in one context would generalize to another.

37. In the area of Adaptive Behavior/Independent Living, Ms. Hampton concluded that Student's social adaptive skills were as delayed as his cognitive abilities. Both skill sets fell significantly below his age level expectancy and were in the profoundly delayed range.

38. In the social/emotional area Mother reported that Student liked to listen to music, and annually participated in carving the turkey during Thanksgiving.

39. Ms. Hampton also reported on Student's language/communication skills. She reported that Student's "abilities to comprehend the communications of others and the meaning and sequence of events around him continue to be around the earliest stages of development." She noted that Student communicated through facial expressions, and was reported to recognize the voices of familiar people. She referred to and summarized portions of the February 28, 2006, report of Ms. Hanawalt, Student's speech and language teacher at Lincoln. In the perceptual/motor category, Ms. Hampton noted that Student's fine and gross motor skills were affected in all areas, including his ability to sustain attention to a task, respond to a task, and to process information. Caregivers must provide lifting and structural support for his body. In the Community/Vocational area, she noted that Student was included in a variety of family activities and gatherings. She concluded that Student required pervasive levels of support to learn or adapt in the areas of cognition, communication, self-care, social, adaptive, and motor skills. He benefited from the teaching offered by Lincoln and he would continue to benefit from special education, with an emphasis on functional communication and socialization, mobility and basic living skills instruction. She made several recommendations to encourage Student to learn that a specific action will trigger a response, to encourage hand play and hand-mouth coordination, to involve him in community outings for socialization and stimulation, to provide tactile stimulation, and to work on grasping and releasing objects. She recommended "motoring" Student through such activities as hand clapping and picking up and grasping items of various textures.

40. Ms. Hanawalt, Student's speech and language pathologist in his Lincoln classroom, performed a speech and language assessment and prepared a report dated December 4, 2006. The report referred to Ms. Hanawalt's previous assessment report dated

February 28, 2006. Ms. Hanawalt's February 28, 2006, report was a comprehensive assessment, based upon observations, interviews with staff and Mother as well as his nurses, and interaction with Student. She commented on his inclusion in the speech/language group in the Lincoln classroom, which involved large and small group activities to experience group interaction. All participants were nonverbal, and adults would "speak" for the participants.

41. Ms. Hanawalt's February 28, 2006, report noted that Student was dependent on others for all his physical needs, and that he needed a communication partner to provide much assistance in delivering messages to him and verbalizing for him. He has had "a great deal" of training with switches and voice output devices with some success. His physical limitations, processing delays, and seizures made it difficult to distinguish between his intentional responses and reflexive responses, though people who were familiar with Student could tell the difference. As for receptive language, Student recognized Mother's voice, and recognized a change in a teacher's inflection on one occasion. Ms. Hanawalt reported that he responded to some simple directions using Brainfingers when playing Pong, and gazed at the screen with his teacher. Since he does not focus normally, it was difficult to interpret his eye gaze. He listened to a teacher who gave him three choices of colors to use on a project. He responded to each choice, with delay, by smacking his lips together lightly for an affirmative signal. He listened to teachers and stories but had not answered "yes" without a verbal cue from the home and hospital teacher. Responses can take 10 seconds or longer. It was difficult for her to know how much he understood without further experiences with him and consultation with Ms. Cottier.

42. Ms. Hanawalt reported that Student was using a step-by-step communicator, and depressing it with his hand mounted at shoulder level. He had reportedly told jokes to his neurologist using his voice-activated communication device, which required him to push once to obtain a series of sentences spoken out loud. He had been putting his lips together intentionally to indicate "yes." His communication partner must verbalize Student's message after he delivers it, having read Student's body language, situational cues, vocalizations, voice output communication aid (VOCA), and Student's affirmative responses or non-responses. The partner then needed to respond to the message in another sentence and to confirm the accuracy of the message. Student was using the computer program *Speaking Dynamically Pro* and had been using Brainfingers at school with "successful activation" by using brain waves, eye movements and facial muscles.

43. Ms. Hanawalt's recommendations included, continued teaching to stimulate receptive language and verbal comprehension, continued use of "yes" response, learning language for his expressive output choices, and suggestions for his communication partners. Such partners should include his family members, good friends, classmates, and teachers, and their communication strategies may vary. She also recommended a speech-language pathologist be involved with Student's communication systems and receptive language input, and to consult regarding the use of communication partners.

44. Ms. Hanawalt's December 4, 2006, report largely reflected what she had reported in her February 28, 2006, report. She stated that Student's health was improving, and he had been successfully using a mercury switch with a step-by-step communicator. He could activate the switch at least two times and he could use it to activate a "joke machine." She also reported that he used a bubble switch, although he had to hold his hand up. He focused on pictures and objects with his eyes, and could make choices by gaze between two objects presented one at a time. Seizure activity had limited fluent back-and-forth interactions, but he has been able to respond by moving his mouth when told, "If you want \_\_\_, move your mouth" at least one time per session. Mother had him greet people by letting him look at them, or smile, or move his mouth.<sup>1</sup>

45. Dayle Chakerian Armstrong, Student's physical therapist, performed a re-evaluation in December 2006. Dr. Armstrong has been Student's physical therapist since March 2005. She received a B.S. in Physical Therapy in 1984 from Mount St. Mary's College, an Advanced M.S. degree in Physical Therapy with a Clinical Specialization in Neurological Disorders in 1991 from the University of Southern California, and her Doctorate of Physical Therapy in July 2007 from Western University. She reported on his health history, on the equipment and orthotics he uses, on his reflexes, his cranio-bulbar and orthopedic status, and treatment recommendations. She noted he has used various switches, and most recently he had used a mercury switch and a string switch. He could use a switch to activate a blender and a power knife, and "loves" to activate a drum and a "joke maker." She also reported that Student's seizure activity increased in June/July.

46. Dr. Armstrong also reported on Student's cognition and communication. She reported he turned his head when his name was called and would also turn his head in the direction of a voice or sound. He smiled upon entrance of familiar people. He expressed some needs, contentedness, and discomfort through facial expressions and moans. He could make an "um" sound, infrequently, to answer or make choices. He indicated "yes" by swallowing or moving lips together. She noted his use of a step-by-step communicator, which he used in class and on outings. She observed him using Brainfingers on a DVD, and he "definitely" enjoyed his successes while using it.

47. Ms. Marler, Student's special education teacher at Lincoln, also assessed Student as part of the triennial IEP. She wrote a report dated December 1, 2006. In her report, she described Student's history in her classroom. She noted that in October 2005, Student's classroom visits increased from one time per week for one hour to three times per week, one hour per session. These visits were to continue working on Student's socialization skills, as well as to further evaluate his ability to operate Brainfingers. Ms. Marler reported that at the IEP meeting on December 8, 2005, she began to collaborate with Student's

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<sup>1</sup>Ms. Hanawalt's December 4, 2006 report was admitted into evidence as administrative hearsay, pursuant to Government Code section 11513. It supplements and explains Ms. Hanawalt's statements as recorded in the triennial IEP of December 4, 2006 and January 11, 2007, the testimony of Ms. Hanawalt and others at hearing, and other assessment reports.

home/hospital teacher on Student's IEP goals and objectives, as well as work more extensively with Student on Brainfingers.

48. Ms. Marler noted that Student seemed to enjoy interacting with the other students in the classroom. He would frequently fatigue within fifty minutes of his hour-long visit, however, due to all of the sensory stimulation in the classroom. As he tired, his seizure activity increased. Occasionally, he would fall asleep. He would often arrive at school in a seizure episode and continue to seize throughout his one hour visit.

49. Ms. Marler reported that as a result of his "normal" seizure activity during his one hour at school, it was difficult for her to adequately evaluate his aptitude to use Brainfingers. He managed the system very well on a good day when he was not seizing very much. He could focus on the computer for thirty continuous minutes, operate switch software, and was developing his ability to perform left button mouse functions to move the cursor and operate simple software with communication and educational functions. When Student had a seizure, the brain signals with which Student operated the system became nonfunctional. The seizures would last an average of five minutes and then Student required two minutes of recovery time. At that point, he was able to continue. If he had a cluster of seizure activity, however, he could not operate the system until the seizures subsided.

50. Ms. Marler reported that he met or made progress towards several of the goals of his previous annual IEP. In particular, he was able to make progress on a recreation/leisure goal in the classroom to operate a computer using a switch mechanism to use various software, as measured by observation, for 20 minutes for a period of a week. She reported he was able to use Brainfingers to progress towards this goal, as he could access switch software by use the Brainfingers training software and was learning how to navigate communication software (*Speaking Dynamically Pro* and *Dynavox*). However, due to Student's absences, Ms. Marler's other classroom duties, and Student's seizure episodes, he has not had many opportunities to use the system. Even after a two-month interval of not using Brainfingers, however, she reported that he remembered how to use the system.

51. Ms. Marler reported that he met the recreation/leisure goal of participating in small and/or large group activities with verbal or physical prompts. He made progress in an English language development goal by activating a voice output communication device using a switch mechanism.<sup>2</sup> However, she noted that he preferred to use his facial gestures or other yes/no responses because it was quicker for him. She noted that he appeared to be frustrated and reluctant to use the switches to access the communication device because it seemed to require too much physical effort.

52. Ms. Marler reported that he met some of the benchmarks on a communication goal in that he moved his mouth to indicate "yes," but his "no" response is inconsistent. She

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<sup>2</sup> Ms. Marler testified at hearing that she had worked with Student on Brainfingers regarding this goal. Her report, however, does not specify that she did so.

therefore rephrased questions to obtain a “yes” response, such as “Are you telling me that you don’t want \_\_\_?”

53. Ms. Marler concluded that Student had the ability to learn to use Brainfingers. He followed verbal directions and pointing prompts, could remember how to perform tasks within the system, and was motivated. He had gained access to switch software and with more training could use the system for communication and leisure. She reported that he would benefit from having Brainfingers at home because he would have more opportunities to apply the system at home than at school.

#### *The Triennial IEP Meeting*

54. The first session of the two-session triennial IEP meeting was held on December 4, 2006. The team included Ms. Tan, the school psychologist, a representative of the regional center, Ms. Edberg, Ms. Hanawalt, (the speech/language pathologist), the school nurse, Dr. Muñoz (the District’s Director of Special Education), Dr. Armstrong (the physical therapist), Ms. Marler, a service coordinator, and Mother. Mother signed the IEP. Because Ms. Edberg was unable to attend on December 4, 2006, the meeting was re-convened on January 11, 2007, at which time all of the above-named people attended, except Ms. Tan.

55. The IEP noted Mother’s observation that Student had improved since the last triennial assessment, her concerns about certain aspects of Student’s home to school transportation, and her desire that Student have access to Brainfingers at home. The District requested that research-based evidence be provided to support Brainfingers before the District considered providing it for home use. The team noted Student’s eligibility for special education in the multiple disability category. The IEP described Student’s cognitive and social/adaptive skills as being in the profoundly delayed range, and stated he continued to benefit from the services offered in the Lincoln and home-hospital settings. The team noted that Student’s curriculum emphasized functional communication, socialization, mobility, and basic living skills. The IEP stated that a regular education curriculum was inappropriate because of Student’s low cognitive level and overall developmental skills.

56. The team decided that Student’s services would include individual home hospital instruction, increasing during the winter months, individual physical therapy, AT/AAC consultation eight times per year, and group speech and language (one time per week, at 30 minutes). His core curriculum would include Reading, English/Language Arts, Math, Science, and PE/Health, all to be provided in the home hospital setting. The team contemplated that Student would graduate with a Non-Diploma Certificate.

57. Student’s accommodations included: allow for delayed response, use verbal cueing, hand-over-hand assistance, and switch use. The team specified that the assistive technology Student required was “switches.” Each of Student’s other annual IEPs in

evidence, which includes his December 14, 2004, IEP, and his December 8, 2005, IEP, designated “switches” as a required assistive technology for Student.<sup>3</sup>

58. The team discussed the assessment reports of Ms. Hampton, Ms. Hanawalt, Dr. Armstrong, and Ms. Marler. The school nurse also shared her report. Ms. Edberg, Student’s home hospital teacher, was not present at the December 4, 2006 session. Therefore, the team reconvened on January 11, 2007, to further consider Student’s status and progress with Ms. Edberg present. Ms. Edberg reported that Student continued to need verbal and physical prompts to complete tasks. At times he could activate a switch on his arm, with a delayed response. Mother shared that Student was very happy when he was able to do a task on his own, and wanted him to be as independent as possible in his communications with his caretaker. Mother wanted Student to be able to initiate communication on his own.

59. Mother also requested that Student only attend school once a week during the winter months. The team agreed that Student would attend school for one hour per week beginning on February 1, 2007, with home hospital services increasing to one hour, four times a week. On April 9, 2007, his schedule would revert to the routine of attendance at Lincoln for one hour, three days per week, and home hospital services two times per week for one hour.

60. Dr. Muñoz discussed his research into Brainfingers, which included reviewing Ms. Marler’s thesis and other papers, as well as e-mailing Dr. Junker. Dr. Muñoz reported that his research revealed that Brainfingers could benefit those with higher cognitive functioning than Student, but would not benefit the severely retarded, such as Student. He also reported that Brainfingers was not strongly research-based. The team decided that Student could continue to work on the device while a determination was made, through the collection of data and observation, whether Brainfingers provided Student an educational benefit. Dr. Muñoz would be available on several occasions to observe Student using the device, and, at Mother’s request, the team agreed to contact Ms. Cottier to perform an AT evaluation regarding Student’s ability to use Brainfingers. The team agreed to meet by April 2, 2007, to review Student’s AT needs.

61. The team discussed Student’s transition services, considered Student’s present levels of performance, and set goals and objectives in the areas of Independent Living, Recreation/Leisure, Functional Academics, Vocational, Community/Vocational, Language/Communication, and Communication English/Language Arts. Student had achieved many of his 2005 goals in the areas of Independent Living, Recreation/Leisure, Functional Academics, Vocational, English Language Development, Community/Vocational goals, and Language/Communication goals. None of the goals in this, or any of Student’s

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<sup>3</sup>Student’s December 8, 2005 IEP designated “switches” and also “voice output devices” as AT required by Student. The language goals of the December 14, 2004 IEP and the Language/Communication goal of the December 4 2006/January 11, 2007 IEP mention the use of a voice output device as an alternative method of communication for Student.

previous IEPs, specified that Student would be trained in or use Brainfingers. The Recreation/Leisure goal in the IEP of December 4, 2006/January 11, 2007, referred to Brainfingers, as follows: “In the classroom or during home school time, [Student] will activate a switch, alternate access switch, or the hands free assistive technology interface system to interact with educational or recreational computer software. . . .” The phrase “hands free assistive technology interface” refers to Brainfingers, but does not compel its use to complete the goal. No other goal in any other IEP, including this IEP, referred to Brainfingers. Ms. Edberg, Student’s home hospital teacher who drafted this goal, knew that Student was working with Ms. Marler to learn Brainfingers in the classroom, and included the reference to show that Ms. Edberg was not the only teacher responsible for working on the goal.

*Ms. Cottier’s and Dr. Munoz’s Observations of Student Using Brainfingers*

62. Pursuant to the IEP team’s decision to obtain an AT assessment, on January 26, 2007, Ms. Cottier observed Student using Brainfingers. She documented her observations in a report of that same date. In her report, Ms. Cottier summarized Student’s previous experiences with various switches, as she had documented in her previous reports. In the report, Ms. Cottier expressed her doubt that the use of mechanical, motion, or proximity switches that required Student to perform a specific motor movement would ever be functional as a reliable means of access to a communication system, regardless of the communication hardware or software that was being used. This opinion was based upon Student’s variable physical status and questionable vision, the repositioning that was necessary each time he was placed in his wheelchair, his frequent seizures and coughing, and his tendency to drop his hand when he was tired. She noted a basic principle in selecting an effective augmentative communication or assistive technology system was that the effort to use the system should be minimized, and the motivation and desire to use the system, and the stamina to continue to use the systems, must be at least equal to, or more than, the effort. Furthermore, she noted that the use of these switches required an extreme amount of energy and precise timing which was not compatible with Student’s limited physical abilities. She concluded that the only way for Student to reliably and/or functionally access an electronic communication system would be through a system that did not require Student to physically use his hands, arms, leg, feet, or head in a consistent, and specific, position-determinative, manner. Therefore, Ms. Cottier felt that Brainfingers, a hands-free system, might be appropriate for Student.

63. Student was in his wheelchair during the hour-long observation session, and he experienced several seizures during the session, which impacted his ability to use Brainfingers. Ms. Cottier noted that Student seemed to receive the information best through his central vision rather than peripheral vision. When she observed him, adults were present either to the side or behind him, but they had no physical contact with him. She observed him playing the “click game,” in which he was required to perform a mouse click (a form of functional switch activation) as one of four brightly colored squares randomly appeared on the screen. He was able to accurately click on the target square for a short 3-4 minute period, but for the majority of the activity he erroneously clicked once or twice in between the

appearances of the target squares. Ms. Cottier thought that Student's seizures may have been a contributing factor to some of these error activations. With respect to this activity, Ms. Cottier reported that Student exhibited at least beginning level skills that could possibly allow him to use communication software.

64. Ms. Cottier also observed Student attempt to move the cursor. He could move a circle of the approximate size of a quarter to various areas of the screen but he was not able to move the circle to a specific area and maintain the circle in that location or to click when the circle reached that area. This skill might also be functional if large selection areas were used, and if he did not have to maintain the cursor in that location or click. Again, Ms. Cottier considered that Student's difficulty with this activity may have been due to his physical status and his seizure activity. Additionally, the classroom teacher reported to Ms. Cottier that she was just ready to begin training Student to use cursor control to make choices.

65. Ms. Cottier also observed Student play a Pong game for a short period of time. He was not consistent, but she reported that he was able to return a slow-moving ball approximately 5 times, and that he scored 2 points.

66. Ms. Cottier repeated her conclusion that, in view of Student's physical limitations, questionable vision and his lack of success when using mechanical, motion, and/or proximity switches, Brainfingers "appeared to be a possible means of access" for Student although he would certainly need more training. Due to his seizure activity on the day of observation, which affected his accuracy level, Ms. Cottier felt that she could not determine whether Student could ultimately use Brainfingers so that he could reliably and functionally communicate. She recommended a four-week trial period, during which Student would use Brainfingers for one hour per day. Data would be collected and analyzed to determine Student's accuracy in using Brainfingers and whether he had the stamina to use the system over an extended period of time. Also, during this trial period one could determine whether Student could use Brainfingers to access Student's *Speaking Dynamically Pro* software and the choice-making communication displays that she developed for his laptop, and to participate in academic activities.

67. Finally, Ms. Cottier recommended that her services be discontinued. First, her services teaching Student to use Brainfingers were not necessary, as services at a higher levels were available at Lincoln; second, consultation services at a rate of even as much as once per month would not be sufficient to produce change, especially since prior services had not resulted in success or change. In any event, Ms. Cottier was unable to provide services more frequently.

68. Pursuant to the IEP team's decision that Dr. Muñoz would observe Student's use of Brainfingers, Dr. Muñoz observed Student using Brainfingers in the classroom on three separate occasions. On the second occasion, he observed Student having seizures to such an extent that he could not use Brainfingers at all. At hearing, Dr. Muñoz testified that it appeared to him as though Student was moving the cursor randomly and not with intention.

Dr. Muñoz was concerned about Student's seizure episodes and the manner in which Ms. Marler handled Student during the seizure episodes. He feared that Brainfingers could be causing the seizures, and, in the IEP meeting of September 22, 2005, he had learned that seizure activity can cause further brain damage. He was also concerned that Brainfingers had not been peer-reviewed. He also did not believe, given his observations and Student's seizure activity, that it would be possible, or even appropriate for District to conduct the daily trial that Ms. Cottier had recommended in her report of January 26, 2007. Rather, he believed that such a trial would be more appropriately conducted in a medical or university setting.

69. On March 22, 2007, District convened an addendum IEP meeting to consider Ms. Cottier's report and Dr. Muñoz's observations. Mother, a friend of Mother's, Ms. Edberg, Dr. Muñoz, a representative of the regional center, Ms. Tan, and Ms. Marler were among those who attended the meeting. Dr. Muñoz reported that Student had a difficult time using Brainfingers during two of his three observations. He reported that neither progress from session to session nor whether Student has the ability to use Brainfingers could be demonstrated. Therefore, the District had decided not to purchase Brainfingers for Student to use at home. The team also discussed Ms. Cottier's report, in particular her comments that Student's physical limitations, questionable vision, and frequent seizures must be considered with respect to his ability to use Brainfingers, and her recommendation of a four-week trial period. With respect to vision, the team noted the written report of Dr. Nguyen, an optometrist, dated March 15, 2007, and her description of Student's visual difficulties. Dr. Nguyen's report recommended the use of Brainfingers at home for eye training as it may improve his ability to use augmentative communication devices.

70. The team considered whether Brainfingers might contribute to Student's seizures. Mother expressed her hope that use of Brainfingers would help Student to be more alert and "control" his seizures. The team noted that Student, however, is often unable to use the system because he is seizing. Ms. Marler reported that Student's seizures appeared to increase when he was pressured to perform, but when he was completely relaxed and his seizures diminished, he was able to move the cursor and access software. Based on Ms. Cottier's recommendation that her services be discontinued, the team agreed to discontinue AT/AAC consultations, while noting that Ms. Edberg, Student's home hospital teacher, was a certified AAC specialist. Dr. Muñoz noted that Brainfingers was available at Lincoln for Student to access for a trial period. The team further noted that Student's classroom visits would soon increase to one hour, three times per week, and might increase to one hour, five times per week during the summer. Mother stated that socialization and community training should be emphasized when Student's classroom time increased.

71. The team determined that data collection regarding Brainfingers would occur when Student returned to the classroom three times per week. He would have access to Brainfingers at least two days per week at that time. Parents consented to this IEP, "except for decision on [Brainfingers]."

72. Sometime after this IEP meeting, Dr. Muñoz was involved in a discussion about Brainfingers among members of the West San Gabriel Valley Special Education Local Plan Area (SELPA), including LACOE. The LACOE Director of Special Education directed Ms. Tan to remove Brainfingers from the classroom, because it was not a peer-reviewed technology. Ms. Tan, in turn, directed Ms. Marler to remove all Brainfingers devices and materials from the classroom. Ms. Marler not only removed the Brainfingers hardware from Student's classroom at Lincoln, and deleted the Brainfingers software from the computer hard drive, but she also removed all of the computers from the classroom. On April 16, 2007, Dr. Muñoz telephoned Mother and advised her that Student would no longer have access to Brainfingers in the classroom. At the time, Student was the only Student from the District in Ms. Marler's classroom. Dr. Muñoz was unaware that Brainfingers and all computers had been removed from the classroom, and did not learn of their removal until the hearing.

73. On May 15, 2007, the District convened another IEP meeting, "to discuss curriculum methods for [Student]." The meeting participants included Ms. Tan, Mother, Father, Ms. Edberg, Dr. Westmoreland (the SELPA Director), and Dr. Muñoz. The team listed Student's services as home hospital, two times per week for 60 minutes per session, group language/speech, one time per week, 30 minutes per session, at the school classroom, and individual physical therapy, one time per week for 60 minutes per session, to be delivered at home.<sup>4</sup> Parents waived the presence of a Japanese interpreter at the meeting.

74. Dr. Muñoz reported to the team that Brainfingers was not a research-based methodology and not part of the LACOE adapted curriculum. He also expressed his concerns regarding whether Brainfingers contributed to Student's seizures. Mother acknowledged that Student had many seizures. Mother reported that she had purchased Brainfingers for Student's home use and Student had made progress using it during seizure-free times. Mother also reported that Student had accessed the internet with the home hospital teacher's assistance (through conventional means, not through Brainfingers) for his science and social science curriculum. Ms. Tan and Dr. Westmoreland explained that research-based methodology and equipment were to be used for assistive technology. Mother expressed her hope that he would be able to independently access the internet with Brainfingers, and requested that he have access to it at Lincoln. Ms. Westmoreland explained that methodology is the choice of the educational agency. The team determined that Student was attending Lincoln three hours per week to focus on socialization and peer interaction because his medical condition hampered his ability to interact with his peers. The team decided that Student would no longer have access to Brainfingers at school, nor would the District provide Brainfingers at home. Parents did not consent to the IEP.

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<sup>4</sup>The list of services erroneously does not include Student's attendance at Lincoln three times per week for one hour per session. This service is referred to in the notes of the meeting, however, and there was no controversy at hearing regarding Student's attendance at Lincoln, the amount of time he was to spend there, or this error in the IEP.

75. In early 2007, Mother purchased Brainfingers for Student to use at home. She paid approximately \$2,145 for the hardware and software. She obtained approximately two hours of training on the device from Dr. Junker over the telephone, at no charge. Mother works with Student on Brainfingers approximately one to three times per week.

76. District would be required to provide Student access to Brainfingers to provide Student a FAPE if : (1) Student's program required Brainfingers to address his unique needs; (2) if, without Brainfingers, his program was not reasonably calculated to provide Student with some educational benefit, and (3) if, without Brainfingers, Student's educational program did not comport with his IEP. The evidence demonstrated that Brainfingers was not required for Student to receive a FAPE

77. Brainfingers was not such a part of Student's IEP that the District's removal of Brainfingers from Student's classroom was a violation of his IEP. Brainfingers was never a formal part of Student's educational program. Ms. Marler began working with Student on Brainfingers because Mother informally requested that she do so. The IEP team as a whole was not involved in the initial decision to introduce Student to Brainfingers. The District, in particular, was not directly involved in that decision. Neither the District nor the IEP team as a whole decided that Student should attend Lincoln so that he could use Brainfingers with Ms. Marler. Rather, the IEP team initially agreed with Mother's suggestion that Student attend Lincoln so that he could socialize with his peers. The team later determined that, while at Lincoln, he should participate in the group speech and language therapy provided in the classroom. Student's participation in the group speech and language therapy was another means of achieving the socialization which the IEP team intended to encourage by Student's attendance at Lincoln.

78. The IEP team knew that Student had access to Brainfingers at Lincoln at least as early as March 2006, when Mother requested that Student's time at Lincoln be extended so that he could have more access to Brainfingers. Yet the team referred to Brainfingers in the context of Student's specific educational program only one time, in one IEP. Specifically, Student's triennial IEP of December 4, 2006/January 11, 2007, described the device and identified it as an alternative switch to be used regarding one goal in one IEP. However, the IEP team never set any goals or objectives that were specific to Student's use of Brainfingers. Indeed, it would have been difficult for the IEP team to formulate any such goals or objectives, for a variety of reasons. First, there was not always time for Student to use Brainfingers, given the limited nature of his attendance at Lincoln. Second, Student's use of Brainfingers at Lincoln was often curtailed by his physical condition, such as fatigue and seizures. Third, there has never been any measure of what constitutes acceptable progress on Brainfingers for an individual such as Student. This is at least partially a function of the lack of any controlled studies on the use of Brainfingers with special education students.<sup>5</sup>

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<sup>5</sup>This factor relates to the District's and LACOE's concern that Brainfingers was not peer-reviewed, and therefore it could not be part of the curriculum. The law only requires peer-reviewed programs to be used "to the extent practicable." (34 C.F.R. section 300.320(a)(4).) In view of the determinations made in this Decision, the issue of peer-review is not particularly relevant and therefore this Decision will not address the validity of the

79. The evidence shows that the IEP team included Brainfingers in the IEP as an alternative to a manual switch. This is significant, because Student has used a variety of manual switches throughout the years and they have been changed as needed. There was no evidence that the IEP team had any input into any of the decisions regarding the type of switch Student was using, or whether prior written notice was given to Student's parents when the type of switch was changed. Rather, the evidence demonstrated that the particular switches Student used were chosen by Ms. Cottier or by his teachers, not by the IEP team.

80. In short, Brainfingers was not a part of Student's IEP such that, when the District denied Student access to Brainfingers, Student's educational program did not comport with his IEP and he was denied a FAPE.

81. Nor was Student able to demonstrate that, unless he had access to Brainfingers, his educational program was not designed to address his unique needs, or was not reasonably calculated to provide him some educational benefit. In this regard, the witnesses at hearing disputed whether Student was even able to learn to use Brainfingers effectively either as a simple switch or as a computer cursor. Mother testified that Student was able to play games with the device, including consistently maneuvering the cursor through a maze. She testified that he was bored with playing games and was ready to use the device to access universal software. She testified that he can tolerate working with it for up to an hour at a time, but that he can also get very tired after using it for 15 minutes. Ms. Marler testified that Student learned how to operate Brainfingers as a simple switch after only 10 minutes the first time he used it, and that he remembered how to use the device even after a six-month lapse. She testified that the last time he worked with her on it in the classroom, he worked a full two hours, including using a toddler reading program. She noted that he could use his eyes to make the cursor go right or left, and used his brain waves to move the cursor vertically. She testified that he was not able to use his facial muscles to move the cursor. Ms. Marler testified that Student could use Brainfingers to type, to communicate with others on the Internet, and to access websites. Dr. Junker viewed a DVD of Student using Brainfingers. He testified that he considered Student to have "beat the computer" on the Pong game, and characterized Student's use of Brainfingers as just like any other teenaged boy playing a video game. He testified that Student's performance on Brainfingers was particularly noteworthy, in view of the fact that Ms. Marler, who was working with Student during that particular Brainfingers session on the DVD, had misadjusted Brainfingers in several respects. Dr. Junker testified that these errors had made use of the device more difficult for Student.

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District's argument regarding peer-reviewed research. However, from a purely practical standpoint, peer review can be important. As Dr. Martina Westmoreland, the SELPA Director testified, school districts must be accountable for the programs that they use. This testimony is consistent with state law which requires local educational agencies to report to the California Department of Education regarding their programs. (Ed. Code, §§ 56205, et seq., 56563, et seq.) The use of peer-reviewed programs allows school districts to demonstrate accountability. Use of peer-review and research-based programs also can enable school districts and IEP teams to more readily determine appropriate goals for students who are using such programs.

82. Dr. Armstrong had observed Student use Brainfingers three times in person, during which she saw him play the Pong game and do the maze. She saw him use Brainfingers on a DVD twice, at which time she saw him do the “grow” game. She also tried to use Brainfingers herself. Based upon her own attempt to use the system, she testified that she had “no doubt” that he was controlling the cursor. She had no opinion, however, as to whether it was an appropriate program for him and she admitted that she does not know how it works.

83. Other witnesses testified that Student did not have the capacity to use Brainfingers consistently and effectively, if at all. In January 2007, Dr. Muñoz witnessed Student attempting to use Brainfingers three times. Dr. Muñoz is currently the Director of Special Education for District. In addition to his administrative services credential, he holds a Ph.D. from U.S.C. in Counseling Psychology. In 1980 he received his M.A. in Counseling from California State University, Sacramento, and his Pupil Personnel Services Credential and School Psychologist Credential. He served as a school psychologist at various schools from 1984-1993, and from 1994-2001.

84. Dr. Muñoz observed Student for one hour during the first of the three observation sessions. Student had four seizures during that period, each of which lasted from three to five minutes. During that session, Dr. Muñoz felt that Student’s movement of the Pong paddle was random. He testified that Student was able to do one of the mazes with many trials and much encouragement. On the second occasion, Student’s seizures prevented Student from using Brainfingers at all. On the third occasion, Dr. Muñoz felt that Student’s performance with Brainfingers was less successful than the first time he observed Student. Again, Student had four seizures during the one-hour observation period.

85. Ms. Cottier has used Brainfingers with other students, and has also observed Student using Brainfingers, as reflected in her report of January 26, 2007, which is summarized above. She testified that Student might be taught to use the Brainfingers training software, and that his use of Brainfingers appeared to be intentional. She explained, however, that learning to use Brainfingers training software was far different from being able to use Brainfingers with the consistency and reliability that would be required to use Brainfingers for communication. She compared this to the ability to build a table. One might have the materials and know how to use a saw, and to sand, and to paint. This does not mean that one could construct a functional table. In her opinion, given the need for communication to be reliable, consistent, and efficient, Student would always need a low-tech means of communication, such as eye gaze, facial movement, and body language. She testified that Student did not require Brainfingers for communication purposes. Ms. Cottier noted that all of the other Students with whom she used Brainfingers were cognitively superior to Student, and, at the lower cognitive levels, after at least a year, they were still working on switch activation. None of these lower cognitive level students were currently able to use Brainfingers as a simple switch as a primary means to access communication. She further testified, based upon her personal experience using Brainfingers, that use of Brainfingers as a mouse for communication purposes was difficult at best. Her students found use of Brainfingers as a mouse was frustrating, tedious, and required a high degree

concentration. She had recommended the trial period because she did not know whether Student could successfully use it even as a simple switch for communication purposes. She testified that, if Student could learn to use Brainfingers, it could provide recreation and cognitive stimulation for him, even if he could not use it with the reliability and consistency necessary for communication. The other switches that Student used, and the computer programs that Student was exposed to without Brainfingers, could also serve the same purpose of providing him recreational opportunities and cognitive stimulation.

86. District called Dana Chidekel, Ph.D., a neuropsychologist. A neuropsychologist studies the relationship between brain function and behavior. Dr. Chidekel received her B.A. in 1983 from Hampshire College, and her M.A. and Ph.D. in Clinical Psychology from California School of Professional Psychology. She received her Certificate in Neuropsychology in April 2001, and is Board Certified as of December 2001 by the American Board of Pediatric Neuropsychology, and as of March 2007 by the American Board of Professional Neuropsychology. As a pediatric neuropsychologist, she has studied and has knowledge of the dynamics of the developing brain. She does not have training in either ACC or AT, or as a speech and language therapist. She has had training in seizure disorders, and has evaluated children with seizure disorders. Dr. Chidekel has never met Student, but she had reviewed his records as contained in the parties' evidence binders, and had observed him using Brainfingers on a DVD.

87. She testified that Student's cognitive level was very low and would remain so. The injury to his brain was severe, damaging his brain stem and cerebellum, which are the foundations of his cognitive development. His brain and nervous system were still developing at the time of his accident, and he had not fully developed his higher level cognitive capacities, such as memory, language, intention, and coordinated motor skills. She testified that his age at injury was therefore the highest level of cognition he could achieve, but, due to the severity of his injury, he could probably only function at the 12-18 month range. She testified that, due to his injury and his age at injury, he had never developed a sense of self. Therefore, he could only develop the most primitive communication skills, as evidenced by the fact that he does not have an identifiable "no" response. She also questioned whether his "yes" response actually was a meaningful "yes," since "yes" may have no meaning without a "no." In her opinion, many of his behaviors, such as moving his lips, were random behaviors.

88. Dr. Chidekel further testified that Student's cognitive capacity determined whether he could learn to use Brainfingers, and use it meaningfully so that he could benefit from it. She concluded that, due to his low cognitive capacity, he could not learn to use Brainfingers in a meaningful way. Dr. Chidekel testified that Student might only be able to use Brainfingers through operant conditioning and associational learning, as opposed to the more sophisticated conceptual learning. She explained that this is why he might be able to use Brainfingers to negotiate the maze. He was conditioned to do so by practice and by reward (for example, the continuous verbal encouragement of Ms. Marler and Mother that was heard on the DVD). She predicted that, if shown a different maze, he would not be able to navigate it, because he does not have the cognitive capacity to understand mazes, such that

he can generalize his knowledge of mazes from one maze to the other. He might be able to learn to move a cursor, through operant conditioning, but that was not the same as being able to meaningfully use the cursor to access software on the computer. To do that, he would need to have the capacity for abstract thought and intentional conduct, and he lacks these. In short, he does not have the skills to use Brainfingers meaningfully, and he will not be able to develop those skills. She characterized Student's activities with Brainfingers, as she viewed them on the DVD, as being random or due to operant conditioning. She testified that the randomness of Student's activities with Brainfingers was illustrated by the fact that, at the end of the first session on the DVD, while playing Pong, Student had a seizure. Ms. Marler stated on the DVD that, even though he has had a seizure, he was still playing. Since the seizure disrupts Student's brainwaves, Dr. Chidekel testified there could be no intentional playing of the game at that point.

89. She further testified that, beyond Student's cognitive deficit, his cortical vision impairment also would negatively impact his ability to learn to meaningfully use Brainfingers on two levels. First, his ability to focus on the computer screen, which was necessary in order to activate Brainfingers, was not reliable. Second, whatever program or site he was using Brainfingers to access would also require him to focus, and, again, his focus was not reliable.

90. Dr. Chidekel also testified that Brainfingers may increase Student's seizure activity. His seizures increase when he is tired, and he fatigues as he uses Brainfingers. She noted that seizure activity can cause brain cells to die, and expressed concern as to whether the risks to Student of using Brainfingers outweighed any benefit.

91. Dr. Chidekel testified that Student did not have the cognitive capacity to choose among eight items. He does not have the cognitive capacity to retain information. He does not have the cognitive capacity to follow a two-step direction. He can follow a one-step direction, through associative or operant conditioning. She testified that Brainfingers was not required for Student to have a functional means of communication.

92. The DVD that was viewed by Dr. Chidekel and Dr. Junker was shown at hearing. The DVD shows Student sitting in his wheelchair in front of the computer screen. Student appears indifferent to his surroundings and to the computer screen. There is no indication that he is purposefully controlling or affecting the movement of the items on the computer screen (for example, the Pong paddle, the circles in the "grow game") as opposed to their moving randomly.

93. Dr. Chidekel has never examined Student and she has never used Brainfingers. However, she is the only witness who has particular expertise in the structure, development, and functioning of children's brains, and how Student's near-drowning accident affected his cognitive abilities and development. Her opinions regarding some of his particular abilities, such as whether he has a true "yes" response, and whether many of his movements are random, do not entirely match the perceptions of those, such as Mother, Ms. Cottier, Ms. Marler, Dr. Armstrong, Ms. Edberg, and Ms. Hanawalt, who have had personal, day-to-day

experiences with Student. Yet, her analysis of how Student's brain injury has affected his cognitive development, and how his lack of cognitive development and his visual deficits affect his ability to meaningfully use Brainfingers, are grounded in science, in her training, and in her experience. She testified clearly, confidently, and cogently as to these matters. The science upon which her analysis was based was uncontradicted, and, indeed, no other witness at hearing possessed Dr. Chidekel's expertise in these particular matters.

94. Ms. Cottier's testimony was also credible, regarding her doubts that Student could meaningfully use Brainfingers as a tool to access communication and his academic curriculum, and regarding her conclusion that Student did not require Brainfingers to communicate. She is a highly qualified speech and language therapist, as well as a certified AT/AAC specialist, who has consulted with Student for six years and who has used Brainfingers with other children in her practice.

95. Dr. Junker is a talented engineer, but he has no training in any aspect of special education or children's disabilities. He has never met Student. His testimony regarding Brainfingers' suitability for Student must be discounted for lack of expertise. Also, as the inventor and seller of Brainfingers, and the trainer of Brainfingers, his motivation to sell the device and charge for training people in using the device undermines his objectivity. Moreover, he tended to exaggerate while testifying. For example, the DVD of Student using Brainfingers does not depict Student as a typical teen-ager playing a video game, as Dr. Junker testified. A typical teen-age boy playing a video game moves, emotes, engages, and sometimes vocalizes. The DVD of Student and Brainfingers does not depict such a child. Secondly, Dr. Junker's characterization of Ms. Marler as one of the best qualified people in the world regarding the use of Brainfingers with disabled children is questionable. On the DVD, Ms. Marler could not initially set up the system so that it worked, and, when it was working, she had it on incorrect settings, as Dr. Junker himself testified.

96. Ms. Marler's difficulty in properly setting up and adjusting the system as shown on the DVD also diminishes Ms. Marler's credibility. Additionally, she had no contemporaneous documentation regarding her observations regarding Student's progress in using Brainfingers, or that he used it "for two hours straight" on one occasion. In this regard, there was no evidence besides Ms. Marler's testimony on this point that Student possesses the stamina or ability to undertake any cognitive activity successfully for "two hours straight." Her observations of Student's abilities (that he can make choices from an array of eight options, he can follow three-step directions, he can remember how to use Brainfingers after six months of not using it) were contradicted by other witnesses. Dr. Chidekel testified that he did not have the cognitive capacity to perform those tasks. Ms. Hanawalt, Ms. Edberg, Ms. Cottier, Dr. Armstrong, and Ms. Hampton, also testified or reported that Student did not have one or more of those abilities. Further, Ms. Marler's assertion that Student can use Brainfingers to type, to access websites, and to communicate with others on the web displays an unrealistic sense of Student's abilities, given his severe cognitive and visual deficits. There was no evidence that Student has the necessary understanding or vision that he could do any of those things. Additionally, Ms. Marler is closely associated with promoting Brainfingers' use, in that she not only wrote her master's thesis about it, but has

also written a training tutorial for it that Dr. Junker has endorsed. Dr. Junker also assisted Ms. Marler with her master's thesis and approved it. In view of Ms. Marler's enthusiasm for Brainfingers, her ability to accurately evaluate Student's capability to use Brainfingers may be compromised.

97. Student also called Tran V. Nguyen, O.D., his optometrist, who testified that Student's functional vision had improved between his eye examination of 2002 and his most recent examination of March 14, 2007. She attributed this improvement to his use of Brainfingers. Dr. Nguyen had no independent knowledge regarding Brainfingers and how it worked. Mother was Dr. Nguyen's only source of information as to Brainfingers and its use by Student. Dr. Nguyen did not know whether, between 2002 and 2004, Student used any other device or exercise that might have improved his vision. She testified that use of Brainfingers could potentially improve his central vision, particularly his eye gaze, and his ability to fixate on, and track objects. She also testified that home-made pattern cards, or any objects moving on a computer screen, would serve these same functions as Brainfingers would in attempting to maximize Student's vision. Dr. Nguyen's opinions as to the possible benefits to Student's vision by using Brainfingers are speculative and lack foundation. Her testimony did not demonstrate that Brainfingers would be any more beneficial to Student than other devices or techniques for improving Student's vision.

98. Brainfingers is an intriguing piece of technology. Student demonstrated that Brainfingers has the capacity to permit hands-free access to the cyber-world to those who have average or above-average cognitive capacities, but who have physical disabilities which impair their ability to independently use a computer in a standard fashion. Student, however, is not such an individual. Rather, Student has severe cognitive and visual impairments, which severely impact his ability to use and benefit from Brainfingers. Student produced no evidence that demonstrated that a child with his constellation of disabilities could learn to use Brainfingers in a meaningful and effective way so that he can access his curriculum. In particular, Student presented no evidence as to the successful use of Brainfingers to access communication and the educational curriculum by someone with Student's visual disabilities. Student did not prove that he can be trained to use Brainfingers as a functional switch so that it could be reliably used for communication purposes. Nor was Student able to demonstrate that he would be able to take advantage of Brainfingers to use a computer program or to use it as a cursor to traverse the internet. Student did not demonstrate that he has the cognitive capacity and visual ability to locate a website and visually process and understand the information it conveys. If Student cannot see the computer screen well, and cannot understand what, if anything, he sees, then Brainfingers is of limited, if any, utility to Student in accessing his curriculum.

99. Significantly, Student did not provide any evidence that he required Brainfingers to access his education and receive an educational benefit. In this regard, Dr. Chidekel testified that Student could not use Brainfingers to access his education or to communicate. Dr. Muñoz and Ms. Edberg testified that Student did not require Brainfingers to access his education. Ms. Cottier testified that Student did not require Brainfingers to communicate. Dr. Hanawalt testified that Student has been able to progress in his

communication skills without the use of Brainfingers. Student has met many of the goals and objectives in his IEPs since 2003 without the use of Brainfingers. Student did not contend, and produced no evidence, that the goals as set forth in any of these IEPs were inappropriate or did not provide Student a FAPE.

100. Under these circumstances, District was not required to include Brainfingers in Student's educational program in order for Student to receive a FAPE.

*Whether District Denied Student a FAPE by failing to provide prior written notice prior to removing Brainfingers from Student's classroom*

101. A school district must give prior written notice to the parents of a student whenever the district proposes to initiate or change the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. California law defines educational placement to include the combination of facilities, personnel, location, or equipment that is necessary to provide instructional services to a student, as specified in the student's IEP. The contents of the prior written notice are also prescribed by statute. The failure of a school district to give prior written notice when it was required to be given may constitute a procedural denial of a FAPE. A procedural denial of a FAPE is actionable if it deprived Student's parents of the opportunity to participate in the IEP process, or deprived Student of an educational opportunity.

102. An IEP team must consider whether the student requires AT, and, if so, the nature and amount of such services must be set forth in the IEP. If AT is required to meet the student's unique needs, and to provide the student with an educational benefit, then the district's failure to provide it is a denial of a FAPE. Once the team determines that AT is required for a Student to receive FAPE, the AT method or device to be used is generally at the discretion of the school district, as long as the school district is providing a FAPE.

103. The evidence demonstrated that the removal of Brainfingers from Student's classroom did not require prior written notice, for several reasons.

104. First, the removal of Brainfingers from Student's classroom was not a change in Student's identification, evaluation, or educational placement, even under the broad definition of educational placement which encompasses the Student's special education curriculum and services. As was discussed above, Brainfingers was not a part of Student's educational placement so as to require prior written notice when it was removed from the classroom.

105. Second, as was also discussed above, Brainfingers was not required to be part of Student's educational program so that Student could receive a FAPE. Without Brainfingers, Student's educational program was designed to address his unique needs, was reasonably calculated to provide Student with some educational benefit, and comported with his IEP. Therefore, the prior written notice requirement was not triggered when Brainfingers was removed from the classroom.

106. Moreover, a procedural denial of a FAPE, such as a failure to give prior written notice, is only actionable if the procedural denial deprived Student of an educational benefit or deprived Student's parents of the opportunity to participate in the decision-making process. The evidence does not support that these factors exist in this case. Student did not prove that Brainfingers provided him with an educational benefit. Mother's observations, opinions, and desires regarding Student's use of Brainfingers in the classroom and at home were documented in the triennial assessment reports, and in the triennial IEP and all addenda thereto. Mother's views on Student's use of Brainfingers were supported by Ms. Marler at the triennial IEP meeting and the March 22, 2007 IEP meeting. Mother was not deprived of input into the decision-making process.

*Whether District denied Student a FAPE by removing Brainfingers from Student's classroom without consulting Student's parents and holding an IEP meeting*

107. A student's educational program is determined by the IEP team at an IEP meeting. The parents must have the opportunity to participate in the IEP meeting; a school district cannot predetermine the student's educational program. A school district must convene an IEP meeting to formally amend the IEP prior to changing the goals, objectives, types of services, and level of services, that are contained in a student's IEP. A district's failure to convene an IEP meeting prior to making such changes may constitute a procedural denial of a FAPE. A procedural denial of a FAPE is actionable if it deprived Student's parents of the opportunity to participate in an IEP or deprived Student of an educational opportunity.

108. Certain aspects of a disabled student's educational program, however, are within the discretion of the school district. For example, the type of AT that is used is generally at the discretion of the school district, and may be changed by the school district, without convening an IEP meeting, so long as the school district is providing a FAPE. In this regard, a FAPE is provided if the educational program provided to the Student is designed to address student's unique needs, to provide educational benefit to the student, and comports with the Student's IEP, regardless of whether it is a program that is favored by a student's parents or whether another program would provide greater educational benefit. The school district is not required to provide the best education available or provide instruction or services that maximize the student's abilities.

109. District did not deny Student a FAPE by removing Brainfingers from Student's classroom. As was discussed above, Brainfingers was never a part of Student's formal educational program. Moreover, Brainfingers was not required to be part of Student's educational program for Student to receive a FAPE. Therefore, no IEP meeting was required prior to the District denying Student access to Brainfingers. As was also discussed above, Mother had input into the decision-making process regarding Student's access to Brainfingers. Mother's observations, opinions, and desires regarding Student's use of Brainfingers in the classroom and at home were documented in the triennial assessment reports, and in the triennial IEP and all subsequent IEPs. Mother's views on Student's use of

Brainfingers were supported by Ms. Marler at the triennial IEP meeting and the March 22, 2007 IEP meeting.

110. Moreover, the District, by unilaterally removing Brainfingers from Student's classroom, did not pre-determine its decision regarding Student's access to Brainfingers so as to deprive Student's parents of input into the decision. The District's decision to terminate Student's access to Brainfingers in the classroom was the culmination of the information the IEP team received regarding Brainfingers from Ms. Cottier's consultation, from Dr. Muñoz's research on Brainfingers and from his observations of Student's use of Brainfingers, and after Ms. Marler and Mother had reported to the IEP team regarding their opinions of Student's use of Brainfingers. The District's decision to discontinue the use of Brainfingers in a classroom in which Student was the only District student was based upon observations of Student using Brainfingers, and the consideration of Student's unique cognitive and physical abilities. As it pertained to Student, the District's decision was not a pre-determined, blanket denial of access to a particular technology. Under these circumstances, Student's parents were not deprived of input into the decision-making process. The District did not violate the procedures of the IDEA and thereby deny Student a FAPE.

*Whether District denied Student a FAPE from fall 2005 by failing to provide AAC devices to Student*

111. An IEP team must consider whether the student requires assistive technology and, if so, the nature and amount of such services must be set forth in the IEP. If assistive technology is required to meet the student's unique needs, and to provide the student with an educational benefit, then the district's failure to provide it is a denial of a FAPE. School districts generally are not required to provide the specific AT requested by parents; the type of AT that is used is generally at the discretion of the school district and may be changed by the school district so long as the school district is providing a FAPE. In this regard, a FAPE is provided if the educational program provided to the Student is designed to address student's unique needs, to provide some educational benefit to the student, and comports with the Student's IEP, regardless of whether it is a program that is favored by a student's parents or whether another program would provide greater educational benefit. The school district is not required to provide the best education available or provide instruction or services that maximize the student's abilities. Moreover, the IEP is evaluated in view of the information that was available to the IEP team at the time it was developed, it is not judged in hindsight.

112. As was discussed above, District was not required to provide Student access to Brainfingers in order to provide a FAPE to Student. With respect to other AT/ACC, Student has had continuous access to AAC and AT since 2005, both at home and at Lincoln. He has been using computers and specialized software since 2005. In particular, as of December 2005, Student was using a laptop computer with the specialized communication software *Speaking Dynamically Pro*, both of which were provided by the District. Ms. Cottier, the augmentative communication specialist retained by the District, had designed several computer displays for Student to use to make choices. His home hospital teacher has helped

him to use a computer with specialized software, such as a software program called *My Own Bookshelf*, which permitted him to make a book about himself.

113. The District has continuously provided switches for his use since December 2005. His IEP of December 8, 2005, contains goals and objectives regarding his activation of a switch to use a voice output device. As of December 2006, he was using a step-by-step communicator, a mercury switch, and a string switch. In the classroom at Lincoln, during 2006, he had access to a computer as well as *Speaking Dynamically Pro* and *Dynavox* software. He was also using a voice output device in 2006. His triennial IEP, which resulted from two IEP meetings that occurred on December 4, 2006 and January 11, 2007, contains goals and objectives that include switch use, computer use, and a voice output device both at home and at school. He has had continuous use of switches and voice output devices at school, including at the time of the hearing. He currently uses a string switch in the home hospital setting, and he uses it to activate a computer with specialized software for communication purposes. He also uses ACC devices, such as step-by-step communicator and a BIGmack device with his home hospital teacher. Recently, he has improved in his use of the string switch, and he has had success in using a mercury switch. Furthermore, these devices are appropriate. They have assisted Student in accessing his curriculum, and he has made educational progress using these devices. Every annual IEP in evidence has noted that Student has met at least some of his goals from the previous year.

114. Student contends that the District violated its obligations to provide AAC to Student because none of the switches and other devices provided successfully permitted Student to communicate. Further, he was unable to use some of the switches provided as his physical abilities changed.

115. Student's contentions are not supported by the evidence or by the law. With respect to District's providing Student a technological method to communicate, Ms. Cottier stated that no such technology may exist. There may be no perfect solution for this Student, and he may have to rely on non-technological means of communicating, such as body language, eye gaze, facial expressions, and lip movements. Student did not provide evidence that any technology, including Brainfingers, would provide the solution to Student's communication difficulties. Student has not proven that Brainfingers or any other device would provide any better solution than the switches that have been attempted thus far.

116. In her search for appropriate AT for Student, Ms. Cottier recommended a variety of switches, and switch use is mentioned as an AT device in Student's IEPs. Over time, Student had less success with some of the switches, because his physical abilities changed. However, an IEP is not viewed from the perspective of hindsight, but by the information that was available to the IEP team had at the time. Similarly, Ms. Cottier's efforts to find an appropriate switch at a particular time also cannot be judged with the benefit of hindsight. Ms. Cottier's testimony and reports regarding the reasons why she selected particular switches at particular times demonstrate that the switches selected were reasonably calculated to benefit Student. When Ms. Cottier realized that a particular switch was no longer appropriate for Student, she would try another one that she thought would

better suit his strengths and weaknesses. Throughout, Student's IEPs and assessments demonstrate that he has used various switches with at least some degree of success, and that he benefited from their use, and that they assisted him in achieving his goals.

117. The evidence showed that District met its obligations to Student to provide him AT/AAC devices. The District did not deny Student a FAPE.

## LEGAL CONCLUSIONS

### *Applicable Law*

#### *Burden of Proof*

1. The United States Supreme Court has ruled that the petitioner in a special education due process administrative hearing has the burden to prove his or her contentions at the hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528].)

#### *FAPE*

2. Pursuant to California special education law and the Individuals with Disabilities in Education Act (IDEA), as amended effective July 1, 2005, children with disabilities have the right to a FAPE that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and independent living. (20 U.S.C. §1400(d); Ed. Code, § 56000.) FAPE consists of special education and related services that are available to the student at no charge to the parent or guardian, meet the state educational standards, include an appropriate school education in the state involved, and conform to the child's IEP. (20 U.S.C. § 1402(9).) "Special education" is defined as specially designed instruction, at no cost to parents, to meet the unique needs of the student. (20 U.S.C. § 1402(29).)

3. Similarly, 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. § 1402(26).) In California, related services may be referred to as designated instruction and services (DIS). (Ed. Code, § 56363, subd. (a).)

4. Under both California law and the IDEA, a child is eligible for special education if the child needs special education and related services by reason of mental retardation, hearing impairments, speech or language impairments, visual impairments, emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities. (20 U.S.C. §1401 (3)(A)(i) & (ii); Cal.Code Regs., tit. 5, §3030.)

5. The IEP is a written document for each child who needs special education and related services. The contents of the IEP are mandated by the IDEA, and the IEP must include an assortment of information, including a statement of the child's present levels of academic achievement and functional performance, a statement of measurable annual goals that are based upon the child's present levels of academic achievement and functional performance, a description of how the child's progress toward meeting the annual goals will be measured, when periodic reports of the child's progress will be issued to the parent, and a statement of the special education and related services to be provided to the child. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. §§ 300.346, 300.347.) For each area in which a special education student has an identified need, annual goals establish what the student has a reasonable chance of attaining in a year. If the child is to take alternative assessments, then the IEP must include short-term objectives in addition to annual goals. (20 U.S.C. § 1414(d)(1)(A)(i)(I)(cc).)

6. In developing the IEP, the IEP team shall consider the strengths of the child, the concerns of the parents for enhancing the child's education, the result of the most recent evaluation of the child, and the academic, developmental, and functional needs of the child. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. § 300.346(a).) The child's program cannot be predetermined, rather, the IEP meeting must be a meaningful IEP meeting to fulfill the goal of parental participation in the IEP process. (*W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484-1485; *Deal v. Hamilton County Board of Education* (6th Cir. 2004) 392 F.3d 840 at 856, 857-858.) A parent has meaningfully participated in the development of an IEP when the parent is informed of the child's problems, attends the IEP meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693.) A parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way. (*Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1036.)

7. The issue of whether a school district has offered a FAPE has both procedural and substantive components. States must establish and maintain certain procedural safeguards to ensure that each student with a disability receives the FAPE to which the student is entitled, and that parents are involved in the formulation of the student's educational program. (*W.G., et al. v. Board of Trustees of Target Range School District, etc., supra*, 960 F.2d 1479 at 1483.) Citing *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 176, 200 [102 S.Ct. 3034], the court also recognized the importance of adherence to the procedural requirements of the IDEA, but noted that procedural flaws do not automatically require a finding of a denial of a FAPE. (*Id.* at p. 1484.) Procedural violations may constitute a denial of a FAPE if they result in the loss of educational opportunity to the student or seriously infringe on the parents' opportunity to participate in the IEP process. (*Ibid.*) These requirements are also found in the IDEA and California Education Code, both of which provide that a procedural violation only constitutes a denial of FAPE 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); Ed. Code, § 56505, subd. (f)(2); *Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1032.)

8. In *Rowley, supra*, the United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the substantive requirements of the IDEA. The Court determined that a student’s IEP must be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student’s abilities. (*Id.* at pp. 198-200.) The Court stated that school districts are required to provide only a “basic floor of opportunity” that consists of access to specialized instructional and related services which are individually designed to provide educational benefit to the student. (*Id.* at p. 201.)

9. To determine whether a school district offered a student a FAPE under the substantive component of the analysis, the focus must be on the adequacy of the district’s proposed program. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1314.) If the school district’s program was designed to address the student’s unique educational needs, was reasonably calculated to provide the student with some educational benefit, and comported with the student’s IEP, then the school district provided a FAPE, even if the student’s parents preferred another program and even if his parents’ preferred program would have resulted in greater educational benefit. (*Ibid.*) Educational benefit in a particular program is measured by the degree to which the student is making progress on the goals set forth in the IEP. (*County of San Diego v. California Special Education Hearing Office, et al.* (9th Cir. 1996) 93 F.3d 1458 at 1467.) School districts are also required to provide each special education student with a program in the least restrictive environment, with removal from the regular education environment occurring only when the nature or severity of the student’s disabilities is such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily. (20 U.S.C. § 1412 (a)(5)(A); Ed. Code, § 56031.)

10. An IEP is evaluated in light of information available to the IEP team at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) “An IEP is a snapshot, not a retrospective.” (*Id.* at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Education, supra*, 993 F.2d 1031, 1041.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*)

#### *Prior Written Notice*

11. A school district shall give prior written notice the parents of a child with a disability when the district proposes to initiate or change, or refuses to intimate or change, the identification, assessment, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. 1415 (b)(3)&(4) & (c)(1); Ed Code, § 56500.4.) In California, specific educational placement means “the unique combination of facilities,

personnel, location, or equipment necessary to provide instructional services” to a disabled child, as specified in the IEP, in any one of a combination of settings. (Cal. Code Regs., tit. 5, § 3042, subd. (a).)

### *Assistive Technology*

12. Assistive technology device means any item, piece of equipment, or product system, whether modified or customized, that is used to increase, maintain, or improve the functional capabilities of a child with a disability. (20 U.S.C. § 1401(1); 34 C.F.R. § 300.5.) Assistive technology service means any service that directly assists a child with a disability in using an assistive technology device, including training for the child, the child’s family, and others who provide service to or are substantially involved in the child’s life. (34 C.F.R. § 300.6(e),(f).) Each public agency must ensure that assistive technology devices and assistive technology services are available to a student with a disability, if required as part of a student’s special education or related services. (34 C.F.R. § 300.308.) As part of the IEP process, the IEP team must consider whether the child requires assistive technology devices and services. (20 U.S.C. § 1414(d)(3)(b)(v); 34 C.F.R. § 300.346(a)(2)(v).) If the IEP team determines that a student needs assistive technology to receive a FAPE, the IEP must include a statement to that effect, and the nature and amount of such services. (34 C.F.R. § 300.346(c); Off. of Special Education Programs, interpretative letter (November 27, 1991), 18 IDELR 1697.) School districts are generally not required to provide the specific assistive technology requested by parents. (*A.S. and W.S., etc. v. Trumbull Bd. of Education* (D. Conn. 2006) 359 F.Supp.2d 152, 174-177.)

13. *Rowley, supra*, 458 U.S. at page 209, established that as long as a school district provides an appropriate education, methodology is left to the school district’s discretion. As the First Circuit Court of Appeal noted, the *Rowley* standard recognizes that courts are ill-equipped to second guess reasonable choices that school districts have made among appropriate instructional programs. (*T.B. v. Warwick Sch. Comm.* (1st Cir. 2004) 361 F.3d 80, 84 (citing *Roland M. v. Concord Sch. Committee* (1st Cir. 1990) 910 F.2d 983, 992-993.)

### *Peer-Reviewed Special Education Programs and Services*

14. Title 34 Code of Federal Regulations, part 300.320(a)(4) provides that IEPs shall include a statement of the special education and related services and supplementary aids and services to be provided to the student, based on peer-reviewed research to the extent practicable. The language “to the extent practicable” regarding the use of peer-reviewed research does not forbid a district from using an educational program or service that is not peer-reviewed, where it is impracticable to provide such a program.

## *Determination of Issues*

1. *Did the District deny Student a FAPE as of April 16, 2007, by failing to provide prior written notice regarding the discontinuation of Student's access to Brainfingers at school?*

15. Based upon Factual Findings 1 through 106 and Legal Conclusions 1 through 14, the District had no obligation to provide prior written notice regarding the discontinuation of Student's access to Brainfingers at school. Prior written notice is only required to be given if the school district proposes to change the child's identification, evaluation, or educational placement, or the provision of FAPE to a child. Brainfingers was not necessary to provide Student a FAPE. Brainfingers was not required to provide Student a functional means of communication, or to access his curriculum. Student did not demonstrate that he could use Brainfingers, or that it would provide him any benefit than other technology or non-technology could provide.

16. Additionally, Brainfingers was not such a part of Student's educational program, as set forth in his IEP, as to constitute part of his educational placement. Student began using it at school, informally and sporadically, and it was mentioned as an alternative to a switch in connection with only one goal in one IEP. Finally, the District's failure to give prior written notice did not constitute a procedural denial of a FAPE because it did not deprive Student of an educational benefit or deprive his parents of the opportunity to participate in the decision-making process with respect to his education.

2. *Did the District deny Student a FAPE from April 16, 2007, to the date of filing the due process complaint, by failing to include Student's parents in the process by which the decision was made to discontinue Student's access to Brainfingers at school, including failing to discuss the issue at an IEP meeting before the decision was made and before Student's access to Brainfingers was discontinued?*

17. Based upon Factual Findings 1 through 106, and Legal Conclusions 1 through 10 and 12 through 13, the District had no obligation to hold an IEP meeting and include Student's parents in the decision to discontinue Student's access to Brainfingers. District was not required to provide Brainfingers to provide a FAPE to Student, and Brainfingers was not a part of Student's educational program. Furthermore, Mother and Ms. Marler, Student's classroom teacher, expressed their opinions regarding Student's use of Brainfingers in the classroom at all relevant IEP meetings. District did not predetermine its decision to deny Student access to Brainfingers in the classroom. District decided to deny Student access to Brainfingers in the classroom only after Mother and Ms. Marler provided their input, and only after considering Ms. Cottier's report regarding her observations, and Dr. Muñoz's observations.

3. *Did the District deny Student a FAPE from fall 2005 to the date of filing the due process complaint, by denying Student access to Brainfingers or any other appropriate AT in the form of an ACC device?*

18. Based upon Factual Findings 1 through 106, and 111 through 117, and Legal Conclusions 1 through 10, and 12 through 13, the District did not deny Student a FAPE because it did not deny Student access to appropriate AT/ACC devices during the period in question. At all relevant times, Student had access to appropriate switches and voice output devices, both at home and at school, and computers and specialized communications software at home. He had access to a computer and specialized communications software at school as well, until approximately April 16, 2007. There was no evidence that Student's inability to access a computer at school from April 16, 2007, denied him educational benefit.

19. District was not required to provide Student access to Brainfingers in order to provide him a FAPE. The switches District provided to Student to access his ACC devices were appropriately changed as Student's physical abilities dictated they be changed. Student used the various switches with some degree of success, he benefited from their use, and they enabled him to consistently achieve many of the goals in all of the relevant IEPs.

#### ORDER

Student's claims for relief are denied.

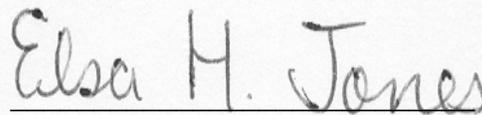
#### PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. Pursuant to this mandate, it is determined that District prevailed on all issues heard and decided.

#### RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by this Decision. Pursuant to Education Code section 56505, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within ninety (90) days of receipt.

Dated: February 29, 2008



ELSA H. JONES

Administrative Law Judge  
Office of Administrative Hearings  
Special Education Division