

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

LEGAL GUARDIAN on behalf of  
STUDENT,

v.

SAN DIEGO UNIFIED SCHOOL  
DISTRICT.

OAH CASE NO. 2008080799

**DECISION**

Administrative Law Judge (ALJ) Charles Marson, Office of Administrative Hearings (OAH), State of California, heard this matter in San Diego, California, on December 8, 9, and 10, 2008.

Student was represented by Ellen Dowd, Attorney at Law. Student's Legal Guardian (Guardian) was present on December 8 and December 10, 2008.<sup>1</sup>

The District was represented by Amy Bozone, Attorney at Law. Amy Perez, a diagnostic resource teacher for the District, was present throughout the hearing.

Student filed a due process hearing request on August 25, 2008. On October 15, 2008, OAH granted a continuance of the dates for hearing. At the conclusion of the hearing, the parties were given leave to file closing briefs by December 19, 2008. On that date, the parties submitted briefs and the record was closed.

**ISSUES<sup>2</sup>**

1. In the school year (SY) 2006-2007 (excluding March through June 2007), did the District fail to offer or provide a free appropriate public education (FAPE) to Student because Student failed to make progress on broad reading, broad written language, and behavior goals?

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<sup>1</sup> Student's attorney waived the presence of Guardian on December 9, 2008.

<sup>2</sup> The issues have been restated to include the District's principal defense to Student's claims.

2. In SY 2007-2008 (excluding April through June 2008), did the District fail to offer or provide a FAPE to Student because:

A. Student failed to make demonstrated or objective progress in broad reading and broad written language;

B. Student failed to make any progress on his behavior goals;

C. The District failed to ensure Student's safety at school;

D. The District failed to consider the continuum of placement options;

E. The District pre-determined its Individualized Education Program (IEP) offer of March 13, 2008, or

F. The District failed to offer assessment plans for a Functional Analysis Assessment or AB 2726 services?

3. In SY 2006-2007 (excluding March through June 2007), and in SY 2007-2008 (excluding April through June 2008), was the least restrictive environment for Student academic instruction in a special day class on a campus that included typically developing peers, or academic instruction on a campus that did not include typically developing peers?

## REQUESTED RESOLUTIONS

Guardian seeks an order requiring, as compensatory education, reimbursement for tuition and related services at Sierra Academy, a private school for disabled students only, and an order placing Student for SY 2008-2009 at a certified non-public school (NPS) for disabled students only, with transportation and an extended school year.

### *Background*

1. Student is a ten-year-old male who resides with Guardian within the geographical boundaries of the District. He is eligible for, and has been receiving, special education and services in the category Other Health Impaired (OHI).

2. Student tested positive at birth for crack cocaine, and suffers from Bipolar I Disorder and Attention Deficit Hyperactivity Disorder (ADHD). These disorders, and his undesirable behavior caused by them, substantially impede his education. For the purposes of this dispute, the parties agree that Student has unique educational needs in the areas of reading, writing, and behavior.

3. Student was placed in foster care at birth, and at eight months began living with his father. At age five he was placed in the custody of Guardian, with whom he has lived since. In SY 2003-2004 he attended kindergarten at Blessed Sacrament Parish School (Blessed Sacrament), a private school. In SY 2004-2005, he entered the general education program in first grade at the District's Florence Elementary School (Florence). At some time in 2004 or 2005, he was determined qualified for, and began to receive, special education and related services due to his ADHD. He continued to attend a general education classroom.

4. Student started second grade at Florence at the beginning of SY 2005-2006. He caused, or was involved in, a number of incidents of undesirable behavior. By mid-year he had also been diagnosed as bipolar, had a one-to-one instructional aide for six hours a day, and was receiving outpatient services from San Diego County Children's Mental Health Services (County Mental Health) under AB 2726.<sup>3</sup> As the result of an IEP meeting on March 10, 2006, Student was removed from general education at Florence and finished second grade in a Non-Severe Special Day Class (SDC) at the District's Franklin Elementary School (Franklin).

5. Student began SY 2006-2007 in third grade at Franklin. On March 7, 2007, believing that Student was making no progress and belonged in an NPS, Guardian unilaterally removed him from Franklin and enrolled him in Blessed Sacrament for the rest of the school year and the summer.

6. Student returned to the District in September 2007, and was enrolled in the Emotionally Disturbed (ED) SDC at Hardy Elementary School (Hardy) for fourth grade. His triennial IEP meeting was held on December 10, 2007. Guardian again urged that Student be placed in an NPS, and the District members of the team again disagreed. The disagreement continued at a supplemental IEP meeting on March 13, 2008, but, by that time, Guardian had unilaterally removed Student from Hardy and enrolled him in the Sierra Academy (Sierra), a private school serving only disabled children. Student is now in the fifth grade at Sierra.

#### *FAPE in SY 2006-2007*

##### *Progress toward goals*

7. Under the Individuals with Disabilities in Education Act (IDEA), a disabled student in a public school is entitled to a FAPE. He receives a FAPE if, among other things, his IEP is reasonably calculated to allow him to benefit from his education. Guardian alleges that Student's IEPs for SY 2006-2007 were not reasonably calculated to allow him to benefit

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<sup>3</sup> Assembly Bill 2726 (1995-1996 Reg. Session), which amended Government Code sections 7576 and 7587, and added Government Code section 7586.6, allocated responsibility for a program for children with mental health problems that interfere with their ability to benefit from special education. Student received outpatient mental health services pursuant to its provisions.

from his education because he made no progress toward his broad reading, broad written language, and behavioral goals.

8. Student began SY 2006-2007 in the Franklin ED-SDC under the terms of an IEP dated March 10, 2006. That IEP placed Student in the SDC for academic studies and allowed him to mix with typically developing peers at lunch, recess, assemblies, and on the bus.<sup>4</sup> It also contained a Behavior Support Plan (BSP).

9. Most of Guardian's claim that Student made no progress in SY 2006-2007 rests on the fact that his performance fell below various grade level expectations for students of his age and grade generally. However, a major premise of the IDEA is that every student is unique in his needs and abilities. Progress under an IEP, therefore, cannot necessarily be measured by expectations based on grade level or age, derived from the performance of large groups of disabled and nondisabled students alike. Instead, it must be measured by the performance of the student to whom the IEP pertains. Grade level expectations may be useful for tracking Student's own performance over time, but comparisons to the abilities and performance of other students have no bearing on whether Student made progress or received a FAPE. Those comparisons are not considered here.

*Broad reading in SY 2006-2007*

10. The March 10, 2006 IEP did not identify reading as a need that required specific attention, so no goal was drafted for it. However, John Denear, who taught Student in his third grade SDC, administered to him the Diagnostic Reading Assessment (DRA) in order to determine his present levels of performance (PLOPs) for the March 2006 IEP meeting. The DRA is the District's preferred reading inventory for students in the third grade and below. It is designed to allow teachers to measure students' reading accuracy, fluency, and comprehension levels. Teachers rank students as near, at, above, below, or significantly below grade level depending on their scores. A student's performance is also measured by numbers corresponding to levels of reading achievement within grades. Mr. Denear, who has substantial experience administering the DRA, described it as the District's best measure of reading performance for younger students.

11. On the DRA administered for the March 2006 IEP meeting, Student's score was 18, which corresponded to a low second grade level of achievement. A year later, for the March 21, 2007 IEP meeting, the DRA was administered again. Student's score was 28, which corresponded to the high second grade. Mr. Denear testified that this was a good year's progress.

12. Grades at Franklin are given at the end of trimesters. Mr. Denear wrote a progress report for Student describing his performance during the two trimesters from

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<sup>4</sup> Since the complaint in this matter was filed on August 25, 2008, the two-year statute of limitation bars litigation of the sufficiency of the March 10, 2006, IEP as written. It does not bar arguments about the operation of that IEP on and after August 25, 2006.

September 2006 through March 2007. (He could not report on the third trimester because Guardian removed Student from Franklin in March 2007.) For the first trimester, ending on November 3, 2006, Mr. Denear rated Student's accomplishment in reading as "IR" (inexperienced reader). For the trimester ending on March 9, 2007, he rated Student as "LR" (less experienced reader). Both times he noted that Student's effort still needed improvement. Mr. Denear testified that the change from inexperienced to less experienced was progress.

13. Mr. Denear's credible testimony from his personal observations that Student made good progress in reading during the first two trimesters of SY 2006-2007, supported by Student's improving scores on the DRA and the progress report, constitutes substantial evidence that Student's reading improved significantly during those trimesters. Guardian introduced no evidence to the contrary.<sup>5</sup> Guardian attempted to show by cross-examination that a few of the references in District documents to grade level expectations or materials were optimistic or contradictory; however, that does not mean that Student made no progress in reading. It is Student's individual improvement that matters, not his position relative to his peers. The essence of Mr. Denear's unrefuted testimony was that he perceived good progress and recorded it, and that his perception was confirmed by Student's improved scores on the DRA. The weight of evidence showed that Student made significant progress in broad reading between September 2006 and March 2007.

#### *Broad writing in SY 2006-2007*

14. The March 10, 2006 IEP contained a writing goal. The goal's baseline stated that Student was easily frustrated with writing tasks; had poor grammar, spelling, and punctuation; and lacked the stamina to finish a piece of writing. It added that his stories were very simple and lacked details and focus.

15. Mr. Denear, Student's third grade teacher, also was his teacher for the last four months of second grade, and thus had more than a year's personal knowledge of his progress in writing. Mr. Denear testified that, at first, Student would get very upset when asked to write, but he made quite a bit of progress during the third grade and began to enjoy writing. For the trimester ending on November 3, 2006, Mr. Denear recorded on Student's progress report that he had made very good progress in written language, and that his effort was good. For the trimester ending on March 9, 2007, Mr. Denear again reported that Student's progress was very good, though his effort needed improvement. As a baseline for a new writing goal proposed in March 2007, Mr. Denear wrote that while Student's writing was not yet well developed, he showed a good interest in it, remaining on task; he used basic punctuation; he still had difficulty with spelling; but he did better with narrative writing, developing a story from a picture.

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<sup>5</sup> As discussed below, Guardian argues that comparing scores on a Woodcock-Johnson test taken in February 2004 and November 2007 showed regression in reading and writing. The comparison has no bearing on SY 2006-2007 because the scores did not measure progress just in SY 2006-2007, but spanned three and a half years. In addition, they were not before the IEP team in March 2007.

16. As a witness, Mr. Denear appeared to be careful and competent. He corroborated his testimony with documents written at the time. Guardian introduced no evidence to refute Mr. Denear's persuasive testimony or the documents that supported it. The undisputed evidence thus showed that Student made meaningful progress in writing between September 2006 and March 2007.

*Behavior in SY 2006-2007*

17. Student's maladaptive behaviors began at least as early as the second grade. Guardian's complaint alleges that, in the first five months of second grade, Student was involved in at least ten incidents, including kissing a boy, kissing a girl, asking a girl to have sex, entering the girls' bathroom, grabbing another boy inappropriately in the bathroom, and making inappropriate sexual bodily gestures. The March 10, 2006 IEP changed Student's placement from general education to a Non-Severe SDC, set forth three behavior goals, and included a behavior support plan. The baselines for Student's social and emotional goal stated that he had enormous difficulty with self-control during stressful situations; often became extremely upset; was difficult to redirect; had difficulty concentrating and staying on task; and was easily distracted. He focused primarily on negative talk about himself and had extreme difficulty in recognizing and expressing his feelings.

18. Mr. Denear testified that Student made "tremendous progress" in behavior in the third grade. The PLOPs for behavior in Student's March 21, 2007 IEP stated: "[Student] has made tremendous progress in the past year controlling severe emotional outbursts and oppositional behaviors." Other entries in Mr. Denear's handwriting confirmed that view. The PLOPs also described several substantial behavioral problems that remained.

19. The March 2006 IEP referred to Student's anger outbursts, although they were not quantified. The March 2007 IEP stated that his outbursts happened every one to three minutes. Guardian argues that this establishes Student made no progress in the interim. However, Mr. Denear persuasively explained that Student made great progress in behavior in third grade up to the middle of February, when his behavior became noticeably worse. District staff were alerted to this development, called Guardian, and inquired into possible causes. Emotionally disturbed students, as Mr. Denear observed, go up and down. Mr. Denear's general report of progress concerned all of the third grade up to March 2007. The baseline for a new goal described Student's present level in March 2007, after Student had regressed. The reports were not inconsistent; the reporting periods were just different.

20. Aside from alleging that there were inconsistencies between the March 2006 and March 2007 IEPs, Guardian did not question Mr. Denear's testimony or reports concerning Student's behavioral improvement, or introduce any evidence that would contradict them. Guardian did not disagree that Student's behavior changed significantly for the worse in mid-February 2007.

21. The preponderance of evidence thus showed that Student made meaningful progress toward his behavioral goals from September 2006 to mid-February 2007, and then regressed. Since his program was unchanged, the evidence did not show any connection between his program and his regression. The record does not reveal the cause of his regression.

*Causation in SY 2006-2007*

22. An IEP is not a guarantee of success. To provide a FAPE, an IEP need not actually produce educational benefit; more accurately, it must be reasonably calculated to allow the student to obtain such benefit. A disabled student may not make progress for many possible reasons, some of which are unrelated to educational programming. If a parent requests a due process hearing to prove that a student is not obtaining educational benefit from an IEP, he or she bears the burden of proving that there is some causal connection between the failure to benefit and some foreseeable shortcoming in the student's IEP.

23. The record shows many possible explanations for Student's level and rate of progress. His disabilities, which interact, detract substantially from his ability to access the curriculum. His ADHD saps his concentration, and his bipolar disorder causes serious and frequent mood swings. Reid Olmstead, the school psychologist who assessed Student in 2007, established that Student can cycle through moods multiple times in a day, and that these cycles can range significantly. Dr. Kimberly Corbett, who has been Student's therapist since September 2005, explained that Student has a history of rapid cycling. In her office she has seen Student cycle from neutral to suicidally depressed to "full-blown manic" within an hour. He has many mini-cycles in a month and a broad range cycle of about two years. Mr. Olmstead and Dr. Corbett agreed that this is detrimental to his education. One of the hallmarks of bipolar disorder, Dr. Corbett explained, is a chemical imbalance that impedes the ability to make rational decisions. Some of these chemical cycles are inherent in Student's make-up; they can also be triggered by environmental stressors. Student's ADHD worsens this effect, since it also impedes executive functioning. Dr. Corbett testified that Student's combination of disorders also affects his behavior: he has difficulty with impulse control, being redirected, and initiating tasks; and he has "low to none" frustration tolerance. In fall 2007, on the Behavior Assessment System for Children-2 (BASC-2), Student scored in the clinically significant range in hyperactivity, aggression, conduct problems, externalizing problems, depression, and adaptability.

24. Student has been heavily medicated during the school years at issue. For example, in March 2006, Student was taking Respirol, Tenex, Claritin, Zolof, and Stratera. By March 2008, Abilify, Concerta, and Clonidine had been added to this mixture. There were many combinations in between. Dr. Corbett testified that arriving at a proper combination of medication for anyone with these disabilities is very difficult, especially for children, and can only be done by experimentation. As a result, Student's medications have been changed many times while she has been his therapist; the changes "happen all the time." She named one physician who prescribed for Student; District documents mention three.

25. Student has slightly lower than average cognitive abilities. In fall 2007, results of the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV) indicated that he had a full scale IQ of 88.

26. Student suffered from frequently changing schools. Starting in kindergarten, he was at Blessed Sacrament, Florence, Franklin, Blessed Sacrament again, Hardy, and Sierra. Mr. DiFede explained that this would have affected Student's progress as well as the consistency of his instruction. Each move required that the new teacher get to know Student. In fall 2007, Student told Mr. Olmstead that changing schools so often made him feel "weird" and made him miss his friends.

27. At hearing, neither party attempted to sort out the consequences of all the factors that affect Student's academic and behavioral performance, and the record would not support any firm conclusions regarding how those factors interacted or affected his performance.

28. While Student's progress between September 2006 and March 2007 was meaningful, it fell short of the District's hopes and Guardian's expectations. To the extent it did, there is no evidence that Student's rate of progress was connected to any alleged flaw in his educational program, except for the opinion of Dr. Corbett discussed below. Student's fourth grade teacher Ryan DiFede, who admitted he erred on the side of optimism in assessing his students' abilities, testified that Student could reach grade level some time in the future, but did not say when that might be. There was no evidence that Student could have progressed substantially faster in the time period at issue than he actually did.

*Least restrictive environment*

29. The IDEA requires that a disabled student be placed in the least restrictive environment (LRE) in which he can be educated satisfactorily. The environment is least restrictive when it maximizes a student's opportunity to mix with typical peers.

30. The only non-District witnesses who testified at hearing were Guardian and Dr. Corbett. Student did not allege in his complaint that there was any specific flaw in his educational programming between September 2006 and March 2007 except that he was not making progress. Guardian's testimony was simply that because Student was not making progress, he must be placed in a private school. Dr. Corbett agreed, on the sole ground that Student should not be on the same campus as typically developing peers. Student's central argument, then, is that he cannot satisfactorily be educated on a campus that contains typical peers, even if he is in an SDC for academics, and that the LRE for him is a nonintegrated campus without typical peers.

31. Dr. Corbett is a licensed clinical and forensic psychologist, a licensed marriage and family counselor, and a certified substance abuse professional. She has substantial

experience in counseling and providing therapy for children, including many disabled children. She is familiar with the District's ED-SDC program as a result of numerous experiences with District students. In general, she believes that the program is excellent. Twice in her testimony she described it as "wonderful" and once as "fantastic," and she stated that she has patients she would love to see placed in the program. Her sole reason for believing that Student does not belong there is that his SDC is on an integrated campus; that is, a campus that includes typically developing peers.

32. While he was in District schools in the school years at issue, Student received all his academic instruction (which accounted for about 86 percent of his time at school) in SDCs. The parties agree that this part of his placement was appropriate. During the rest of his time he mixed with both nondisabled and disabled students at lunch, recesses, assemblies, and on the bus. Dr. Corbett testified that being among typical peers in those circumstances was very damaging to Student's self-esteem. Student compares himself unfairly to every child he meets, and concludes that he is different and defective. When he sees "normal" children he wants to be normal, and does not understand why he is not. Even when Student is inside the SDC, Dr. Corbett testified, he thinks that he is caged, while the students outside are free on the campus, getting special privileges, and being allowed to be normal. As a result, he has periods of time when he is all right, and then he decompensates. In her opinion, Student needs to be in an environment in which he is not subjected to comparing himself with others and coming up short.

33. Dr. Corbett conceded that Student could not be isolated entirely from typical peers even if placed on a nonintegrated campus. He would still encounter them whenever he is outside of school and not at home. She testified that in those circumstances he can leave, which he cannot do now at Hardy. Asked whether he would not remember his typical peers even while on a nonintegrated campus, she responded that the comparison would not have the same impact on him.

34. For several reasons, Dr. Corbett's opinion is insufficient to establish that the District denied Student a FAPE by keeping him on an integrated campus. Dr. Corbett's testimony omitted discussion of several obvious issues. It was directed almost entirely to the issue of appropriate relief. Her opinion addressed only what Student needs now, in the middle of SY 2008-2009. Aside from stating that Student decompensates as a result of comparing himself to typical peers, she never specifically attributed any of his educational difficulties to his lack of self-esteem. For example, she never directly testified, and was not asked to testify, that Student's current placement is inappropriate for him, or that his lack of self-esteem causes all, or even most, of his behavioral outbursts. She did not explain how even an extreme lack of self-esteem would relate to Student's difficulties in reading and writing. Nor does her opinion explain why Student's progress in subjects such as math, science, and art is satisfactory, but his progress in the others allegedly is not. Dr. Corbett did not claim that there was any connection between Student's low self-esteem and his academic performance.

35. Moreover, Dr. Corbett's opinion was premised on the belief that Student has made no progress in his current placement. That premise is incorrect.

36. In addition, empirical evidence casts substantial doubt on the validity of Dr. Corbett's opinion. From March 2007 through August 2007, Student attended the Sierra Academy, a very small private school for the emotionally disturbed that has no nondisabled students on its campus. Student's experience at Sierra occurred after the last of the IEP decisions challenged here, so it is not relevant to the reasonableness of the District's calculations. Nonetheless, Guardian attempted to show that Student's experience at Sierra proved that a nonintegrated campus is better for him. For the most part, the attempt was unpersuasive.

37. Guardian testified that Student's behavior at Sierra had been much better than at Hardy, and that after an adjustment period, Student was well-accepted at Sierra, and made friends there. Dr. Corbett also testified that Student enjoyed Sierra because he felt like he belonged.

38. In support of her contention, Guardian produced two report cards from Sierra. The first, for the period March to June 2008, stated that "[a]t times, [Student] exhibits frustration, yet is able to turn it around and refocus on positive actions." It rated Student's behavior as excellent in three classes, above average in three others, and showing improvement in physical education. This was described in the report as a "[g]reat job." A similar report for summer 2007 reports "amazing" improvements in all areas including behavior. However, Student's marks for behavior were not as good as in the spring. He was rated as excellent only in one class, above average in two, and as showing improvement in math.<sup>6</sup>

39. The record reveals very little about Sierra. Student's reports from Sierra use a relative scale, as in "above average," that compares him only to other students at Sierra. The school's population consists only of children who are ED, sometimes severely so. Although there was no evidence on the point, the average of behavior at Sierra is likely quite different than at Hardy. The average of academic achievement is also unknown, so no meaningful comparisons can be drawn between Student's grades at the two schools. There was no evidence about the quality of Sierra's instruction. Guardian testified that she did not know if the teachers there were credentialed.

40. However, three specific incidents of Student's misbehavior at Sierra, described in detail by Sierra staff in reports sent home, were sufficiently serious as to cast doubt on the school's positive reports. On May 15, 2008, Student was on a break in the hallway when he moved into a multi-purpose room, picked up a chair, and threw it. He defied instructions to move away from the chairs, then picked up another chair and threw it. On May 23, Student ran down a hall and collided with an adult, who ordered him to sit on the floor. He did, but

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<sup>6</sup> Guardian attempted to introduce into evidence a letter from a teacher at Sierra. After an objection was made, the letter was withdrawn, and no further attempt to introduce it was made.

then struck out at the adult until he had to be physically restrained. On May 30, Student was found “inappropriately joking around” with peers and told to return to the classroom. He did, but directed profanity at the teacher and “created a mess” by destroying papers, hitting and kicking the table, and throwing markers.

41. Student’s reported behaviors at Sierra were similar to his behaviors in the District’s schools. On October 7, 2007, Student was suspended from Hardy for two days for assaulting a school employee and fighting with another student. On February 19, 2008, Student was suspended for one day for conduct described as “minor disruption/defiance.” On February 28, 2008, he was again suspended for one day for a minor confrontation which was described as involving attempted or threatened physical injury or mutual combat with minor or no injury. There are no other suspension reports from District schools in the record. Most of Student’s lesser infractions at Hardy involved verbal outbursts, frequently in class. On balance, Student’s behavior at Sierra was about the same, or only a little better, than his behavior at Hardy. Student’s experience at Sierra, therefore, does not demonstrate that being on a nonintegrated campus would substantially improve his behavior.

42. Finally, Dr. Corbett’s opinion and recommendation cannot be squared with Congress’ directive, expressed in the IDEA, that a disabled student must be placed in the least restrictive environment (LRE). He must be allowed to mix with typical peers to the maximum extent appropriate, as long as the student can still receive a satisfactory education – i.e., a FAPE. A central purpose of the IDEA was to end the practice of isolating disabled students. The District does not enjoy its usual latitude of professional judgment in placement decisions concerning the LRE. The law’s command is clear: a student’s contact with typical peers must be maximized as long as the student can receive a FAPE. The District’s decision to keep Student on an integrated campus was motivated in large part by its desire to place him in the LRE.

43. Determining the LRE for a student in this context requires the consideration of four factors: (1) the educational benefits of placement with typical peers; (2) the non-academic benefits of such placement; (3) the effect the student would have on the teacher and children while among typical peers; and (4) the costs of placing the student with typical peers. Application of those factors here requires the conclusion that placement on an integrated campus was the LRE for Student. He achieved at least as much academic benefit at Hardy as he would have on a nonintegrated campus. He mixed with typically developing peers at lunch, recess, assemblies, and on the bus, which he could not do on a nonintegrated campus, and had opportunities to model his behavior on theirs. There was no evidence that he was any more disruptive than was usual for him while among typical peers, and no evidence or claim made about the relative costs of the placement options.

44. Guardian’s only reason for asserting that Student did not receive a FAPE in SY 2006-2007 was that he made no progress in reading, writing, or behavior. However, the preponderance of evidence showed that, between September 2006 and March 2007, Student made meaningful progress in broad reading and broad writing, and, except for a lapse in behavior in February, made meaningful progress toward his behavioral goals.

45. In March 2007, Student, who is on a diploma track, was receiving passing marks and advancing from grade to grade. Student does not dispute that he was making adequate progress in subjects such as math and science. The IEP team noted Student's progress, raised its expectations in his new goals, and adjusted his BSP. Guardian's complaint does not allege that there were any specific flaws in Student's goals or BSPs for SY 2006-2007, or that any of his unique needs in the areas of reading, writing, and behavior were not addressed. She does not identify any information that was, or should have been, before the IEP team in March 2007 that should have caused it to place Student on a nonintegrated campus, and the record reveals none. Student's educational program for SY 2006-2007 was therefore reasonably calculated to allow him to obtain benefit from his education. As his progress shows, he did obtain significant educational benefit. Since the District was able to provide Student a FAPE on an integrated campus, the IDEA required that he be placed there and not removed from all contact with nondisabled students at school.

*FAPE in SY 2007-2008*

*Progress toward goals*

*Broad reading in SY 2007-2008*

46. From March 2007 to September 2007, Student was enrolled in Blessed Sacrament, a private school. Beginning in September, Student's fourth grade year, his teacher in the ED-SDC at Hardy was Ryan DiFede, who, by the time of hearing, had been teaching in special education for 12 to 13 years. Mr. DiFede testified that Student apparently made no progress at Blessed Sacrament; his skills had not advanced or declined while there, and he returned to Hardy having about the same skill levels as when he left. Mr. DiFede also established that, starting in September, Student made significant progress on his reading goal. Mr. DiFede wrote a progress report for Student's two trimesters of fourth grade. By November 9, 2007, at the end of the first trimester, Mr. DiFede rated Student "LR," or less experienced, the same grade he had in January of that year. By the end of the second trimester, however, Mr. DiFede elevated Student's rating to "MR," or moderately experienced.

47. Mr. DiFede wrote on a goal progress report dated November 30, 2007, that Student "made some progress" on his reading comprehension goal, "has met some of the performance elements," but still had work to do. He assessed Student's achievement level on the goal as between 25 and 49 percent, and confirmed at hearing that all that progress had been made since early September. At the time, Student could read a late second grade passage at a rate of 100 words per minute with from none to two errors, and recall details of the text with 90 percent accuracy. When it became time in December to write a new reading goal, Mr. DiFede added that Student could also decode short words with 80 to 100 percent accuracy, and new multi-syllable words, 46 percent of the time. By March 13, 2008, he reported that in reading fluency, Student was reading a "beginning 3rd grade passage 80 to 90 words per minute with 0 to 2 errors (making progress)," and that in reading

comprehension, Student was “working on vocabulary, accuracy 8 out of 10 (making progress).”

48. On cross-examination, Guardian pointed out minor variations in Mr. DiFede’s reporting, such as a possibly inconsistent use of the terms late second grade and early third grade material. Mr. DiFede also admitted that in one report his characterization of Student as a moderate fourth grade reader was inaccurate. But none of these shortcomings substantially undermined Mr. DiFede’s basic testimony that Student made real progress from September to December, which Mr. DiFede recorded at the time.

49. Karyn Massari is a diagnostic research teacher for the District’s ED program office. She has worked for the District for 25 years, 18 of them in special education. She visited Mr. DiFede’s ED-SDC at least twice a month in SY 2007-2008, and had opportunities to observe Student in class. She confirmed that, when Student returned to the District from private school in September 2007, he showed no advancement since his departure from the District. She also credibly established that she saw improvement in Student’s reading in Mr. DiFede’s class.

50. The December 2007 IEP meeting was Student’s triennial review. To prepare for it, Mr. DiFede and school psychologist Olmstead undertook a thorough reassessment of Student’s needs and skills. In November, Mr. Olmstead administered to Student the Woodcock-Johnson III Tests of Achievement (WJ-III). Student had taken the same test in 2004. Both tests were normed to his age group at the time. On the February 2004 WJ-III, Student obtained a broad reading score of 94; on the November 2007 WJ-III, his score was 87. Student relies almost exclusively on the comparison of these scores to argue that he made no progress in reading.

51. For several reasons, the WJ-III results from 2004 and 2007 did not prove that Student made no progress in reading between September and December 2007. The test results spanned a period of three and a half years and gave no indication when Student might have had difficulty. They were contradicted by Mr. DiFede’s testimony and reports, and Ms. Massari’s testimony, based on observations in class over time. They were also contradicted by reports of DRA testing back to 2004, which showed a steady improvement in Student’s reading. As mentioned, in March 2006, he scored 18 on that measure, and in March 2007, he scored 28.

52. For their triennial assessment, Mr. DiFede and Mr. Olmstead also administered the Analytic Reading Inventory (ARI), which gave separate ratings for independent and guided reading and for frustration level. Mr. DiFede established that the ARI is superior to the DRA for students in the fourth grade and above. In independent reading Student scored at first grade level on the ARI. In instructional reading, he was at second grade level, and in frustration management he was at third grade level. These results suggested that Student did better in reading at school than on his own.

53. Ms. Massari, who has substantial experience in administering and interpreting the WJ-III, explained persuasively that comparing its results for a five-year-old and a nine-year-old does not furnish an accurate measure of reading ability, and, in Student's case, did not support a claim of regression. The test is not as accurate at lower grade levels as it is at higher levels. To get a score of 94 on the WJ-III at age five, Student would only have to write his name, write "cat," and read three-letter words. "It's extremely easy," she testified, "to get scores like [Student] got at five years old." The District almost never uses only WJ-III scores for very young students.

54. Student did especially poorly on the reading fluency subtest of the WJ-III in 2007, scoring 83. Ms. Massari credibly testified that his score was low enough to bring his full broad reading score down. Although Student's score on the 2004 Reading Fluency subtest is not in the record, Ms. Massari established that the subtest is extremely easy for a five-year-old, who would only need to identify letters and fill in blanks from pictures. The testers frequently do not even get to the fluency subtest with five-year-olds; such a child could score 0 on the fluency subtest and still get fairly high marks for reading overall. She very rarely sees a five-year-old child score under 90 in broad reading. Even though the tests are normed for age, this difference in difficulty explains the difference between Student's scores at five years and nine years of age.

55. By contrast, Ms. Massari testified, emotionally disturbed nine-year-olds with ADHD have great difficulty with the reading fluency subtest. At that age level, the subtest requires letter and word identification, including multi-syllable words; completion of sentence-long true or false tests in three minutes; and comprehension of up to a paragraph of prose. It is not an accurate test for ED and ADHD students, she testified, because it is timed, and students with those disabilities are nervous about completing it. The students are easily distracted by noise, and frequently have to be called back to the test. Most nine-year-old ADHD students can do better than their scores indicate.

56. Based on her experience with the Woodcock-Johnson tests, Ms. Massari concluded, it is not accurate to say that Student's scores in 2004 and 2007 show regression in reading. The test is inaccurate at the lower age levels, and much easier even though normed.

57. Mr. DiFede shared Ms. Massari's skepticism of the use of the WJ-III for very young children. He too did not think that Student's scores in 2004 and 2007 indicated regression in reading; lots of other factors could have produced the scores. The time between the tests was long. The tasks required of a nine-year-old were much more difficult. The WJ-III is especially difficult for students with behavioral difficulties that affect academics. He sees lots of scores in the 80s and 90s for such students.

58. The testimony of Mr. DiFede and Ms. Massari about the improvement in Student's broad reading in SY 2007-2008 was based on their observations over time, and was therefore more reliable than a single test administered on a single day. Mr. Olmstead testified credibly and without contradiction that Student's rapid and unpredictable mood

swings resulting from his bipolar disorder could affect his test results on any given day. His medication regime could do so as well.

59. The testimony of Ms. Massari and Mr. DiFede was credible, consistent, and based on their substantial experience in the use of the WJ-III in testing children. Their testimony about the limitations of the WJ-III for measuring Student's broad reading growth from such a young age was uncontradicted. Guardian introduced no evidence on the subject. Her expert witness, Dr. Corbett, was not asked to address it and did not.

60. Guardian testified that, based on Student's reading at home, she did not believe he was making progress in SY 2007-2008. However, the evidence showed a clear difference between Student's performance at school and at home, where Student's reading was at its worst. In his progress report from SY 2006-2007, Mr. Deneer rated Student's home reading unsatisfactory in both accomplishment and effort for both trimesters. In his progress report from SY 2007-2008, Mr. DiFede gave the same unsatisfactory markings to Student's homework. Mr. Deneer testified that he had asked Guardian why Student was doing so poorly at home. She responded that she had a very difficult time getting him to do any reading at home. Mr. Deneer testified that Student eventually did some of his home reading in class. Guardian's impressions of Student's reading at home, therefore, do not contradict the District's evidence of his reading performance at school.

61. For the reasons above, Student's lower score on the 2007 WJ-III was not persuasive evidence that he had regressed in writing. The personal observations over time of Mr. DiFede and Ms. Massari, confirmed by contemporaneous documents, were more convincing than the WJ-III results and Guardian's observations at home. The preponderance of evidence showed that Student made significant progress in broad reading between September 2007 and March 2008.

*Broad writing in SY 2007-2008*

62. The evidence concerning Student's progress in writing closely paralleled the evidence of his progress in reading. His teacher, Mr. DiFede, testified that Student made progress in writing between September 2007 and March 2008. Mr. DiFede's contemporaneous documentation confirmed that view. In a goal progress report on November 30, Mr. DiFede wrote that, since September, Student had moved "slightly beyond the initial baseline" of his written language goal and had progressed less than 25 percent toward it. At hearing, Mr. DiFede called that "some progress, not lots." In a March 13, 2008 report, however, Mr. DiFede wrote that Student was "spelling words such as dog, fast, glass, hands, rash, etc. correctly on 9 of 10 occasions in spelling lessons (making progress)," and that he was "working on writing sentences – topic from personal experience (making progress)."

63. Guardian contends that a comparison of older and newer WJ-III scores shows that Student was also regressing in writing. In the broad written language subtest of the WJ-III in 2004, Student scored 103, while in November 2007 his score on the same subtest was

79. At that time Student had spent only two months back in the District and, before that, six months at Blessed Sacrament.<sup>7</sup> All the persuasive reasons offered by Ms. Massari and Mr. DiFede that the WJ-III reading test was inaccurate for a five-year-old also applied to the written language subtest. On the writing portion of the WJ-III, Ms. Massari established, a five-year-old only needed to know how to write his name and write “cat,” and got credit if he wrote both the “c” and the “t.” The child could, without penalty, misspell “apple” as long as he got the “a,” the “p,” and the “l” in the correct order. But a nine-year-old would have to correctly spell a list of multi-syllabic words, and, given a sentence or a paragraph of prose, write a “good sentence” about it. He would also have to take a seven-minute reading fluency test, taking three words furnished by the test and writing them in a comprehensible sentence. Any period of distraction would hurt his score. Student’s lowest score in 2007 was 72 on the writing fluency subtest, which, Ms. Massari explained, seriously damaged his overall score. Given these factors, she testified, his decline between 2004 and 2007 should not be characterized as regression. This testimony was credible and consistent, and Guardian introduced nothing to refute it. Dr. Corbett was not asked about Student’s broad writing scores. Guardian introduced no evidence, other than the WJ-III results, to show that Student made no progress in broad writing in SY 2007-2008.

64. Once again, the testimony of Mr. DiFede and Ms. Massari, based on their personal observations over time and confirmed by contemporaneous writings, was more persuasive than the comparison of 2004 and 2007 WJ-III scores. The preponderance of evidence therefore showed that Student made meaningful progress in writing in the portion of the school year he attended Hardy.

#### *Behavior in SY 2007-2008*

65. Mr. DiFede testified that Student made some progress toward his behavior goals between September 2007 and the December 10, 2007 IEP meeting, and his contemporaneous reports confirm his view. Although the documents reflect serious and ongoing behavioral difficulties, they also reflect significant progress. Student was given behavioral goals in his March 21, 2007 IEP, which the District began to implement only in September 2007, when Student returned from Blessed Sacrament. A March 2007 goal for time on task stated in its baseline that, with the exception of writing, Student “requires constant redirection to remain on task, he will engage other students, get out of his seat or focus on other classroom activities.” The assessment done by Mr. DiFede and Mr. Olmstead in late fall 2007 reported, among other things, on three classroom observations of Student. In math class on October 31, 2007, Student was observed to be on task 65 percent of the time. On that same day, in a Halloween assembly, he was on task 93 percent of the time. On November 11, at opening activity, he was on task 97 percent of the time, and in language arts 91 percent of the time. These observations showed substantial improvement in Student’s time on task.

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<sup>7</sup> There was no evidence about Student’s experience at Blessed Sacrament, except for the testimony of Mr. DiFede and Ms. Massari that, on his return, Student seemed to have made no progress there.

66. Another March 2007 behavioral goal was for interpersonal skills. In its baseline, Mr. Denear wrote that Student always wanted to have his way, and, if he didn't get it, manipulated his peers, or lied and cheated in order to win. But by December 2007, Mr. DiFede, in a baseline for a new goal for interpersonal skills, stated that Student "uses friendly words & actions with his peers on 5 out of 10 occasions" over three weeks.

67. In the BSP attached to the March 2007 IEP, Mr. Denear had written that Student had impulsive outbursts every two to three minutes. According to the PLOPs in a behavior goal written in December 2007, these outbursts were down to about one a day.

68. Dr. Corbett testified that during SY 2007-2008, she saw no behavioral, social, or emotional progress in Student at all, and that his behaviors continued to regress and decline. However, her opinion was unexplained, unsupported, and undocumented. Nothing in the record suggests that she wrote any report during the school years at issue, administered any tests, kept any notes, logged any behavior, recorded any incidents, or otherwise systematically collected or analyzed behavioral information in any way. School officials, on the other hand, kept meticulous records of their observations of Student's behavior. The triennial assessment by Mr. DiFede and Mr. Olmstead was based on repeated observations in class and on campus that were carefully documented and described. Mr. DiFede testified he kept daily logs of Student's behavior and sent them home to Guardian for her signature. Guardian admitted she received at least half of them. Yet neither Guardian nor Dr. Corbett made any reference to them. The observations of District staff were made in the educational context, which is the context that matters here. Dr. Corbett's relationship with Student was therapeutic; her observations were made in her office and perhaps at Guardian's home. Other than one 15-minute visit to Mr. DiFede's classroom, Dr. Corbett made no claim she had observed Student's behavior on campus, and she did not address how he behaved during that visit. For all these reasons, the testimony of Mr. DiFede, Mr. Olmstead, and Ms. Massari was more persuasive than the contrary testimony of Dr. Corbett.

69. Dr. Corbett's testimony was also less credible than it otherwise might have been because she was quick to testify, unpersuasively, outside her area of expertise. In answer to a question about behavior, she volunteered that in SY 2007-2008 Student's academic performance had either leveled off or declined. Nothing in her background, training as a psychologist, or observations of Student would suggest she was qualified to opine on that subject. She has no teaching credential and no teaching experience, except for briefly teaching her specialty at Platt College. She has no apparent training or experience in evaluating classroom academic performance. When asked why she was qualified to give an opinion on Student's academic progress, she stated she was trained and experienced in administering the Woodcock-Johnson and other standardized tests. When asked why she did not believe Student was making academic progress, she gave two reasons. First, she believed that Mr. DiFede, at the March 2008 IEP meeting, did not present "any evidence whatsoever" that Student had made progress, and had presented no objective information. When confronted on cross-examination with the fact that Mr. DiFede had made reference to the WJ-III and the DRA, she conceded these measures were objective. Second, she did not believe that Student had made academic progress because the District declined her request

for more assessments. As Mr. Olmstead pointed out, Student had been assessed five times in recent years, including a thorough battery of tests in fall 2007, and all five time the test results were generally consistent. Dr. Corbett's reasons for doubting Student's academic progress were wholly unconvincing.

70. The preponderance of evidence thus showed that between September and December 2007, Student made significant progress toward his behavioral goals.

71. The parties agree that between December 2007 and March 2008 Student made no progress toward his new behavioral goals. The record does not reveal the reason that Student's progress stopped. Nor does it reveal any flaw in Student's new goals or in his ongoing instruction that might have caused the change, and Guardian does not argue there was any such flaw.

72. The undisputed evidence showed that between December 10, 2007 and March 13, 2008, Student's behavior did not improve at school. On this record, the reasons are unknown.

73. By the time of the December 10, 2007 IEP meeting, Student was receiving passing marks and advancing from grade to grade, and making undisputed progress in subjects such as math and science. The IEP team recognized Student's progress, adjusted his BSP again, and drafted new and more demanding behavioral goals, using baselines that reflected his progress earlier in the school year. Guardian's complaint does not allege that there are any specific flaws in the goals or the BSPs written in December 2007, or that any of Student's unique needs in the areas of reading, writing, and behavior were not addressed. Guardian does not identify any information, other than Dr. Corbett's opinion, that was, or should have been, before the IEP team in December 2007 that should have caused it to place Student on a nonintegrated campus, and the record reveals none. Student's educational program adopted in December 2008 was therefore reasonably calculated to allow him to obtain benefit from his education. As his progress shows, he did obtain significant educational benefit.

#### *Causation in SY 2007-2008*

74. All the factors discussed above that may have limited Student's progress in SY 2006-2007 may have had the same effect in SY 2007-2008. There was no evidence of any direct causal relationship between any perceived flaw in student's educational programming and his failure to progress at a faster rate, except (by inference) Dr. Corbett's opinion, discussed above, that his educational difficulties were caused by his placement on a campus that also contained typically developing students.

#### *Least restrictive environment*

75. Dr. Corbett's opinion that Student could not receive a FAPE on an integrated campus was unpersuasive for the reasons described above. The District was required to

place Student in the least restrictive environment in which he could be satisfactorily educated; that is, receive a FAPE.

76. Since the District was able to provide Student a FAPE on an integrated campus, the IDEA required that he be placed there and not removed from all contact with nondisabled students.

### *Safety*

77. At the March 2008 IEP meeting, Guardian gave the District a letter announcing that she was withdrawing Student from Hardy and unilaterally placing him at an NPS. The letter made no complaint about Student's placement on an integrated campus. Instead, its focus was safety:

Since enrolling at Hardy, [Student] has been taken for medical treatment after being assaulted by his peers multiple times during school hours. [Student] has also been suspended due to his behaviors and has left school campus.

At hearing, Guardian testified that Student was frequently bullied at school. She described two incidents of particular concern. In the first, Guardian was informed by her day care provider Dolores Johnson that Student had been beaten up at school, was in pain, and had to be given crutches. The school never told her of the incident. Guardian stated that Student had to spend the night in Children's Hospital as a result, and that the incident seriously affected his health. He began to vomit and have tantrums at home, which he had not done before. In the second incident, Guardian testified, Student left the Hardy campus; again the school did not advise her of the incident.

78. Guardian did not claim to have witnessed these incidents. Considering Student's disabilities and behavioral challenges, his descriptions of these events to Guardian may not have been reliable. Student did not testify, nor did Ms. Johnson. Mr. Denear testified that Student was well liked; was not beaten up in his third grade class; and that he knew of no incident in which he was beaten up elsewhere. Mr. DiFede testified that in his fourth grade SDC any disputes between Student and his peers were "fairly mutual"; Student initiated as well as received. He did not recall incidents of bullying in his class. Student was a bullying target only insofar as other students were frustrated with the behaviors Student initiated. It was possible, Mr. DiFede testified, that there were incidents of bullying in either direction on the playground, but he and his staff were out there a lot, and he did not recall any particular incident of bullying. He believed that Student was safe at Hardy both in class and on the playground.

79. Mr. DiFede testified he was told by his substitute that, on a day Mr. DiFede was not at school, an incident occurred on the playground in which "feet went to [Student's] shins." Adults intervened immediately, and the incident consumed less than 20 seconds. Student was taken for examination to the office, where no injury was observed. The next day Mr. DiFede noticed that Student returned to school with crutches, but did not use them

during the school day. He seemed to be fine that day, and not in pain; he was involved in normal outside activities. He resumed using the crutches when he was picked up from school.

80. Bruce Ferguson, the principal of Hardy, testified about the incident in which Student allegedly left the campus. He recalled hearing from Mr. Olmstead that Student had gone 15 feet into the parking lot, and Mr. Olmstead had successfully called him back. Mr. Olmstead confirmed this description of the incident; he instructed Student to return to the area in which he was permitted to be, and Student did so. There was no evidence that there were cars moving in the parking lot, or that there was any other threat to Student's safety.

81. Upon receiving Guardian's letter withdrawing Student from Hardy, Mr. Ferguson asked the school nurse to search for records indicating any injuries or evidence of bullying. The nurse found nothing.<sup>8</sup> Mr. Ferguson testified that he was familiar with the incidents in which Student had been suspended, and was not surprised or concerned about them. He believed Student was safe at Hardy.

82. For the reasons above, the personal observations of Mr. Denear, Mr. DiFede, Mr. Olmstead, and Mr. Ferguson were more persuasive than the information Guardian obtained from Student about the incidents described above. They were in a better position to know what actually happened. The preponderance of evidence did not show that the District failed to ensure Student's safety at Hardy.

*Procedural arguments: the March 13, 2008 IEP meeting*

*Predetermination and the continuum of options*

83. Local educational agencies must ensure that a continuum of placement options is available to disabled students, but that continuum need not be discussed at every IEP meeting. The only possible placements relevant to the parties' dispute were the District's offer of continued placement on an integrated campus, and Guardian's preference for a placement in a nonintegrated NPS.

84. Parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. A district must fairly and honestly consider the views of parents expressed in an IEP meeting. School officials may not arrive at an IEP meeting with a "take it or leave it" attitude, having already decided on the program to be offered. A district does not predetermine an IEP simply by meeting to review and discuss a child's evaluation and programming in advance of an IEP meeting, but a district that predetermines the child's program and does not consider the parents' requests with an open mind has denied the parents' right to participate in the IEP process. Guardian argues that the District

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<sup>8</sup> Student introduced no evidence of medical examinations made or bills incurred in connection with these alleged incidents, and did not seek reimbursement for any medical expenditures.

members of the March 13, 2008 IEP team arrived at the meeting having already decided to keep Student at Hardy.<sup>9</sup>

85. Both at the December 2007 meeting and the supplementary meeting in March 2008, District staff fully explained the reasons they thought Student was making progress.<sup>10</sup> Guardian and her supporters freely discussed their positions and explained their views. There were no restraints on their full participation.

86. The evidence showed that the District members of the team arrived at the March 2008 meeting with an offer marked "draft." Ms. Massari and Mr. DiFede testified that an IEP team commonly starts with a draft, and that changes can be, and frequently are, made at the meeting. There was no evidence to the contrary.

87. Principal Ferguson testified that there was no one at the meeting who was authorized "to expend funds" for a private placement. This does not mean the IEP team could not have recommended a private placement. Testimony from Ms. Massari established that the team was authorized to recommend such a placement if it thought one appropriate. There was no evidence that the District would not have accepted the IEP team's recommendation and authorized the expenditure.

88. Guardian's principal reason for arguing that the placement decision was predetermined is her assertion that no discussion of an alternative placement occurred either at the December 2007 meeting or the March 2008 meeting. The record does not support her claim.

89. At the December 2007 meeting there was a significant discussion of private placement. Guardian testified, apparently in reference to the December 2007 meeting, that a District team member asked her which private school she wanted Student to attend. She stated she wanted Springall Academy, but "they said no." Asked whether that was the total discussion, she replied: "It went on a little bit. We were trying to convince them that it was necessary for [Student] to be at a nonpublic school." Guardian appeared at the December meeting (as she usually did) with Dr. Corbett, educational advocate Dayon Higgins, Student's godmother, and an advocate from CMH. (Most of these supporters also accompanied Guardian in March 2008.) Guardian testified that at the December meeting, she and all her supporters attempted to convince the District to place Student at an NPS. However, she continued, the District members of the team only wanted to consider Student's need to be

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<sup>9</sup> Guardian now argues that the District's offer at the December 10, 2008 IEP meeting was also predetermined. However, that argument is not considered here, because Guardian's complaint alleges only that the offer "at the 3/13/08 IEP" was predetermined.

<sup>10</sup> Guardian testified she did not understand much of the District's explanations of various measures of performance. However, Guardian is a social worker with a bachelor's degree in behavioral science and a master's degree in human behavior. She was accompanied at both meetings by an advocate from CMH, and by Dr. Corbett, who testified she understood all the information provided. Guardian's lack of understanding could easily have been overcome simply by asking her supporters.

with his peers in general education as well as in special education. This was a description of a substantial discussion of a non-public placement. The fact that District team members responded only by restating that Student must be in the LRE does not make the discussion any less meaningful. The parties simply continued their longstanding disagreement.

90. By March 2008, the parties had been arguing about a private placement for Student for more than two years. Guardian testified that she had requested a private placement at every IEP meeting since Student started at Franklin. A February 2006 IEP document recorded that Guardian and Dr. Corbett requested a private placement, and the District declined. Dr. Corbett testified that she had attended a minimum of six IEP meetings for Student, and recommended a private placement on a nonintegrated campus at every one of them. The District's routine response, she stated, was to refer to the LRE requirement and to ask, "Why would you want to do that to him?"

91. Guardian's claim in her Closing Brief that "absolutely no discussion of NPS placement ever took place" at the March 2008 meeting is inaccurate. At one point Guardian did so testify. But at another point, asked whether at the March 2008 meeting the District members of the IEP team told her why they would not offer placement in an NPS, Guardian testified: "Yes, they've always felt that they were meeting [Student's] needs at every level." Shortly after the meeting Ms. Massari sent a letter to Guardian declining to pay for private school. The letter stated, in part: "The District has offered a placement, which can meet [Student's] needs and provide a free appropriate public education in the least restrictive environment." Guardian testified that the same opinion was expressed by District members at the March 2008 meeting. Mr. DiFede testified that at the March 2008 meeting the District team members and Dr. Corbett "had conversations about placement" but the District members restated that they thought their offer was an offer of a FAPE. The discussion of the placement at the supplemental meeting in March 2008 was brief, but it did occur.

92. In light of the many previous discussions of the same subject by the same people over the years, and the substantial discussion in December 2007, the District did not refuse to discuss a non-public placement at the supplemental March 13, 2008 meeting. It would be unrealistic to expect that anyone at the meeting would arrive without firm impressions formed from the previous meetings, but there was no evidence that, at the March 2008 meeting, the District members of the IEP team would not have been open to an alternative placement if Guardian and her supporters had anything new or different to say. Thus the evidence did not show that the District violated the IDEA either by failing to discuss the continuum of placement options or by predetermining its offer. Nor has Guardian identified any specific harm to Student or to her participatory rights these alleged violations might have caused.<sup>11</sup>

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<sup>11</sup> Guardian argues in her closing brief that the District seriously infringed upon her right to participate in the decisional process, that she did not understand the measurements of progress used or the PLOPs in Student's goals, and that the District did not adequately explain the measurements to her. Since none of these issues was alleged in the complaint, none can be considered here.

### *Functional Analysis Assessment and AB 2726 reassessment*

93. In some circumstances, if a child's behavior seriously impedes his learning or that of others, an IEP team must consider the use of positive behavioral interventions and supports to address that behavior. One of these is a behavior intervention plan, which results, if needed, from a Functional Analysis Assessment (FAA). At the end of the March 2008 IEP meeting, in an effort to persuade Guardian to accept the offer, the District members of the team added an offer of an FAA and to seek from CMH a reassessment of Student's eligibility for services under AB 2726. Ms. Massari testified without contradiction that the District did not believe either assessment was needed, but was responding to Guardian's concerns because "we were not seeing the same things" Guardian was seeing, and were willing to take another look.

94. Ms. Massari also testified that Guardian stated she did not want either of the offered assessments. Guardian confirmed that in her testimony, and abandons the argument in her Closing Brief. There was no evidence that the District violated the IDEA by not offering the FAA or the AB 2726 reassessment, or not preparing assessment plans.

## LEGAL CONCLUSIONS

### *Burden of Proof*

1. Guardian, as the party seeking relief, has the burden of proving the essential elements of her claim. (*Schaffer v. Weast* (2005) 546 U.S. 49 [163 L.Ed.2d 387].)

### *Elements of a FAPE*

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

3. In *Board of Educ. v. Rowley* (1982) 458 U.S. 176 [73 L.Ed.2d 690], the Supreme Court held that the IDEA does not require school districts to provide special education students the best education available, or to provide instruction or services that maximize a student's abilities. (*Rowley, supra*, at p. 198.) School districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instruction and related services individually designed to provide educational benefit to the student. (*Id.* at p. 201.)

4. There are two parts to the legal analysis of a school district's compliance with the IDEA. First, the tribunal must determine whether the district has complied with the

procedures set forth in the IDEA. (*Rowley, supra*, at pp. 206-207.) Second, the tribunal must decide whether the IEP developed through those procedures was designed to meet the child's unique needs, and was reasonably calculated to enable the child to receive educational benefit. (*Ibid.*) An IEP is not judged in hindsight; its reasonableness is evaluated in light of the information available at the time it was implemented. (*JG v. Douglas County School Dist.* (9th Cir. Dec. 24, 2008, No. 06-17380) 2008 WL 5377696, p. 12; *Adams v. Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)

5. An IEP does not guarantee a student's success. (*CJN v. Minneapolis Public Schools* (8th Cir. 2003) 323 F.3d 630, 642.) A school district does not violate IDEA if a disabled student's lack of progress is attributable to factors other than flaws in his educational programming. (*Garcia v. Board of Educ.* (10th Cir. 2008) 520 F.3d 1116, 1127 [poor attitude and bad habits]; *Bend-Lapine School Dist. v. DW* (9th Cir. 1998) 152 F.3d 923 (unpublished)[student's resistance]; *Walczak v. Florida Union Free Sch. Dist.* (2d Cir. 1998) 142 F.3d 119, 133 [resistance to peer interaction]; *Ashland Sch. Dist. v. Parents of Student R.J.* (D.Ore. Oct. 6, 2008, No. 07-3012-PA), 2008 WL 4831655, p. 19 [sexual conduct]; *Blickle v. St. Charles Community Unit Sch. Dist. No. 303* (N.D.Ill. July 29, 1993, No. 93-C-549) 1993 WL 286485, p. 4, fn. 7; p. 8, fn. 10 [truancy and substance abuse].)

#### *Measuring benefit and progress*

6. In *Rowley*, the Court found that some educational benefit had been conferred on the student since she achieved passing marks and advanced from grade to grade. (*Rowley, supra*, 458 U.S. at pp. 202-203.) However, the Court cautioned that it was not establishing any one test for measuring the adequacy of educational benefits conferred under an IEP. (*Rowley, supra*, 458 U.S. at pp. 202, 203 fn. 25.)

7. A student may derive educational benefit under *Rowley* if some of his goals and objectives are not fully met, or if he makes no progress toward some of them, as long as he makes progress toward others. (*Fort Zumwalt School Dist. v. Clynes* (8th Cir. 1997) 119 F.3d 607, 612-613; *J.P. v. West Clark Community Schools* (S.D.Ind. 2002) 230 F.Supp.2d 910, 943-944; *McGovern v. Howard County Pub. Schs.* (D.Md. Sept. 6, 2001, No. AMD 01-527) 2001 U.S. Dist. LEXIS 13910, p. 59; *Fermin v. San Mateo-Foster City School Dist.* (N.D.Cal. August 7, 2000, No. C 99-3376) U.S. Dist. LEXIS 11325, pp. 22-23.)

8. A student's failure to perform at grade level is not necessarily indicative of a denial of a FAPE, as long as the student is making progress commensurate with his abilities. (*Walczak, supra*, 142 F.3d at 131; *E.S. v. Independent School Dist., No. 196* (8th Cir. 1998) 135 F.3d 566, 569; *In re Conklin* (4th Cir. 1991) 946 F.2d 306, 313; *Derek B. v. Donegal School Dist.* (E.D.Pa. 2007, No. 06-2402) 2007 WL 136670, pp. 12-13; *M.H. v. Monroe-Woodbury Central School Dist.* (S.D.N.Y. March 20, 2006, No. 04-CV-3029-CLB) 2006 WL 728483, p. 4; *Houston Indep. School Dist. v. Caius R.* (S.D.Tex. March 23, 1998, No. H-97-1641) 30 IDELR 578; *El Paso Indep. School Dist. v. Robert W.* (W.D.Tex. 1995) 898 F.Supp.442, 449-450.)

*In SYs 2006-2007 and 2007-2008, did the District fail to offer or provide Student a FAPE because he made no progress in broad reading, broad writing, or behavior?*

9. Based on Factual Findings 4-21 and 46-73, and Legal Conclusions 1-8, the evidence showed that, during SYs 2006-2007 and 2007-2008, Student received passing marks and was advancing from grade to grade. Based on Factual Findings 7-21, and Legal Conclusions 1-8, he made meaningful progress toward his broad reading, broad writing, and behavior goals in SY 2006-2007. Based on Factual Findings 46-73, and Legal Conclusions 1-8, the evidence showed that Student made meaningful progress toward his broad reading and broad writing goals in SY 2007-2008 and made meaningful progress on his behavior goals between September and December 2007. The evidence did not show that Student's failure to make progress in behavior between December 2007 and March 2008 was related to any flaw in his educational programming.

10. Based on Factual Findings 4-73, and Legal Conclusions 1-8, the evidence showed that Student's IEPs during the years at issue addressed all his unique needs and were reasonably calculated to allow him to receive educational benefit, and that he did receive educational benefit. The evidence therefore showed that Student was offered a FAPE in the school years at issue, and received a FAPE during his presence in the District's school.

#### *Least Restrictive Environment*

11. Federal and state law require a school district to provide special education in the LRE. A special education student must be educated with nondisabled peers "to the maximum extent appropriate," and may be removed from the general education environment only when the nature or severity of the student's disabilities is such that education in general classes with the use of supplementary aids and services "cannot be achieved satisfactorily." (20 U.S.C. § 1412 (a)(5)(A); 34 C.F.R. § 300.114(a)(2)(ii)(2006).) In light of this preference, the Ninth Circuit, in *Sacramento City Unified Sch. Dist. v. Rachel H.* (1994) 14 F.3d 1398, 1403, adopted a balancing test for determining the LRE that requires the consideration of four factors: (1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect the student would have on the teacher and children in the regular class, and (4) the costs of mainstreaming the student.

*In SY 2006-2007 (excluding March through June 2007), and in SY 2007-2008 (excluding April through June 2008), was the LRE for Student academic instruction in a special day class on an integrated or nonintegrated campus?*

12. Based on Findings of Fact 22-45 and 74-82, and Conclusion of Law 11, the evidence did not show that, in order to receive a FAPE, Student had to be placed on a nonintegrated campus. Student could and did receive a FAPE on the District's integrated campus during those years. The evidence showed that he received academic benefit on the Hardy campus. It showed that he received nonacademic benefit because he mixed with typically developing peers at lunch, recess, assemblies, and on the bus. There was no evidence that his behavioral difficulties were significantly worse, or that his presence was

significantly more disruptive, on an integrated campus, or while mixing with typical peers, than on a nonintegrated campus. The placement of Student in an SDC on an integrated campus therefore constituted placement in the LRE for both the school years at issue.

*In SY 2007-2008, did the District deny Student a FAPE because it failed to ensure Student's safety at school?*

13. Based on Findings of Fact 77-82, and Conclusions of Law 1-8, the evidence did not show that the District failed to ensure Student's safety at school. The evidence did not show that the incidents described by Guardian happened as she was told they happened, and did not show that the incidents were either so numerous or so serious that they indicated Student was unsafe at school. The evidence showed that the District provided Student with a safe learning environment at Hardy.

#### *Consequence of procedural error*

14. A procedural error does not automatically require a finding that a FAPE was denied. Since July 1, 2005, the IDEA has codified the pre-existing rule that a procedural violation results in a denial of FAPE only if it impedes the child's right to a FAPE, significantly impedes the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to their child, or causes a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see, *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.) Procedural errors during the IEP process are subject to a harmless error analysis. (*M.L. v. Federal Way School Dist.* (9th Cir. 2004) 394 F.3d 634, 650, fn. 9 (lead opn. of Alarcon, J).)

#### *Parents' right to participate in the decisional process*

15. Federal and state law require that parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. (20 U.S.C. § 1414(d)(1)(B)(i); Ed. Code, §§ 56304, 56342.5.) A district must ensure that the parent of a special education student is a member of any group that makes decisions on the educational placement of the student. (Ed. Code, § 56342.5.) Among the most important procedural safeguards are those that protect the parents' right to be involved in the development of their child's educational plan. (*Amanda J. v. Clark County Sch. Dist.* (9th Cir. 2001) 267 F.3d 877, 882.)

#### *Continuum of Placement Options*

16. Local educational agencies must ensure that a continuum of program options is available to meet the needs of individuals with exceptional needs for special education and related services. (34 C.F.R. § 300.115(a)(2006); Ed. Code, § 56360.) However, there is no requirement that an IEP team discuss the full continuum of program options.

### *Predetermination of offer*

17. Predetermination occurs when an educational agency has made its determination prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives. (*H.B. v. Las Virgenes Unified School Dist.* (9th Cir. 2007) 239 Fed.Appx. 342, 344-345.) A district may not arrive at an IEP meeting with a “take it or leave it” offer. (*JG v. Douglas County School Dist.*, *supra*, 2008 WL 5377696, p. 12, fn. 11.) However, school officials and staff do not predetermine an IEP simply by meeting to review and discuss a child's evaluation and programming in advance of an IEP meeting. (*N.L. v. Knox County Schs.* (6th Cir. 2003) 315 F.3d 688, 693, fn.3.) School district personnel may bring a draft of the IEP to the meeting; however, the parents are entitled to a full discussion of their questions, concerns and recommendations before the IEP is finalized. (*JG v. Douglas County School Dist.*, *supra*, 2008 WL 5377696, p. 12, fn. 11; *Appen. A to 34 C.F.R. part 300, Notice of Interpretation*, 64 Fed.Reg. 12478 (Mar. 12, 1999).)

18. A parent has meaningfully participated in the development of an IEP when she is informed of her child’s problems, attends the IEP meeting, expresses her disagreement regarding the IEP team’s conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schs.*, *supra*, 315 F.3d at p. 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*, *supra*, 993 F.2d at p. 1036.)

*Did the District deny Student a FAPE because it predetermined its offer or failed to discuss the continuum of options at the March 13, 2008 IEP meeting?*

19. Based on Factual Findings 83-92 and Legal Conclusions 14-18, the evidence did not show that the District predetermined its March 13, 2008 IEP offer or failed to have the required discussion of placement options. The evidence did not show that the District arrived at the meeting with a “take it or leave it” position. Nor did the evidence show that the District's conduct at the meeting caused any educational loss to Student or to Guardian's participatory rights. The District was not required, at the IEP meeting, to discuss every placement option on the continuum of options.

### *Functional Analysis Assessments*

20. If a child’s behavior impedes his learning or that of others, an IEP team must consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i)(2006); Ed. Code, §§ 56341.1, subd. (b)(1), 56523.) One such intervention is with a behavioral support plan. Another involves a behavior intervention plan, a document that is developed when a student exhibits a serious behavior problem that significantly interferes with the implementation of the goals and objectives of his IEP. (Cal. Code Regs., tit. 5, § 3001, subd. (f).) A serious behavior problem is behavior that is self-injurious or assaultive, causes serious property damage, or is pervasive and maladaptive and not effectively controlled by

the instructional and behavioral approaches specified in the student's IEP. (*Id.*, subd. (aa).) The adoption of a behavior intervention plan must be preceded by an FAA.

*In SY 2007-2008, did the District deny Student a FAPE because it failed to offer assessment plans for an FAA or for AB 2726 services?*

21. Based on Factual Findings 93-94, and Legal Conclusion 20, the evidence did not show that the District was required to conduct an FAA or a reassessment of Student's eligibility for mental health services under AB 2726. It was therefore not required to offer those assessment plans.

#### *Limitation of Issues*

22. A party who requests a due process hearing may not raise issues at the hearing that were not raised in the request, unless the opposing party agrees otherwise. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i); *County of San Diego v. California Special Education Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1465.)

#### *Reimbursement*

23. Parents may be entitled to reimbursement for the costs of placement or services they have procured for their child when the school district has failed to provide FAPE, and the private placement or services were proper under the IDEA and replaced services that the district failed to provide. (20 U.S.C. § 1412(a)(10)(C); *School Comm. of Burlington v. Dept. of Educ.* (1985) 471 U.S. 359, 369-371 [85 L.Ed.2d 385].)

*Is Guardian entitled to reimbursement for educational expenses incurred for the Sierra Academy or to an order placing Student in a nonintegrated NPS?*

24. Based on Factual Findings 4-94, and Legal Conclusions 1-23, the District offered and provided Student a FAPE for all time periods at issue. Therefore, Guardian is not entitled to reimbursement for educational expenses incurred in her unilateral placement of Student at the Sierra Academy, or to an order placing Student in a nonintegrated NPS.

### ORDER

Student's requests for resolution are denied.

### PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, the District prevailed on all issues.

