

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

In the Matter of:

ALAMEDA UNIFIED SCHOOL DISTRICT

Petitioner,

v.

STUDENT,

Respondent.

OAH CASE NO. N 2007100793

**DECISION**

Administrative Law Judge (ALJ) Deidre L. Johnson, Office of Administrative Hearings, Special Education Division (OAH), State of California, heard this matter on November 26 and 27, 2007, in Alameda, California.

Karen E. Samman Attorney at Law with Lozano Smith, was present and represented Alameda City Unified School District (District).

No one appeared on behalf of Student. Student's mother and father (Mother and Father, collectively referred to as Parents) represented Student's interests prior to hearing but did not appear at or participate in the hearing.

On October 25, 2007, the District filed a request for a due process hearing. At hearing, oral and documentary evidence was received. District requested an extension to submit written closing argument. The ALJ granted an extension and held the record open until December 11, 2007, for District's written closing argument. At 5:00 p.m. on December 11, 2007, the record was closed, and the matter was submitted.

## ISSUES<sup>1</sup>

Did District's offer of placement and services contained in the individualized education program (IEP) of June 27, 2007, offer Student a free appropriate public education (FAPE) for the 2007 summer extended school year (ESY), and for the 2007-2008 school year?

## PROCEDURAL MATTERS

A telephonic prehearing conference (PHC) was held on November 19, 2007. Ms. Samman participated on behalf of the District. The ALJ telephoned Parents but they did not answer the telephone and did not respond to the message left by the ALJ. Following the ALJ's unsuccessful attempts to contact Parents, the PHC proceeded and Parents did not participate on behalf of Student. Student did not file a PHC statement, a witness list, or an exhibit list prior to the PHC as ordered by OAH in the Scheduling Order and Notice of Due Process Hearing dated October 25, 2007.

By the beginning of the hearing on November 26, 2007, Student had not provided the District with any witness list, exhibit list, or exhibits.<sup>2</sup> On the date set for hearing, the ALJ directed District staff to contact Parents to find out if they intended to appear at the hearing. District staff telephoned Parents at both their home and cell phone numbers, but did not reach them. The hearing proceeded without Student's participation.

## FACTUAL FINDINGS

### *Background*

1. Student is eight years old and lives with Parents within the boundaries of the District. Student is eligible for, and has been receiving, special education and related services under the category of autistic-like behaviors. Student's academic functional skills are at a pre-kindergarten level, approximately that of a typically developing three-year-old. Student displays significant speech, language, and sensory processing delays and lacks social skills.

2. When Student was two years old, Parents placed him in Son Light Preschool (Son Light), a private, church-affiliated preschool in Oakland, with typically developing preschoolers. He attended Son Light by parental choice through the 2006-2007 school year. District previously reimbursed Parents for Student's tuition and a one-to-one aide at Son

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<sup>1</sup> The ALJ has reframed and reorganized the issues for purposes of clarity in this decision.

<sup>2</sup> Education Code section 56505, subdivision (e)(7) requires the parties to disclose their witnesses and exhibits to the other party not less than five business days prior to the hearing.

Light, until some time in 2006 when a dispute arose between the parties because District believed that Student was too old for preschool and belonged in a special day class (SDC) for children with autism.

#### *Previous Due Process Hearing*

3. Student filed a request for a due process hearing in Case No. N2006090010 on August 31, 2006. District filed a request for a due process hearing in No. N2006100365 on October 10, 2006. On November 1, 2006, OAH consolidated the two matters. On October 19, 2006, Student filed a second request for a due process hearing in Case No. N2006100740, and on November 22, 2006, OAH consolidated the three matters (the 2006 consolidated cases).

4. A hearing was held on the 2006 consolidated cases on April 2-6 and 17-20, 2007, before ALJ Charles Marson, who issued a decision on June 19, 2007. Mother was present throughout that hearing and represented Student. Father was briefly present on one day. The matters at issue in the consolidated cases were fully litigated. ALJ Marson's decision in the consolidated 2006 cases is a final decision binding on the parties (2006 Decision).<sup>3</sup> The 2006 Decision determined specified issues regarding the 2004-2005 school year, the 2005-2006 school year, and the 2006-2007 school year. Official notice is taken of the 2006 Decision.

#### *Offer of FAPE*

5. A child with a disability has the right to a free appropriate public education (FAPE) under the reauthorized Individuals with Disabilities Education Improvement Act (IDEA 2004). FAPE is defined as special education, and related services, that are available to the student at no cost to the parent, that meet the State educational standards, and that conform to the student's IEP. The term "related services" (designated instructional services in California) includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from education.

6. To determine whether the District offered Student a FAPE in the June 2007 IEP, the IEP must meet both the procedural and substantive requirements of the reauthorized Individuals with Disabilities Education Improvement Act (IDEA 2004). The first question is whether District complied with the procedural requirements of the law. Not every procedural violation is sufficient to support a finding that a student was denied a FAPE. To constitute a denial of FAPE, the procedural inadequacy must have (a) impeded the child's right to a FAPE, (b) significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of FAPE, or (c) caused a deprivation of educational benefits.

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<sup>3</sup> The decision is final under the doctrine of res judicata and pursuant to Education Code section 56505, subdivision (h).

7. The second test in evaluating District's offer is whether the June 2007 IEP developed was substantively appropriate. District was required to offer an IEP that was designed to meet Student's unique needs and was reasonably calculated to provide educational benefit. An IEP for each child with a disability must include a statement regarding the child's present levels of academic achievement and functional performance; measurable annual goals designed to meet the child's educational needs and enable the child to make progress; a statement of the special education and related or supplementary aids and services to be provided; an explanation of the extent to which the child will not participate with nondisabled children; any individual accommodations necessary to measure performance on state and districtwide assessments; and other information, including the anticipated frequency, location, and duration of the services. Offers are to be evaluated as of the time the IEP team designed them, as part of the IEP, in light of the information available at the time the offers were made, and are not to be judged in hindsight.

*Assessments and Scheduling the IEP Meeting<sup>4</sup>*

8. The local educational agency (LEA) must convene an IEP team meeting at least annually to review the student's progress, the IEP, whether the annual goals are being achieved, the appropriateness of placement, and to make any necessary revisions. Student's annual IEP was due in January 2007. At that time, District attempted to obtain Parents' consent to assess Student to obtain updated information as to his unique needs and present levels of performance and progress in order to formulate a new IEP offer.

9. On January 17, 2007, Special Education Director Rosalind Davenport sent Parents a letter with a proposed assessment plan for signature and proposed IEP meeting to discuss the plan. The plan proposed to assess Student in the areas of academic/preacademic, social/adaptive behavior,<sup>5</sup> language/speech/communication development, occupational therapy, and adaptive physical education.

10. Parents did not consent to the assessment plan, and District filed a request for a due process hearing on February 26, 2007, identified as OAH Case No. N2007020774, to obtain an order entitling District to assess Student despite lack of consent. This case was not consolidated with the 2006 consolidated cases. The case settled and Mother executed an assessment plan on March 15, 2007. At Parents' request, the plan included the following additional areas for assessment: audiology, intellectual development, and psychomotor development. In reliance on the settlement, District proceeded to schedule its assessors to assess Student at Son Light on April 16, 17, 18, and 26, 2007, and to thereafter hold an IEP meeting on one of three proposed dates of May 8, 9, or 10, 2007.

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<sup>4</sup> The assessment history prior to the June 2007 IEP meeting is relevant to explain the lengthy delay in scheduling the IEP meeting.

<sup>5</sup> The social/adaptive behavior assessment was arranged with a third party provider, applied behavior analysis (ABA) expert Kevin Dotts.

11. By letter from Mother and an advocate dated April 13, 2007, Parents rescinded consent to the assessment, claiming their consent had been obtained under duress. By letter from Mother dated May 5, and faxed to Ms. Samman, attorney for District, on May 10, 2007, Parents again consented to the March assessment plan. In addition, Mother asked for the area of assistive technology and augmentative communication (AAC) to be assessed and District agreed.

12. District thereafter conducted and completed the assessments in May and June 2007, except two, the audiological and the AAC assessments. Parents had already obtained a private AAC assessment in January 2007, and Parents agreed that District's payment of the invoice for the AAC assessment met its obligation to assess in that area. District arranged for the audiological assessment to be administered at Children's Hospital of Oakland but it was never done because Parent would not sign a release of information. District therefore did not have an audiological assessment completed before the June 27, 2007 IEP meeting through no fault of its own.

### *Procedural Requirements*

13. The school district must provide the parent adequate advance notice of an IEP team meeting to ensure that at least one parent is present at the IEP meeting or has been afforded an opportunity to participate. The notice must be sent "early enough" to ensure an opportunity to attend. The IEP team members must also include not less than one regular education teacher if the student is, or may be, participating in the regular education environment, not less than one special education teacher, a knowledgeable representative of the school district who is qualified to supervise the provision of special education services, and an individual who can interpret the instructional implications of the assessment results. A parent has meaningfully participated in the development of an IEP when he or she 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.

14. By notice dated June 7, 2007, District scheduled an IEP meeting for June 27, 2007, beginning at 1:00 p.m. Prior to the meeting, District provided Parents with copies of all assessment reports and approximately 20 proposed annual goals for their review.

15. On June 27, 2007, the IEP team convened. Mother was present until late in the meeting when she had to leave. However, she then participated to a certain extent by telephone. Student's advocate Tracy Bailey participated in the meeting by speaker phone, and Vicky Wells, a private behavior analyst for Student, was present. The District team members present were Special Education Director Rosaline Davenport, school psychologist Lauren La Plante, speech and language pathologist Roberta Rockwell, general education teacher Elizabeth Gentile, SDC class teacher Sharon O'Neil, occupational therapist Nicolette Danielsen, adapted physical education instructor Harry Hathaway, special education coordinator Susan Martin, and nonpublic agency ABA analyst Kevin Dotts. Also present by speaker phone was nonpublic agency AAC provider Dr. Marilyn Buzolich for about twenty minutes.

16. District provided Student with adequate advance notice of the IEP meeting. Although the law does not expressly require delivery of assessment reports and proposed IEP documents in advance of the IEP meeting, District appropriately provided Parents the assessment reports and proposed IEP documents in advance of the meeting. The IEP team included all members required by law including Mother, knowledgeable supervisory representatives, general education and SDC class teachers, and those who could interpret the educational implications of the assessments. The IEP meeting notes indicate that the IEP team listened to Mother's concerns for almost 45 minutes. Mother was given the opportunity to observe three classes before the meeting. She expressed disagreement with some of District's assessments and proposed goals, and had both an advocate and a private behavior analyst participating with her in the meeting. The District members considered Mother's concerns and objections as they worked to reach a consensus on the offer. The fact that District team members did not adopt all of Mother's requests does not indicate that Parents were denied participation in the meeting.

17. Based on the above findings, District scheduled and conducted the June 2007 IEP meeting in accordance with the statutory requirements, including advance notice, composition of the team, and meaningful parental participation, and there were no procedural violations on those grounds.

#### *Student's Unique Needs*

18. A student is entitled to receive specially-designed instruction and related services that meet his or her unique needs and are necessary to assist in benefiting from the education. To that end, a district must identify a student's unique educational needs.

19. District conducted assessments in May and June 2007 to obtain updated information about Student's levels of performance and progress since District's last assessments in 2005. In addition to reassessment in the areas of psychoeducational, occupational therapy, speech and language, assistive technology, and preacademic skills, District also assessed in the areas of adaptive physical education and applied behavioral analysis (ABA). As of the June 2007 IEP meeting when Student was still in kindergarten at Son Light, the IEP team reviewed District's assessments,<sup>6</sup> staff observations, and school records, and concluded that Student remains severely disabled with autistic-like behaviors.

#### *Psychological Assessment*

20. On June 4, 5 and 11, 2007, District school psychologist Lauren La Plante reassessed Student's psychoeducational development. Ms. La Plante has been a school psychologist for over three years and has training and experience conducting psychoeducational assessments, including for children with autism. Ms. La Plante reviewed

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<sup>6</sup> The appropriateness of District's assessments is not an issue in this proceeding. However, the assessments are useful in identifying Student's unique needs.

Student's history and records, including the October 2005 psychoeducational assessment, and Parents' privately obtained behavioral assessment of March 2006. Ms. La Plante utilized the following standardized tests: the Differential Abilities Scales 2d Edition, Early Years Form (DAS-2), the Beery-Buktenica Developmental Test of Visual-Motor Integration 5th Ed. (VMI-5),<sup>7</sup> the Adaptive Behavior Assessment System (ABAS II), and the Behavior Assessment Scale for Children (BASC-2). She observed Student during the test sessions in his private sensory room at Son Light and in the classroom with his aide and with his mother, on the playground, and during his occupational therapy assessment. She interviewed Mother twice, as well as his one-to-one aide Shavonne.

21. In the June 2007 reassessment, Ms. La Plante's results were "highly consistent" with prior testing over the previous two years. In cognitive functioning, Student continues to perform within the extremely low range with skills below the first percentile for all areas assessed, and in the mentally retarded range, taking into consideration his communication difficulties due to his autism. His adaptive skills are also in the extremely low range, below the first percentile in almost all areas, and his behavioral symptoms are typical of students with autism, including attention problems. Ms. La Plante also reviewed District's June 2007 academic reassessment. She recommended that Student "will likely need specialized instruction throughout his school day in order to access curriculum material," with opportunities for mainstreaming and for increased independence from Mother or the aide to initiate activities. Ms. La Plante's report and testimony were credible and consistent with other evidence, and her recommendations are persuasive.

#### *Academic Performance Assessment*

22. On June 1, 2007, SDC class teacher Sharon O'Neil administered an academic reassessment of Student at Son Light during free play and again with Mother in his private room at the school.<sup>8</sup> Ms. O'Neil has been a special day class teacher with the District for over ten years and holds a moderate-severe teaching credential. Ms. O'Neil attempted to administer a Brigance academic test in the private room. Due to Student's unfamiliarity with her and his high level of distractibility, she was not able to complete the test but was able to observe skills and limitations.

23. In the June 2007 reassessment, Ms. O'Neil testified credibly that Student could rote count to 40 and identify numbers from one through nine, read a list of colors on a chart,<sup>9</sup> say good morning with prompting, identify all letters of the alphabet, identify basic colors, shapes and objects, and categorize objects with prompting. Ms. O'Neil was not able to determine if Student had yet developed the skill of one-to-one correspondence, a necessary

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<sup>7</sup> The VMI-5, using a wide-grip pencil, was discontinued as Student has significant difficulties with visual-motor integration skills (how his eyes and hands work together).

<sup>8</sup> The preschool had a room for Student upstairs where he had private quiet time, sensory equipment such as a trampoline, and other materials. There is no evidence whether he had a fixed schedule for use of this room.

<sup>9</sup> The record is unclear whether the "list" was colors, colored words, or black-on-white words.

pre-math skill. Ms. O'Neil stated that Student is highly dependent on prompts, and needs many opportunities for sensory input and sensory breaks.

24. Both Ms. La Plante and Ms. O'Neil established that Student's academic skills remain at the pre-kindergarten level. Student's areas of need include upper and lower case letter recognition, sight word recognition, number sense, and self-help skills for toileting and independence.

#### *Occupational Therapy Assessment*

25. On June 11, 2007, a private occupational therapist with Dori Maxon Pediatric Consulting Services, Nicolette Danielsen assessed Student's occupational therapy needs pursuant to a contract with District. Ms. Danielsen holds degrees in both occupational therapy and psychology and has training and experience in the assessment of occupational therapy needs, including gross and fine motor skills, sensory needs, and visual motor skills. She reviewed Student's records, interviewed Mother, observed Student at Son Light, and administered the assessment in his private room at the school. During the assessment, Student needed, and Mother provided intense vestibular, proprioceptive activities on a trampoline, swing, and therapy ball in his room, and pressure to the soles of his feet, which helped him to remain calm and to focus.

26. In the June 2007 reassessment, Ms. Danielsen found results consistent with the previous assessment. She was also unable to use standardized test tools. In addition to clinical observations of Student in the areas of fine motor skills, visual perceptual, gross motor skills, self care, sensory processing, she conducted the Sensory Profile School Companion to understand his sensory processing skills. In her report and testimony, Ms. Danielsen established that Student's fine motor skills were at the four-year-old level, and that Student had difficulty with visual motor tasks such as cutting, copying and writing. His gross motor skills are addressed separately in an adaptive physical education assessment, and Ms. Danielsen found this to be an area of relative strength. Student's self care skills appear to be at the five-year-old level. The Sensory Profile confirmed that Student displays characteristics of hypo-sensitivity to auditory stimuli and hyper-sensitivity to visual and tactile stimuli. He needs verbal directions paired with physical or visual prompts, and has an excessive need to seek vestibular movement to stay alert and organized. He no longer had a chew toy on a string around his neck. He needs proprioceptive information about his muscles and joints, deep pressure, stretching or vibration. He obtained this from hugs, hand flapping, jumping on his knees, and moving quickly. Ms. Danielsen explained that Student's sensory needs interfered with his ability to participate in the educational environment. She recommended that Student needs occupational therapy services to address his delayed fine motor skills and to communicate and meet his sensory needs. Ms. Danielsen was a knowledgeable, credible witness and her findings and recommendations regarding Student's needs were persuasive.

### *Speech and Language Assessment*

27. On June 1, 2007, District speech therapist Roberta Rockwell assessed Student's speech and language needs. Ms. Rockwell has been a speech and language pathologist for 21 years, provides training to District's speech and language staff, and has training and experience conducting speech and language assessments, including those involving autism. Ms. Rockwell reviewed Student's history and records, including many past assessments that involved communication skills, interviewed Mother and Son Light staff, and observed Student for two hours at the preschool.

28. In the June 2007 reassessment, Ms. Rockwell attempted two standardized tests of Student's expressive and receptive language skills, but discontinued testing due to Student's deficits, including distractedness and need for multiple stimuli presentations and prompting. Ms. Rockwell then used a variety of nonstandardized assessment tools including language sampling, measured observation, and the Rossetti Infant Toddler Language Scale. Based on a language sampling of 12 utterances collected during 35 minutes, Student's mean length of utterance was about 1.5 words, or that of a about a one year old child. Longer utterances generally required prompting. One spontaneous utterance was noted. Student's articulation skills for one syllable words were good, but for two syllable words, the second syllable was frequently an approximation. Student's skills for verbal and nonverbal communication ranged from about nine to 12 months of age. Student could remain quiet easily during a ten minute circle time but demonstrated attending for only about one minute. During the two-hour observation, Student was observed initiating contact physically with his aide and parent three times, interpreted as either "hello" or seeking comfort. Student did not initiate verbal or physical communication with peers or other adults and was not seen speaking or interacting with peers. When he was attending, Student could understand routine verbal directions such as "put on your shoes," but generally needed frequent and repetitive prompting.

29. Ms. Rockwell's assessment was consistent with District's previous assessment. Based upon her expertise and thorough assessment, Ms. Rockwell persuasively established that Student's unique needs include a severe expressive and receptive language disorder, at about the 18 month level, including significant deficits in social reciprocity, with a marked weakness in shared or joint attention, and that he needs speech and language services including developing compensatory communication using PECS (Picture Exchange Communication System).

### *Assistive Technology/Augmentative Communication Assessment*

30. After District agreed in May 2007 to conduct an augmentative communication assessment, it contracted with Dr. Marilyn Buzolich to conduct an assistive technology (AT)/AAC assessment. Dr. Buzolich contracted with Deborah Burns-McCloskey to conduct the assessment. Ms. McCloskey has a master's degree in speech and language pathology and audiology and has over 20 years experience in AAC and AT assessments. Dr. Buzolich and/or Ms. McCloskey informed District that Ms. McCloskey had already conducted an

AAC assessment of Student in January 2007, at Parents' unilateral request, but that the invoice for the assessment had remained unpaid. Parents and District agreed that District would assume the payment to fulfill its assessment obligation and District paid for the report.

31. On January 26, 2007, at the unilateral request of Parents, Ms. McCloskey conducted a private AAC assessment of Student at Son Light. She found that Student had very limited communication skills of a few words, simple signs, and simple gestures. His limited speech abilities were not sufficient to meet his daily communication needs and she recommended that he needed a speech generating device (SGD) to augment his limited speech.

32. Parents requested the January 2007 assistive technology reassessment because of Student's increased frustration and inability to communicate what he wanted to say. Ms. McCloskey established that, although Student has made steady progress across the board, his current system of verbal and nonverbal communication does not meet his functional communication needs. He relies on limited verbalizations, proxemics (approaching a person, place or thing), facial expressions, eye gaze, gestures, and some signs. Due to his fine motor deficits, signing alone is not a viable alternative to speech. She found that, in the absence of a SGD, Student frequently relies on aberrant behavior to communicate his basic physical needs and wants.

33. Ms. McCloskey persuasively recommended that due to Student's significant verbal speech disorder, he would benefit from the use of a SGD, which would enable him to communicate independently. An SGD provides an "auditorized" and visual display, which can serve as a cue to assist him in formulating language.

#### *Adapted Physical Education Assessment*

34. On May 30, 2007, District adapted physical education instructor Harry Hathaway conducted an adapted physical education (APE) assessment by observing Student at Son Light and attempting to administer the Test of Gross Motor Development-2 (TGMD-2). Mr. Hathaway holds a bachelor's degree in kinesiology (physical education) and has been with the District for four years. Mr. Hathaway requested the Son Light classroom teacher and Student's aide to fill out observation surveys and return to him. He did not give a survey to the school's physical education teacher because the school did not have one. The teacher timely completed the form with limited information, but the aide did not return it to him after two requests. The teacher reported that Student could kick, walk on a balance beam and bounce on a trampoline, but made no mention of any other gross motor skills developmentally appropriate for a child of Student's age, such as galloping, catching, throwing, hopping, leaping or swinging a bat.

35. The locomotion portion of the TGMD-2 was aborted due to Student's distractability and inability to start the activities, except for running, where he scored poorly. Mr. Hathaway concluded that Student's skill set seemed low, and recommended that he receive direct APE services as well as physical education. He recommended that Student

needs skills to allow movement of his body through space, and also needs to develop specific coordination of body and limbs. Based on the above, Mr. Hathaway's findings and recommendations were persuasive.

### *The Applied Behavior Analysis Assessment*

36. On May 29 and June 6, 2007, Kevin Dotts, the owner and director of I Can Too! Learning Center, Inc., assessed Student's behaviors to determine if there was a need for ABA. Mr. Dotts has a master's degree in special education, about 14 years of private ABA therapy experience and education, and opened I Can Too! in 2000. He has also consulted with about 25 school districts in setting up district-run ABA programs. Mr. Dotts met Mother several years ago when she asked him to consider providing ABA services to Student. At that time, he saw a video of Student and attended an IEP meeting, but was never hired and never provided services. District first contacted him in the fall of 2006 regarding an ABA assessment of Student.

37. Mr. Dotts observed Student on May 29 and June 6, 2007, in the educational environment at Son Light. The behaviors targeted for observation were: ability to attend, sustain attention, observe/reference, imitate, response rate on first stimuli, independent skills, ability to communicate effectively, mode of communication, and frequency of communication, agenda oriented behaviors, noncompliance, and any other excessive behaviors that interfered with his ability to maximize his learning. Mr. Dotts spent almost three hours observing Student.

38. Mr. Dotts found that Student demonstrated minimal observation and imitation skills, which are the two foundational skills for independent learning. Student only observed other children or the adults at the school four times during the entire assessment, and was not therefore learning from them or interacting with them. Student also showed very little independent skills, was extremely prompt dependent on his aide, and expected his aide to get him through the class day. He demonstrated less than five percent response rate on first presentation and in most cases, after repeated verbal prompts, the aide had to resort to a physical prompt to obtain an appropriate response. Student demonstrated minimal attention skills and prompting was required over ninety percent of the time. Student did not seem to understand the power of communication, and did not reference his peers. He was very unorganized and, when not directed, would wander off or engage in self-stimulatory behaviors.

39. Mr. Dotts persuasively established that Student is a significantly impaired child that needs a small classroom environment that is highly structured and visually supported in order to facilitate communication and learning skills, with a teacher specialized in autism disorders, along with an ABA program to support his transition from the preschool. Student has needs for developing his learning, attention and sustained attention, communication, responsiveness, and independence skills, and for a structured and contingency-based reinforcement system.

40. Based on all of the above assessments, Student's unique needs are in the areas of preacademics, including upper and lower case letter recognition, number sense, and self help skills for toileting and independence, delayed fine motor skills, communicating and meeting his sensory needs, expressive and receptive language, social reciprocity, attention and joint attention, augmented alternative communication, APE, and responsiveness.

### *Annual Goals*

41. When developing an IEP, the team must consider the strengths of the student, the concerns of the parents, the results of the most recent assessments, and the academic developmental and functional needs of the child. An IEP must include measurable academic and functional goals and special education and related services designed to meet all of the child's unique needs that result from his or her disability so that the child may progress in the general curriculum.

42. For the June 2007 IEP, the District IEP members proposed 20 annual goals to address Student's unique needs in all areas.<sup>10</sup> The proposed annual target date for the goals was June 27, 2008. Each annual goal has short-term objectives with target dates between June 2007 and June 2008. Mother objected to all of the goals at the IEP meeting because she did not think the baselines for the goals were accurate.

43. Goals One through Six address Student's unique needs in preacademics as identified by SDC teacher Sharon O'Neil: upper and lower case letter recognition, sight word recognition, number sense, and self-help skills for toileting and independence. The baselines for all six goals are accurate and are based on the June 2007 academic assessment. All six goals are measurable and would be tracked with recorded data by school staff.

44. Goal One is to match all lowercase to uppercase letters with 75 percent accuracy for four out of five trial days. Goal Two addresses sight word recognition to identify high frequency function words for six out of eight cards in four out of five trial days. Goal Three addresses number sense to count up to ten objects with 75 percent accuracy on eight out of ten trial days. Goal Four also addresses number sense and one-to-one correspondence, to count up to ten objects using one-to-one correspondence with 75 percent accuracy on eight out of ten trial days. Goal Five aims to have Student communicate a need for toileting by using a picture, sign or word on two out of 3 occasions per day over a four week period. Goal Six is a self help goal for independence in which Student would transition between school activities using a visual picture schedule with 75 percent accuracy over ten consecutive days. Based on the assessment and the testimony of Ms. La Plante and Ms. O'Neil, the goals meet Student's preacademic needs and are appropriate.

45. Goal Seven addresses Student's unique needs for socialization as reported by all who assessed him in 2007. As the baseline, Student was not observed by any assessors to initiate interaction with peers, and tended to play by himself or with the adults who interacted

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<sup>10</sup> District staff wrote a number at the top of each goal's page so the goals are numbered consecutively.

with him. The goal proposes that by June 2008, when participating in a structured activity or game, Student would be able to take turns with an adult or peer by waiting, without interrupting others, for a signal from staff that it is his turn 75 percent of the time on eight out of ten trial days. Turn-taking is a foundational skill for peer interactions, it is measurable, and is therefore an appropriate goal.

46. Goals Eight, Nine, Thirteen, Fourteen, Fifteen, Sixteen, and Seventeen were proposed by the District members of the IEP team to address Student's unique needs in speech, language, and communication as identified by speech and language pathologist Roberta Rockwell and ABA analyst Kevin Dotts:<sup>11</sup> expressive and receptive language, social reciprocity, shared or joint attention, and communication. The unique needs and baselines are based on the 2007 speech and language reassessment and are therefore accurate. All seven goals are measurable and would be tracked with recorded data by school staff.

47. Goal Eight is a communication goal which appropriately addresses joint attention and social reciprocity where Student would be able to participate in meaningful/functional social routines reinforcing a core vocabulary in a variety of structured settings with an occurrence of two times within a five minute trial. The core vocabulary examples in the goal are "one, two, three go/stop"<sup>12</sup> and "Where's [Student] – Here I am." Goal Nine addresses Student's expressive communication needs as he does not have a spontaneous means of communication, and proposes that Student would, with moderate gestural prompting, begin to use pictures or line drawings (e.g. Mayer Johnson symbols) to communicate his wants and needs in three out of five communication attempts during structured activities.

48. Goal Thirteen is a communication behavior goal addressing Student's very low rate of communication with others (once or twice an hour). He would be able to increase his communication intent behaviors through the use of a visual communication system to a minimum of 15 times per hour in the classroom by June 2008. The visual communication system could be anything, such as a picture or pointing, and could vary. Goal Fourteen is a goal for task completion that addresses Student's needs to develop independence, and proposes that Student would be able to complete a variety of tasks with a minimum of ten pieces without support in four out of five opportunities. This goal would reduce Student's reliance on prompts. Goal Fifteen addresses receptive language needs since Student only responded to first presentation of familiar instructions less than five percent of the time. Student would be able to respond to first presentation of a familiar instruction 70 percent of the time in a structured environment.

49. Goal Sixteen is in the area of following directions and also addresses receptive language and Student's need to develop imitation skills. By June 2008 Student would be

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<sup>11</sup> Mr. Dotts proposed Goals Thirteen through Seventeen in his ABA assessment report.

<sup>12</sup> The typed goal says "to/stop" and Ms. Rockwell testified that was a typographical error.

able to imitate one step actions with or without stimuli with 80 percent accuracy in a structured environment. Goal Seventeen addresses Student's need to develop sustained attention and proposes that he would be able to sustain his attention to an adult directed task with no more than one prompt per minute during an activity of three to five minutes in length. This goal also addresses reducing Student's dependence on prompts. Both Ms. Rockwell and Mr. Dotts testified persuasively that these seven goals are realistic and could be achieved. The assessments and the testimony of Ms. Rockwell and Mr. Dotts established that Goals Eight, Nine, Thirteen, Fourteen, Fifteen, Sixteen, and Seventeen are appropriate.

50. Goal Ten contains two goals based on Harry Hathaway's conclusion that Student has gross motor needs to be addressed with APE. The baseline establishes that, while Student shows the ability to motor plan some activities, he needs skills to allow movement of his body through space, and also needs to develop specific coordination of body and limbs. By June 2008, individually or in a group, Student would be able to: (a) move two body parts (e.g., head, shoulders, arms, legs) in response to directions in four out of five trials with 80 percent accuracy for a period of two weeks; and (b) move body and limbs in imitation of the instructor or peer demonstrator to perform a routine of eight out of ten warm-up exercises with 50 percent accuracy. Based on Mr. Hathaway's assessment and testimony, these goals are measurable, address Student's gross motor needs and are appropriate.

51. Goals Eleven and Twelve are occupational therapy goals based on Nicolette Danielsen's 2007 occupational therapy assessment and findings that Student's deficits included delayed fine motor skills, and needs to communicate and meet his sensory imbalances. Goal Eleven addresses fine motor skills and proposes that Student will demonstrate improved fine motor control and accuracy by writing his first name legibly within two-inch margin paper and within one-eighth inch of the writing baseline in three out of four trials. The baseline states that Student is able to write approximations of the letters of his first name in very large print and is unable to remain on a writing line even after a demonstration, and that his fine motor skills are at the four year old level. Goal Twelve addresses Student's sensory needs from a baseline that he displays characteristics of hypo-sensitivity to auditory stimuli and hyper-sensitivity to visual and tactile stimuli, with an excessive need to seek vestibular, proprioceptive and tactile input, including requesting a sensory based activity if the item is present, and if prompted, he will repeat back. By June 2008 Student would be able to independently request sensory based activities using appropriate communication in order to meet his sensory needs within his daily school schedule in three out of four trials. The baselines for both goals accurately reflect Ms. Danielsen's findings. Based on the assessment and Ms. Danielsen's testimony, the goals are appropriate to address Student's occupational therapy needs.

52. Goals Eighteen, Nineteen and Twenty are AAC goals based on Deborah Burns-McCloskey's January 2007 AAC assessment findings that Student needs an SGD to augment Student's limited communication skills. The baseline for all three goals is the same and summarizes Student's limited communication verbalizations, gestures and signs that are inadequate to meet his daily needs to be able to communicate both one-to-one and in small

group settings. Goal Eighteen proposes that by June 2008 Student would use technology to develop operational competence using an augmentative communication (speed generating) device. Goal Nineteen proposes that Student would develop functional competence with aided systems. Ms. McCloskey stated that his school day would be charted in a participation plan based on his communication needs to plan when Student would use his aided systems. Goal Twenty proposes that, with staff support, Student would implement assistive technology as a tool for learning and exploration, and specifically, that he would explore learning software using an expanded keyboard (such as Intellikeys) four times weekly. The short term objectives for each goal develop his skills with the device in increments. The device is not identified in the goal because the appropriate device for Student would be selected from three types of SGDs during an initial trial period. The assessment and testimony established that these goals are appropriate to address Student's need for augmented communication.

### *Placement and Services*

53. A school district is required to provide instruction and related services that are designed to address the student's unique educational needs, reasonably calculated to provide the student some educational benefit, comport with the student's IEP, and are provided in the least restrictive environment. The IEP must contain a statement regarding the student's present levels of academic achievement and functional performance, and a statement of the special education and related or supplementary aids and services to be provided.

54. To the maximum extent appropriate, children with disabilities should be educated with children who are not disabled, unless due to either the nature of the disability, or its severity, education in a regular class cannot be achieved satisfactorily even with the use of supplementary aids and services. When determining whether a placement is in the least restrictive environment (LRE), four factors must be evaluated and balanced, including the academic benefits of placement in a mainstream setting, with any supplementary paraprofessionals and services that might be appropriate, the non-academic benefits of mainstream placement, the negative effects the student's presence may have on the teacher and other students; and the cost.

55. At the June 27, 2007 IEP meeting, District offered Student special education placement and related services for both the 2007 ESY and for the 2007-2008 school year and a transition plan to support Student's transition from the private preschool to the public school. .

### *Placement for the 2007-2008 School Year*

56. For the 2007-2008 school year, District offered a placement in an autism-specific SDC class at Amelia Earhart Elementary School (Earhart) for four and one half hours a day, five days a week.

57. For the 2006-2007 school year, District offered Student placement in an SDC class for children with autism at Haight Elementary School (Haight). In the 2006 consolidated cases, the parties fully litigated whether District's offer to place Student in the autism-specific SDC class at Haight for the 2006-2007 school year was appropriate. That autism-specific SDC class was moved to Earhart for the 2007-2008 school year. District contends that it is the same class placement that is at issue in this proceeding.

58. At the hearing on the 2006 consolidated cases, Parents actively sought a general education placement for Student. The 2006 Decision determined that District's autism SDC at Haight was the least restrictive environment in which Student could be satisfactorily educated. Judge Marson found that Student would not have benefited academically or nonacademically in a general education kindergarten class, and his presence there would have been mildly disruptive to the teacher and other students.

59. In the present case several things have changed.<sup>13</sup> First, Parents did not attend the hearing or present any evidence or argument regarding a general education placement. Second, the SDC class was moved from Haight to Earhart. According to Special Education Director Rosalind Davenport, by the end of the school year, the class at Haight reached a high of 12 students, and District decided to split the class to keep it smaller. The autism intensive class was moved from Haight to Earhart and the SDC class at Haight is now a different more inclusive class for students with milder disabilities on the autism spectrum.

60. Additionally, the autism SDC now has a different teacher.<sup>14</sup> The teacher is now Ia Hernandez, who is in the process of obtaining a master's degree specializing in autism and holds an intern credential. Finally, ABA analyst Kevin Dotts, who observed the autism SDC class at Haight, consulted with the District when the class was moved from Haight to Earhart over the summer of 2007 to ensure that the classroom design would meet the needs of students on the autism spectrum who would attend the class. Mr. Dotts' consultation altered the structure and design of the SDC class.

61. Ms. Hernandez has seven students in the autism SDC class at Earhart for the 2007-2008 school year, ranging from kindergarten to the second grade level. The class has a two-to-one student/adult ratio with trained classroom aides, and is a highly visual, intensive autism class. All service providers come into the classroom regularly and also collaborate continually with the teacher. For example, in addition to individual sessions, the occupational therapist leads a group therapy session once a week using sensory activities, addressing fine and gross motor skills. The speech and language therapist comes into the classroom twice a week and the APE teacher comes three times a week. District's behavior analyst visits weekly and is in constant collaboration with the teacher. The highly structured routine is based on best practices for students with autism, including TEACCH (Treatment

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<sup>13</sup> The doctrine of collateral estoppel precludes a party from relitigating the same issue necessarily decided in a previous case involving the same parties. In order for it to apply, the issue must be identical.

<sup>14</sup> District's IEP offers do not identify specific teachers because the District has discretion to make personnel decisions. Neither the personnel change nor the qualification of the teacher is an issue in this proceeding.

and Education of Autistic and Communication Handicapped Children), ABA, PECS, discrete trial training, incidental teaching (teaching skills in the natural context), positive behavioral supports, and picture schedules. In addition, language, communication, and social skills supports are integrated into the entire curriculum to increase each student's expressive and receptive language.

62. The purpose of PECS is to give a child access to communication. The class uses PECS board maker software to produce icons with photos or graphics of objects. PECS is a two-person communication system. For example, a child may communicate "I want Cheetos" by picking up an icon showing a picture of a bag of Cheetos and handing it to the teacher. The icons are also used on each student's picture schedule. The visually based approach would provide Student with prompts independent of an aide. Children with autism learn well with a highly structured routine. The daily schedule starts with a period of facilitated "free choice," then moves to morning circle, language arts, and so on. For each transition to the next activity, a bell rings and each student uses their picture schedule to see what the next activity will be. The class also uses spoken language, sign and augmentative communication. The class uses positive reinforcement to systematically set each student up for success and create positive outcomes using proactive strategies and interventions. Each child's IEP goals are addressed on an ongoing basis in the classroom, including data collection and assessments to track progress. Opportunities for social skills include direct social skills instruction as well as integrated play groups. The classroom has sensory stations as a scheduled activity.

63. Ms. Hernandez reviewed District's proposed goals and is confident that they could all be implemented in her classroom. The June 2007 IEP also proposed that Student would have about 16 percent of his time in mainstreaming opportunities with the general education students at recess, lunch, and assemblies, and those opportunities would include facilitated interactions.

64. The testimony and documentary evidence established that Student requires a small, highly structured class, with structured step-by-step instruction from staff trained to work with children with autism, strategies to decrease his reliance on continual prompting from an aide, and increased opportunities for communication. No evidence was presented to suggest that Student could benefit from a general education kindergarten placement, and in fact, the witnesses were uniformly of the opinion that he could not. The autism SDC class at Earhart provides a small, structured environment with a curriculum rich in language, communication, and social skills opportunities that is appropriate to meet his needs. Accordingly, District's offer for the 2007-2008 school year in the autism SDC class at Earhart offered Student a FAPE.<sup>15</sup>

*Placement for the 2007 Summer Extended School Year (ESY)*

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<sup>15</sup> Mother verbally agreed to visit the autism SDC class at Earhart but never did.

65. ESY services shall be provided to students who have handicaps which are likely to continue indefinitely or for a prolonged period, and where interruption of the student's educational programming may cause regression. The ESY offer must be comparable to the Student's school year IEP program.

66. For the 2007 ESY, District offered a specialized academic classroom placement in an SDC class for students with moderate to severe disabilities located at Ruby Bridges Elementary School (Ruby Bridges), for four hours a day, five days a week.

67. The above 2007 summer ESY offer at Ruby Bridges is subject to an analysis similar to that for the SDC class at Earhart. District does not operate an autism-specific SDC class during the summer ESY after the end of the regular school year. The SDC class at Ruby Bridge was taught by Sharon O'Neil, the SDC teacher who conducted Student's academic assessment at Son Light. She had many years experience teaching children with disabilities including autism, and was assisted by highly trained paraprofessionals. The class was small, highly structured, and facilitated language and social skills training throughout the day in a multi-sensory environment. There were three aides plus the teacher for nine students, about three of whom were on the autistic spectrum. This provided a small student/teacher ratio of about 2.25:1. Based on the above findings, District's offer of a moderate to severe SDC class for the 2007 summer ESY, including children with autism, was appropriate.

68. The testimony and documentary evidence established that Student requires a small, highly structured class, with structured step by step instruction from staff trained to work with children with autism, strategies to decrease his reliance on continual prompting from an aide, and increased opportunities for communication. Based on the unrefuted testimony of most, if not all witnesses at the hearing, Student could not have benefited from a general education kindergarten placement. District's offer for a moderate-severe SDC at Ruby Bridge for the 2007 summer ESY was therefore appropriate.

#### *One-To-One Paraprofessional Support*

69. District's summer ESY and 2007-2008 school year offers provided for Student to have one-to-one paraprofessional support. For the summer ESY, Student would have full time aide support while at Ruby Bridges. For the school year at Earhart, Student would have full time aide support with a paraprofessional highly trained in behavioral strategies from the beginning of school through November 30, 2007, with the level of support to be reviewed at an IEP meeting on or before that date. The stated goal to be reviewed in that IEP meeting would be to fade the aide support as Student's independence level increased.

70. Given Student's extreme dependence on his aide, it would have been unreasonable to propose reducing the support at the same time that he was transitioning in to a new school environment. District's offer wisely proposed to give Student both the summer ESY and three months of the new school year, implementing goals for self help, communication and independence, among others, before reviewing whether it would be

appropriate to fade the aide support either qualitatively or quantitatively. District's proposal was not to begin to fade support, but to review whether fading aide support would be appropriate or whether Student needed further growth and development in particular skill levels first. Given these facts, District's offers for aide support are appropriate.

#### *Occupational Therapy Services*

71. Related services must be provided by the District if a student's unique needs related to his disability require such services for the student to obtain educational benefit.

72. District offered Student one-to-one direct occupational therapy services for 30 minutes once a week for the summer 2007 ESY. For the 2007-2008 school year, the offer is for one individual occupational therapy session for 30 minutes once a week, one small group therapy session for 30 minutes once a week, and 15 hours per year, or about an hour and a half per month, of occupational therapy consultation to classroom staff.

73. As set forth in Factual Findings 25 and 26, Student's occupational therapy assessment led to two proposed goals to address his delayed fine motor skills and needs to communicate and meet his sensory needs. Ms. Danielsen explained that the ESY program operates on a shorter day, hence one 30-minute individual session once a week was sufficient to get Student started, given his transition needs. Providing 60 minutes of both group and individual sessions during the school year was designed to help Student achieve his goals. The consultation services will ensure that all staff are trained to address Student's needs on a daily basis in addition to the weekly sessions. Therefore, District offered occupational therapy services that were appropriate to address Student's needs in that area.

#### *Speech and Language Services*

74. District offered Student 30 minutes of direct speech and language therapy two times a week for a total of 60 minutes a week for the summer 2007 ESY. For the 2007-2008 school year, the offer is for one individual speech and language therapy session for 30 minutes once a week, one small group therapy session for 30 minutes once a week, and 30 minutes of consultation per week to classroom staff.

75. As set forth in Factual Findings 27 through 29, Student's speech and language assessment led to several proposed goals to address his expressive and receptive language, social reciprocity, and joint attention deficits. The individual and group therapy sessions give Student individualized attention, and structured socialization with not more than one or two other students in a small group. Ms. Rockwell testified persuasively that these services will help Student achieve his goals. The consultation services are consistent with the intensive autism-specific environment of the SDC, to ensure that all staff are trained to address Student's needs on a daily basis in addition to the weekly sessions. The speech and language services offered here are in addition to the language and communication-rich environment of the autism SDC. Considering all of these factors, the speech and language services are appropriate.

### *Applied Behavior Analysis Services*

76. For the 2007 summer ESY, District offered Student behavior intervention services utilizing ABA through I Can Too!, the NPA run by ABA analyst Kevin Dotts, as follows: ten hours a week of direct ABA services plus three hours a week of supervision at Ruby Bridges until the end of the ESY, and then the same amount of direct and supervisory services at Student's home until the end of August 2007. For the 2007-2008 school year, District offered ten hours a week of direct ABA services plus four hours a week of supervision at Earhart, provided by the same NPA.

77. Mr. Dotts' education, training and experience lend great weight to his ABA assessment, his recommendations, and his testimony. He has about 150 people on staff at I Can Too!, oversees their training and has educational standards for hiring. He has observed children with severe autistic deficits like Student make a great deal of progress utilizing ABA and other autism-specific methodologies. Mr. Dotts established that Student's preschool classroom at Son Light is "incredibly inappropriate" for him. While the appropriateness of Parents' private placement is not at issue in this proceeding, Mr. Dotts persuasively testified that because of Student's age and developmental levels, it is vital for Student to be appropriately placed in a structured environment with personnel who specialize in teaching children with autism.

78. Goals Thirteen, Fourteen, Fifteen, Sixteen, and Seventeen are based on the 2007 ABA assessment. Mr. Dotts is confident that after about ten months in his proposed program, with the goals adopted by the District members of the IEP team and offered to Student, he may not require further ABA services to continue to make progress in the SDC classroom environment. Based on the foregoing, he ABA services offered to Student are appropriate.

### *Augmentative Alternative Communication Services*

79. Based on Ms. McCloskey's 2007 AAC assessment and proposed goals for augmentative communication with an SGD, District offered Student an AAC trial period from September 4 to November 30, 2007 to try three different devices with 15 hours of consultation and training with Dr. Buzolich and/or Ms. McCloskey. No AAC offer was made for the 2007 summer ESY.

80. Ms. McCloskey's recommendation that Student needs an SGD to develop a means of communication is well supported not only by her assessment but by the emphasis from all assessors on the severe limitations of Student's ability to communicate his wants and needs. It would not have been productive to start a speech device trial during the one-month ESY, and then necessarily discontinue it until September. Parent and Student's behavior analyst Vicky Wells agreed at the June 2007 IEP meeting that it would be better to wait until

fall in order to obtain the devices first. The evidence established that District's offer for AAC services to begin with the new school year is appropriate.

### *Adapted Physical Education Services*

81. Based on Mr. Hathaway's 2007 APE assessment and proposed goals to address Student's gross motor needs, District offered Student 30 minutes a week of direct APE therapy services for the 2007-2008 school year. No APE offer was made for the 2007 summer ESY since it is a shortened program. Mr. Hathaway explained that the weekly session would vary from individual to small group, and that Student could be successful with the APE goals at the level of services offered. This offer is in addition to the APE services Mr. Hathaway provides several times a week to the autism SDC class at Earhart. The evidence established that District's offer for APE services is appropriate.

### *Transition Plan*

82. If Parents had accepted District's offer, Student would have moved from a private preschool with about 20 typically developing preschoolers who ranged in age from two to five, into the Ruby Bridge SDC from June 28 to July 25, 2007. Thereafter Student would have a break from school until September 4, 2007, when the fall school year in the autism SDC class at Earhart started.<sup>16</sup> District offered a transition plan with the June 2007 IEP offer.

83. The transition plan provided six stages. First, Parents would visit the SDC class at Ruby Bridges, and enroll Student in the ESY class. Then, the week before Earhart started, Parents would visit the autism SDC class there, meet the teacher and staff, and then a few days later Student would receive a tour also, and would enroll in the class. That same week, Parents would meet with the ABA staff from I Can Too! and plan both Student's daily schedule needs and his reinforcement hierarchy. After two weeks of enrollment, Parents would visit and observe Student in the SDC. Thereafter, there would be monthly meetings with both school staff and ABA staff. Finally, there would be an IEP meeting before the end of November 2007 to discuss Student's service levels and the AAC trial.

84. The transition plan was proposed at the June 27, 2007 IEP meeting, and the ESY at Ruby Bridges began the next day, so District did not propose to give Student an advance tour of the class. However, the SDC teacher, Ms. O'Neil, had already met and assessed Student's academic performance levels, was at the IEP meeting, and was available to assist Student's transition. The consistency of summer-long ABA services, at Ruby Bridges and then at home, was another aspect of Student's transition. The plan for the fall transition to Earhart allowed Parents to have early and regular follow-up and feedback, and IEP review after three months. The plan would have allowed Student to become comfortable

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<sup>16</sup> District offered ABA services throughout the summer, at Ruby Bridge and then at Student's home to also help transition Student to Earhart.

with his new environments with oversight and parental involvement. The transition plan is therefore appropriate.

### *Transportation*

85. District offered Student transportation to and from his home and Ruby Bridge for the 2007 summer ESY, and to and from his home and Earhart for the 2007-2008 school year. The transportation offer is appropriate.

## LEGAL CONCLUSIONS

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

2. A child with a disability has the right to a free appropriate public education (FAPE) under the reauthorized Individuals with Disabilities Education Improvement Act (IDEA 2004). (Ed. Code, §§ 56000, 56026; 20 U.S.C. § 1412(a)(1)(A).) FAPE is defined as special education and related services that are available to the student at no cost to the parent, that meet the State educational standards, and that conform to the student's individualized education program (IEP). (Ed. Code, § 56031; Cal. Code Regs., tit. 5 § 3001, subd. (o); 20 U.S.C. § 1401(9); .) The term "related services" (designated instructional services (DIS) in California) includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from education. (Ed. Code, § 56363; 20 U.S.C. § 1401(26).)

3. If a parent in the past consented in writing to the child's receipt of special education and related, but then refuses to consent to those services in a subsequent IEP, the LEA shall file a request for a due process hearing. (Ed. Code, § 56346, subd. (d).)

### *Contents of the IEP*

4. School districts receiving federal funds under IDEA 2004 are required pursuant to 20 U.S.C. § 1414(d)(1)(A)(i) to establish an IEP for each child with a disability that includes: (1) a statement regarding the child's present levels of academic achievement and functional performance; (2) measurable annual goals, including academic and functional goals designed to meet the child's educational needs and enable the child to make progress; (3) a description of how the child's progress toward meeting the annual goals will be measured; (4) a statement of the special education and related or supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child; (5) an explanation of the extent to which the child will not participate with nondisabled children in the regular class; (6) a statement of any individual accommodations necessary to measure performance on state and districtwide assessments; and (7) other information,

including the anticipated frequency, location, and duration of the services. (Ed. Code, § 56345.)

5. There are two parts to the legal analysis of whether an LEA such as a school district offered a pupil a FAPE. The first question is whether the LEA has complied with the procedures set forth in the IDEA. (*Board of Educ. of the Hendrick Hudson Cent. School Dist. v. Rowley* (1982) 458 U.S. 176, 206-07 [73 L.Ed.2d 690].) The second question is whether the IEP developed through those procedures was substantively appropriate. (*Rowley, supra*, at p. 207.)

#### *Procedural Violations*

6. Procedural flaws do not automatically require a finding of a denial of FAPE. A procedural violation does not constitute a denial of FAPE unless the procedural inadequacy (a) impeded the child's right to a FAPE; (b) significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of FAPE; or (c) caused a deprivation of educational benefits. (Ed. Code, § 56505, subd. (j); 20 U.S.C. § 1415(f)(3)(E)(i) & (ii).) (See also *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1483-1484.)

7. The LEA shall convene an IEP team meeting at least annually to review the student's progress, the IEP, including whether the annual goals are being achieved, the appropriateness of the placement, and to make any necessary revisions. (Ed. Code § 56343, subd. (d).) The LEA shall have an IEP in effect for each child with exceptional needs at the beginning of each school year. (Ed. Code § 56344, subd. (b); Code of Fed. Regs., tit. 34, § 300.342.)

8. The LEA must provide the parent with adequate advance notice to ensure that at least one parent is present at the IEP meeting or has been afforded an opportunity to participate; this notice must be provided early enough to ensure attendance. (Ed. Code, § 56341.5, subds. (a) & (b).) The meeting notice must include information about the purpose of the meeting, and the parent's right to bring other people to the meeting who have knowledge or special expertise regarding the child. (Ed. Code, § 56341.5, subd. (c).) The IEP meeting should be scheduled at a mutually agreed upon time and place.

9. In addition to at least one parent, the IEP team members must include not less than one regular education teacher if the student is, or may be, participating in the regular education environment, not less than one special education teacher, a knowledgeable representative of the school district who is qualified to supervise the provision of special education services, and an individual who can interpret the instructional implications of the assessment results. (Ed. Code § 56341, subd. (b).) The IEP team must consider the strengths of the student, the concerns of the parents, the results of the most recent assessments, and the academic developmental and functional needs of the child. (Ed. Code § 56341, subd. (a).)

10. IDEA 2004's procedural mandates require that the parent be allowed to meaningfully participate in the development of the IEP. (*Rowley*, 458 U.S. at pp. 207-208.) A parent is a required and vital member of the IEP team. (20 U.S.C. § 1414(d)(1)(B)(i); Ed. Code, §§ 56341, subd. (b)(1) [parents are members of IEP team], 56341.5 [district must ensure opportunity for parents to participate in IEP meeting], 56342.5 [parent must be member of any group making decision on educational placement].) The requirement that parents participate in the IEP process ensures that the best interests of the child will be protected, and acknowledges that parents have a unique perspective on their child's needs. (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 891.) Procedural violations that interfere with parental participation in the development of the IEP "undermine the very essence of the IDEA." (*Id.* at p. 892.) An IEP cannot address the child's unique needs if the people most familiar with the child's needs are not involved or fully informed. (*Id.*)

11. In order to fulfill the goal of parental participation in the IEP process, the school district is required to conduct, not just an IEP meeting, but a meaningful IEP meeting. (*Target Range, supra*, 960 F.2d at p. 1485.) A parent has meaningfully participated in the development of an IEP when he or she is informed of the child's problems, attends the IEP meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1036 [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].) "A school district violates IDEA procedures if it independently develops an IEP, without meaningful parental participation, and then simply presents the IEP to the parent for ratification." (*Ms. S. etc. v. Vashon Island School District* (9th Cir. 2003) 337 F.3d 1115, 1131.) The test is whether the school district comes to the IEP meeting with an open mind and several options, and discusses and considers the parents' placement recommendations and/or concerns before the IEP team makes a final recommendation. (*Doyle v. Arlington County School Board* (USDC Virginia 1992) 806 F.Supp. 1253 at 1262.)

12. As set forth in Factual Findings 13 through 17, District complied with the procedural requirements of the law in the scheduling and conduct of the June 2007 IEP meeting and Parents meaningfully participated in the IEP process, so that no procedural violations occurred.

#### *Substantive FAPE*

13. For a school district's IEP to offer a student a substantive FAPE, the proposed program must be specially designed to address the student's unique needs, reasonably calculated to provide the student with some educational benefit, and must comport with the student's IEP. (20 U.S.C. § 1401(9).) According to the United States Supreme Court, a FAPE must provide a threshold "basic floor of opportunity" in public education that "consists of educational instruction specially designed to meet the unique needs of the

handicapped child, supported by such services as are necessary to permit the child ‘to benefit’ from the instruction.” (*Rowley*, 458 U.S. at p. 189.) The *Rowley* court rejected the argument that school districts are required to provide services “sufficient to maximize each child’s potential commensurate with the opportunity provided other children.” (*Id.* at pp. 198-200.)

14. The IDEA does not require school districts to provide special education students the best education available, or to provide instruction or services that maximize a student’s abilities. (*Rowley, supra*, at p. 198.) The Ninth Circuit refers to the “some educational benefit” standard of *Rowley* simply as “educational benefit.” (See, e.g., *M.L. v. Fed. Way School Dist.* (2004) 394 F.3d 634.) Other circuits have interpreted the standard to mean more than trivial or “de minimis” benefit, or at least “meaningful” benefit. (See, e.g., *Houston Indep. Sch. Dist. v. Bobby R.* (5th Cir. 2000) 200 F.3d 341; *L.E. v. Ramsey Bd. of Educ.* (3d Cir. 2006) 435 F.3d 384.)

15. An IEP is evaluated in light of information available at the time it was developed, and is not to be evaluated in hindsight. (*Adams, etc. v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) The Ninth Circuit has endorsed the “snapshot rule,” explaining that “[a]n IEP is a snapshot, not a retrospective.” The IEP must be evaluated in terms of what was objectively reasonable when it was developed. (*Id.* at 1149). (See also *Christopher S. v. Stanislaus County Off. of Ed.* (9th Cir. 2004) 384 F.3d 1205, 1212; and *Pitchford v. Salem-Kaiser School Dist. No. 24J* (D.Ore. 2001) 155 F.Supp.2d 1213, 1236.) To determine whether the District offered Student a FAPE, the focus is on the appropriateness of the placement offered by the District, and not on the alternative preferred by the parents. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.)

16. In addition to special education instruction and services during the regular school year, ESY services must be provided if the IEP team determines, on an individual basis, that the services are necessary for a child to receive a FAPE. (Ed. Code, § 56345, subd. (b)(3).) ESY services shall be provided to students who have handicaps which are likely to continue indefinitely or for a prolonged period, and interruption of the student's educational programming may cause regression, when coupled with limited recoupment capacity, rendering it impossible or unlikely that the student will attain the level of self-sufficiency and independence that would otherwise be expected in view of his or her handicapping condition. (Cal. Code Regs., tit. 5, § 3043.) The ESY program should be comparable in standards, scope and quality to the school year IEP program. (Cal. Code Regs., tit. 5, § 3043 subd. (g)(2).)

17. As set forth in Factual Findings 18 through 85, District’s annual goals and offers for placement and services in the June 2007 IEP were reasonably designed to provide Student some educational benefit, addressed his unique needs and provided him a FAPE for both the 2007 summer ESY and the 2007-2008 school year.

ORDER

District's June 2007 IEP offered Student a FAPE for the 2007 summer ESY and for the 2007-2008 school year.

#### PREVAILING PARTY

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

#### NOTICE OF APPEAL RIGHTS

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

DATED: December 24, 2007



DEIDRE L. JOHNSON  
Administrative Law Judge  
Office of Administrative Hearings  
Special Education Division