

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

EAST WHITTIER CITY SCHOOL  
DISTRICT.

OAH CASE NO. N2008090101

**NOTICE:** This decision has been  
UPHELD by the United States District  
Court. Click [here](#) to view the USDC's  
decision.

**DECISION**

Administrative Law Judge (ALJ) Deidre L. Johnson, Office of Administrative Hearings, Special Education Division (OAH), State of California, heard this matter on November 3, 4, 6, 24, and 25, and December 1, 2, and 3, 2008, in Whittier, California.

Ralph O. Lewis, Attorney at Law, represented Student and his parents (Parents). Parents were present during the hearing. Student was not present.

Christopher H. Knauf, Attorney at Law, represented the East Whittier City School District (District). Elisa Yasutomi, Director of Special Education, was present on behalf of the District throughout the hearing.

On September 2, 2008, Student filed a request for a due process hearing (complaint). On October 17, 2008, OAH granted a continuance of the hearing on agreement of the parties.

At hearing, oral and documentary evidence were received. At the request of the parties, the record remained open until December 22, 2008, for the submission of written closing arguments, at which time the record was closed, and the matter was submitted.

## ISSUES<sup>1</sup>

1. In preparation for Student's individualized education program (IEP) in July 2008, did the District inappropriately reassess Student by inadequately reviewing his prior records, and by failing to determine that a further psychoeducational assessment was warranted?

2. In connection with the July 2008 IEP, did the District procedurally or substantively deny Student a free appropriate public education (FAPE) by:

- A. Failing to permit Parents an equivalent opportunity to observe District's proposed placements;
- B. Failing to hold the IEP meeting within the statutory time period;
- C. Failing to ensure the attendance at the IEP meeting of a general education teacher;
- D. Failing to discuss a continuum of placements and services;
- E. Predetermining Student's placement and services and failing to consider Parents' independent educational assessments;
- F. Failing to provide a copy of the IEP documents to Parents at the close of the IEP meeting, and unilaterally changing the IEP documents after the IEP meeting without their consent;
- G. Failing to make a clear written offer of special education placement and services; and
- H. Failing to provide prior written notice?

3. Did the District's July 2008 IEP offer for the 2008-2009 school year deny Student a FAPE by:<sup>2</sup>

- A. Failing to have a statement of Student's present levels of academic achievement and functional performance, and measurable, understandable annual goals that met Student's unique needs to enable him to be involved in and make progress in the general curriculum;

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<sup>1</sup> Consistent with the complaint, the ALJ has reframed and reorganized the issues for purposes of clarity and organization.

<sup>2</sup> Student's complaint claimed there was a transportation problem. Student presented no evidence concerning a problem with transportation services. Therefore, he abandoned this claim.

- B. Offering an inappropriate placement in a preschool special day class in a group environment;
- C. Offering an inappropriate transition plan; and
- D. Offering inappropriate speech and language services?

### REQUESTED REMEDIES

Student requests an order that the District fund Student's home applied behavior analysis (ABA) therapy program for the remainder of the 2008-2009 school year and develop accurate present levels of performance and goals. He asks for reimbursement for the costs that Parents have incurred for his unilateral private educational placement from August 2008 through the date of this Decision, including 20 hours a week of direct private ABA services, weekly ABA supervision, and monthly ABA team meetings.<sup>3</sup> Student asks for reimbursement for Parents' costs to purchase supplies for ABA, occupational therapy (OT), and speech and language therapies. Student requests reimbursement for independent educational assessments Parents obtained from clinical psychologist Melanie Lenington, Ph.D., and speech and language pathologist JoAnne Abrassart. Student also requests reimbursement for costs incurred in connection with this case, including copy costs and teaching supplies used in the home program. Finally, Student requests an award of additional speech and language therapy hours as compensatory education.

### CONTENTIONS OF THE PARTIES

Student contends that he is not ready to attend preschool in the District's "autism focus" preschool class because he needs an intensive home-based ABA intervention program for 40 hours a week in order to make progress and to develop preacademic and functional skills.<sup>4</sup> Student claims that District failed to adequately assess him, violated the law in the conduct of the July 2008 IEP meeting, and failed to offer an educational program that addressed his unique needs, including placement, annual goals, and speech and language services. Student's and District's specific contentions regarding each issue are described throughout the decision.

District contends generally that Student is ready for preschool in its autism focus preschool class, and that he does not display the kinds of severe behavioral or medical problems that would justify a more restrictive home-based preschool program. District contends that its 2008 annual reassessment met all legal requirements, it did not violate the

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<sup>3</sup> District's funding for the home ABA program ended in August pursuant to a prior settlement agreement.

<sup>4</sup> The District's "autism focus" preschool special day classes are composed exclusively of children with special education needs due to autistic-like behaviors, with the curriculum and class structure designed using strategies, methodologies, and programs that address autism.

law in conducting the July 2008 IEP meeting, and that its offer constitutes a FAPE in the least restrictive environment.

## FACTUAL FINDINGS

### *Jurisdiction and Background*

1. Student is about four and a half years old and lives with Parents within the geographical boundaries of the District. In October 2006, when Student was two years, two months old, he and his twin brother were medically diagnosed with autism by the University of California Los Angeles (UCLA) Pediatrics and Child Development Department. In the initial 2006 UCLA evaluation, Student displayed a marked impairment in three of the primary categories of deficiencies shared by children with autism: social communication (preverbal), social interaction (including lack of eye contact or functional play), and restricted, stereotyped patterns of behaviors (including self-stimulatory spinning). Parents were referred to the Eastern Los Angeles Regional Center (Regional Center) for services.

2. Thereafter, the Regional Center provided early intervention services including a group-based Infant Toddler Program through the Association for Better Learning Experiences, OT and speech and language therapy services, and a separate home ABA therapy program for 20 hours a week beginning in March 2007, by Pacific Child and Family Associates (Pacific), a certified nonpublic agency (NPA).

### *Initial 2007 Assessments*

3. When Student turned three years old in 2007, the District made an initial offer for special education placement and services that Parents rejected. The District's 2007 assessments, IEP meetings, and offers are relevant to evaluate Student's issues regarding the District's 2008 reassessment and special education offers because the prior records and offers were reviewed and considered by the District's 2008 assessors and IEP team members in reassessing Student and making the placement and service offers at issue.<sup>5</sup>

4. In early 2007, the District and the Whittier Area Cooperative Special Education Program (WACSEP), the special education local plan area (SELPA) in which the District is located, met with Parents to transition Student into the school system. The Regional Center prepared a package of Student's records which was transferred to WACSEP, including reports and evaluations provided by Parents, and those prepared by or on behalf of the Regional Center. Among the many reports considered by the 2007 IEP team were the October 2006 UCLA report, along with an updated report dated June 1, 2007; an evaluation report dated December 30, 2006, by clinical psychologist Candace Bivona, Ph.D., with the Child Development Institute; and a psychological evaluation report of May 16, 2007, by Randi E. Bienstock, Psy.D., for the Regional Center. Student was still preverbal

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<sup>5</sup> The appropriateness of the 2007 assessments and IEP offers are not at issue in this case.

and lacked functional nonverbal communicative gestures, but had made consistent gains in all domains, including his ability to transition, improved attention, and improved eye contact during structured activities.

5. The District and WACSEP held two IEP meetings, on July 11, and August 29, 2007. The IEP team reviewed and considered Student's prior records and evaluations and District's and WACSEP's assessments, and discussed Student's initial educational placement in the District. Between December 2006 and July 2007, Student had been evaluated by numerous professionals. The IEP team also reviewed and considered the WACSEP Initial Psychoeducational Multidisciplinary Evaluation dated June 19, 2007; the Initial IEP Report from Pacific dated July 11, 2007; and the WACSEP Behavior Specialist Report dated July 11, 2007. The IEP team determined that Student was eligible for special education and related services under the eligibility category of autistic-like behaviors.

#### *2007 WACSEP Multidisciplinary Evaluation*

6. The 2007 IEP team also reviewed the WACSEP Initial Psychoeducational Multidisciplinary Evaluation dated June 29, 2007, by WACSEP school psychologist Ms. McGuire and speech and language pathologist Ms. Wood. The assessors reviewed Student's prior records and evaluations, including the documents listed above. The June 2007 WACSEP report showed that Student, at the age of two years, 10 months old (34 months), was significantly delayed in all areas of development, including perception, gross motor, imitation, eye-hand integration, cognitive performance, and verbal cognitive functioning. Student displayed severe delays in the areas of receptive and expressive language, phonology skills, including speech articulation, and pragmatics. Student demonstrated problem behaviors consistent with autism, including in the areas of emotional reactivity (tied to emotional expression and tantruming), withdrawal (difficulty communicating and socializing), and attention (difficulty with internal focus).

7. The WACSEP assessors recommended a "school-based program that utilizes whole group and small group instruction and practice, rather than a one-to-one program that teaches skills in isolation..." The report indicated that the classroom should have a "predictable classroom routine with visual scheduling and visual cues ... [and] warnings before switching activities to help him prepare his body for the transition."

#### *July 2007 Pacific ABA Progress Report*

8. The 2007 IEP team reviewed Pacific's Initial IEP Report dated July 11, 2007, by Mr. Putman, which summarized Student's progress in the Pacific ABA home program since March 2007. Student, as of July 2007, had received 20 hours a week of direct, one-to-one behavior intervention. As of July 2007, according to Pacific's ABA data, Student exhibited an escape-related tantrum, the function of which was escape from a non-desired activity or request, about once per hour for two to four minutes, which could increase to one and a half tantrums per hour in non-therapy, generalized settings. Student exhibited an access-related tantrum, the function of which was to access a preferred item, about once

every two or more hours for three to five minutes. Student's stereotypical behaviors were described as "rubbing his feet on the ground, placing items on his face, standing on a chair, jumping on the therapist, climbing on furniture, excessively touching items, dropping items, fidgeting, and clapping." Student engaged in a stereotypical behavior in this category less than one and a half times per hour (1.4 times per hour). His non-functional perseverative routines included repeating an activity continuously in a specific manner or pattern about once every three and a half hours (0.3 times per hour). Mr. Putnam established at hearing that these described negative behaviors constituted those with the highest priorities during the provision of the ABA services.

9. Pacific's ABA report noted that Student exhibited difficulty generalizing skills across settings. Overall, Mr. Putnam noted Student's improvement and progress across all areas of deficit, but he was of the opinion that Student had "extreme difficulties engaging in the group setting due to his extremely limited skill sets and excessive maladaptive behaviors." Pacific had just begun providing 40 hours a week of direct home services through the Regional Center, and recommended to the 2007 IEP team that Student should receive 40 hours of home ABA services per week.

#### *2007 WACSEP Behavior Report*

10. The 2007 IEP team reviewed the WACSEP Behavior Report by Elaine Sun, dated July 11, 2007. Ms. Sun, a school psychologist and autism behavior specialist, observed Student during the formal psychoeducational and speech and language assessments done by Ms. McGuire and Ms. Wood, and interviewed Parents and Mr. Putnam. She also observed Student in his home ABA program and reviewed prior Pacific reports to the Regional Center.

11. Although Ms. Sun did not testify, Lisa Torres, a WACSEP program specialist, credibly established that Ms. Sun was an experienced school psychologist and autism behavior specialist who was involved in the District's development of its autism focus preschool program in 2000. Nowhere in Ms. Sun's 2007 behavior evaluation of Student did she report any seriously maladaptive behaviors, such as excessive tantruming, running away, screaming, self-injurious behavior, or behavior injurious to others or to property. Ms. Sun reported that she did not see any tantruming during her home visit, and saw his attention redirected on occasion. Ms. Sun recommended that Student could successfully attend a preschool class with a special education teacher trained in autism strategies, in a highly structured autism focus special day class. In addition, she recommended an extended day program for an additional hour and fifteen minutes a day, four times a week, for one-to-one DTT/ABA instruction.

#### *Parents' Disagreement with the 2007 Assessments and IEP Offer*

12. On July 11, 2007, at the first IEP meeting, Parents submitted a written letter of disagreement to the District, in which they criticized the District's psychoeducational and

speech and language assessments. Parents requested an independent educational evaluation (IEE).<sup>6</sup>

13. On August 29, 2007, the IEP team reconvened, and the District and WACSEP offered an educational placement in an autism focus preschool class for four hours a day, five days a week, plus a one-to-one DTT-based extended day class for one hour and fifteen minutes four days a week; speech and language services, behavior specialist support, and other services and annual goals. On the same date, Parents submitted a letter stating that the proposed goals, classroom placement, and speech and language services were inappropriate, that Student did not have the prerequisite skills to function in a group setting, and that he needed an intensive 40-hour a week in-home early intervention program based on ABA principles, to be provided by Pacific. Thereafter, when the District prepared for the July 2008 IEP, it was aware of the above 2007 evaluations, reports, and IEPs, including Parents' concerns and objections.

#### *District's 2008 Reassessment*

##### *Failing to Adequately Review Student's Records*

14. Student contends that when the District conducted a reassessment of Student in the spring of 2008 in preparation for Student's annual July 2008 IEP, the District failed to adequately review all of his pertinent records because it should have considered Student's private 2007 IEE by Dr. Lenington, and failed to do so. District contends that it did not receive a copy of Dr. Lenington's 2007 evaluation until October 2008, in connection with the present case.

15. After a pupil's initial assessment, a special education pupil must be reassessed not more frequently than once a year, and shall be reassessed at least once every three years, unless the parent and the local educational agency (LEA) agree otherwise. A reassessment shall be conducted if the LEA determines that the educational or related services needs of the pupil warrant a reassessment, and if the pupil's parent or teacher requests one.

16. As part of an annual reassessment, the IEP team and other qualified professionals, as appropriate, shall: (1) review existing assessment data, including assessments and information provided by the parents, current classroom-based assessments and observations, and teacher and related services providers' observations; and (2) on the basis of the review and input from the parents, identify what additional data, if any, is needed to determine whether the pupil continues to be an individual with exceptional needs, the present levels of performance and educational needs of the pupil, whether the pupil continues to need special education and related services, and whether any additions or modifications to

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<sup>6</sup> Subsequent to Parents' July 2007 request for an IEE, District did not provide an IEE at public expense but, instead, filed a request for due process in OAH Case No. N2007080165, on August 7, 2007. On September 26, 2007, Student filed a request for due process in OAH Case No. N2007090696. Official notice is taken of both cases. By order dated November 29, 2007, OAH dismissed the cases based on a confidential settlement between the parties.

the special education and related services are needed to enable the pupil to meet the measurable annual goals, and to participate, as appropriate, in the general curriculum. If the IEP team and other qualified professionals, as appropriate, determine that no additional data is needed to determine whether the pupil continues to be an individual with exceptional needs, and to determine the educational needs, the LEA shall notify the parents of that determination and the reasons for it.

17. During the due process litigation between the parties regarding the District's 2007 assessments and IEPs, Parents retained Dr. Lenington to perform a private IEE. On September 4, 5, 7, 12, and 17, 2007, Dr. Lenington conducted a developmental assessment of Student. The evidence established that as a result of the November 2007 settlement of the cases, the District agreed to and did reimburse Parents for the cost of Dr. Lenington's private September 2007 evaluation. There was no evidence of the terms of the reimbursement agreement, including whether or not an invoice or a written report from Dr. Lenington was required in order to effectuate the reimbursement, or when the reimbursement was made.

18. If, prior to the July 2008 IEP, the District had notice that there was a written assessment report containing the results of Dr. Lenington's September 2007 assessment, it would be reasonable to charge the District with having notice of the contents of the assessment report before the July 2008 meeting, since they ultimately paid for it. As set forth above, the District was required to consider any information provided to it by the Parents in conducting the reassessment. However, Dr. Lenington did not prepare a written report of the assessment in September 2007. Dr. Lenington, as a matter of admitted practice, does not indicate on the face of her reports the date on which a final evaluation report is prepared by her, and may take many months after an assessment to complete a written report. At hearing, Dr. Lenington testified that she did not recall when her written report on Student's September 2007 evaluation was completed. When completed, the report was delivered to Parents.

19. Neither Parents nor Mr. Lewis sent a copy of Dr. Lenington's undated report of her September 2007 evaluation to the District at any time prior to the July 2008 IEP meeting.<sup>7</sup> Even assuming that the District should have known there would be a written report at some point, there is no evidence that anyone informed the District that the written report had finally been completed and was available. In addition, Parents sent the District a letter dated May 5, 2008, stating that they intended to have both Dr. Lenington and Ms. Abrassart "complete their evaluations" in time for the IEP, thus implying that Dr. Lenington had not yet completed her evaluation.

20. Based on the foregoing, the District was unaware of, and did not receive a copy of Dr. Lenington's undated report of her 2007 private evaluation of Student prior to the July 2008 IEP meeting. Given the confidential nature of the private evaluation, it was

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<sup>7</sup> WACSEP school psychologist and behavior specialist Brian Wenzel corroborated the fact that there was no report from Dr. Lenington among the District's documents he reviewed to prepare for the July 2008 IEP.

incumbent upon the Parents to affirmatively notify the District when the written report was ready, and to consent to its disclosure. Having failed to do so, Parents cannot complain that the District failed to consider the 2007 evaluation report in reassessing Student in the spring of 2008. Therefore, District's failure to consider Dr. Lenington's 2007 evaluation and written report as part of its obligation to review Student's prior evaluations did not in itself render its reassessment of Student in the spring of 2008 a denial of FAPE.

*Failing to Conduct a New Psychoeducational Assessment*<sup>8</sup>

21. Student contends that the District also failed to appropriately reassess him in the spring of 2008 by failing to determine that a further psychoeducational assessment was warranted in order to obtain current and updated data about Student's levels of performance and needs. District contends that its determination that no further formal assessment was warranted was reasonable, and that it complied with the law by conducting observations of Student in his home ABA program.

22. In late March or early April 2008, after an IEP meeting on March 17, 2008, regarding Student's OT needs and services, District's Special Education Director, Dr. Marcia Schoger, had a discussion with Mother about the July 2008 IEP meeting. Dr. Schogur informed her that the District would not require any further formal evaluation of Student in order to prepare for it. Dr. Schogur explained the District's position that its obligations for the first annual assessment were to obtain data on Student's progress to address his unique needs, which they planned to do.

23. On April 2, 2008, Parents ensured there was a record of the conversation by sending Dr. Schogur a letter confirming that the District was not going to conduct any assessments in connection with the July 2008 IEP. There is no evidence that Parents notified the District of any concerns regarding new suspected areas of deficit, or any lack of progress in his home ABA program signaling that a new formal reassessment should be considered. Parents were represented by counsel, and Mother is an attorney. Moreover, Parents could have requested that the District conduct a new assessment at any time, thus requiring the District to assess or take other action, and did not do so.

*District's 2008 Home Reassessment Observations*

24. In addition to reviewing Student's records, the District requested the opportunity to conduct an observational assessment of Student in the home ABA program as part of its annual obligation to reassess Student. The purposes of the observational assessment were to see what Student's then-current levels of performance and functioning were, and what skills Pacific was addressing, and to determine if there were any areas of concern that would call for further assessment or otherwise impact the District's impending offer for placement and services.

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<sup>8</sup> Student does not argue that the District should have conducted another speech and language assessment in the spring of 2008.

25. On June 13, 2008, the District sent a team to observe Student at home, consisting of Ms. Ainsworth, the autism focus preschool teacher; Mr. Wenzel, the WACSEP school psychologist and behavior specialist; Ms. Anderson, the District's program specialist; and Sunna Kim, District's speech and language pathologist. The District observers spoke with Mother and Pacific's program supervisor Mr. Putnam, and discussed the areas in which the ABA therapy was focused. The team observed Student in his home ABA program. They observed Student for about 25 minutes in a one-to-one DTT session with the therapist in a special therapy room, and for an additional 25 minutes with his twin sibling in a play area. It was the consensus of the District staff that Student had made significant progress since July 2007.

26. Ms. Anderson has been an autism and severe-handicapped program specialist with the District since August 2007, and obtained a master's degree in special education school psychology in 1988. She has about 20 years of experience in special education, including many assessments and IEPs. Ms. Anderson credibly established that, based on her observations in June 2008, Student was able to remain at "table top activities" (activities while seated at a table) for more than 10 minutes, and did not engage in any escape or tantruming behaviors during the observation. He was focused, engaged in joint attention and had eye contact, and was compliant. Some of the skills worked on included imitation, matching, and functional play with a toy car. When Student could not get a puzzle piece to fit, he became frustrated and whimpered, was verbally prompted to continue, and complied. Student engaged nonverbally and followed directions, although he did not communicate verbally. The team did not see Student show any interest in the play equipment or directly interact with his sibling. He hummed throughout the observation. Ms. Anderson did not recommend that further formal assessment of Student was warranted prior to the IEP.

27. Mr. Wenzel obtained a bachelor's degree in psychology in 2005 and a master's degree in educational psychology in 2007. He was a behavior therapist at a private NPA for autistic children for two years, creating and implementing behavior modification strategies including ABA and other methods, and has conducted psychoeducational assessments. During the observation, Mr. Wenzel saw Student work on many tasks, including attending, matching, nonverbal imitation, toileting, eye contact, fine motor skills, receptive instruction, receptive labels, sitting, verbal imitation, and object manipulation. Mr. Wenzel was persuasive that these skills were being worked on in the District's autism focus preschool class, and that Student displayed basic readiness skills. Mr. Wenzel did not recommend that further formal assessment of Student was warranted prior to the annual IEP.

28. Ms. Ainsworth was a general education teacher for six years, and obtained a special education mild/moderate teaching credential in 1999. Ms. Ainsworth obtained a master's degree and specialist credential in early childhood special education in 2004. She has been a special education teacher with the District since 2005, first in an intensive developmental special day class, and since 2006 in the autism focus preschool class, and the extended day ABA class. Ms. Ainsworth's observations of Student on June 13, 2008, were consistent with those made by Ms. Anderson and Mr. Wenzel. Ms. Ainsworth was also persuasive that the skills being worked on in Student's home ABA program were the same

skills that she was working on in the autism focus preschool class. She did not recommend that any new formal assessment would be warranted prior to the annual IEP meeting.

29. Dr. Lenington is a clinical psychologist who obtained her doctorate in 1993, and has been both licensed by the State of California and operating a private practice in Los Angeles since 1994. In addition, she has been in the field of OT since 1981 as a licensed OT therapist. Dr. Lenington's practice includes psychological and developmental assessments for children and adults, with a specialty in the assessment and treatment of neuro-developmental disorders. Approximately 80 percent of her practice is in the area of assessment, including attending IEP meetings. Out of about 700 assessments since 1994, the vast majority have been for parents and families, with not more than 15 assessments for school districts. She has no training or experience in education. Dr. Lenington testified that a new formal psychoeducational assessment was warranted in the spring of 2008 in order to be fully informed about Student's deficits and levels of functioning.

30. In June 2008, the District had received current data from Pacific regarding Student's areas of need being worked on in the home ABA program, and in addition, the District conducted its own observational assessment. However, Dr. Lenington was persuasive in her criticism that insufficient cognitive testing had been done in prior assessments. In December 2006, Dr. Bivona had to discontinue the administration of the Mullen Scales of Early Learning, a standardized tool to assess Student's developmental functioning, because he was "generally noncompliant, nonresponsive, and unmotivated..." Again, in May 2007, Ms. Bienstock, psychologist for the Regional Center, attempted to administer the Mullen Scales to assess cognitive functioning and also had to discontinue the testing because Student "did not participate in the activities." In June 2007, the only cognitive assessment tool used by the WACSEP psychologist, Ms. McGuire, was the PEP-R test. Dr. Lenington was persuasive that the PEP-R was a non-standardized test of limited value, and that the version used was outdated.<sup>9</sup> In contrast, Dr. Lenington's 2007 evaluation used standardized tests to assess Student's developmental functioning (Bayley Scales of Infant Development (Bayley Scales)), and cognitive functioning (Wechsler Preschool and Primary Scale of Intelligence III (WPPSI-III); and Differential Abilities Scales II (DAS-II)).

31. None of the previous assessments known to the District had obtained much cognitive data due to Student's young developmental age. Because of Student's age, intensive early intervention program, and his growth and progress in the ABA program and related services, his profile was changing rapidly. District's duty to conduct a new assessment was triggered because more thorough data was necessary to evaluate whether Student was mildly mentally retarded, in the borderline range between low average and deficient, or in the low average range of intelligence. Due to Student's significant global delays in all areas of development, an understanding of his cognitive functioning was

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<sup>9</sup> Standardized tests for pupils are tests that are designed to be administered and scored in a predetermined manner and given to children across the country to establish chronological and developmental standardized scores to measure skills and abilities.

necessary to evaluate his annual progress. Absent Dr. Lenington's September 2007 cognitive and psychological assessment results, which were unknown to the District, it did not have sufficient information. The District should therefore have determined that additional data on cognition were warranted. Hence, the District should have conducted a new cognitive assessment in the spring of 2008. Based on the foregoing, the District violated the law by failing to conduct a new psychoeducational assessment of Student in the area of cognitive functioning.

32. The fact that the Parents proceeded with a second independent evaluation in May 2008 did not relieve the District from its independent obligation to have conducted an assessment to obtain current data on Student's levels of cognitive functioning. Since Dr. Lenington conducted a re-evaluation in May 2008, as an equitable remedy the District should pay for it. Accordingly, the District should reimburse Student for Dr. Lenington's May 2008 re-evaluation, and her attendance at the July 2008 IEP meeting. Based on the foregoing, the District shall reimburse Parents in the total sum of \$3,250.<sup>10</sup>

#### *Violations Regarding the July 2008 IEP*

33. To determine whether an LEA offered a FAPE, 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.

#### *Failing to Permit an Equivalent Observation Opportunity*

34. Student contends that Parents and their experts were denied an opportunity to observe the District's proposed preschool placements that was equivalent to that permitted District personnel when they observed Student in the home program in June 2008. District contends that it provided Parents a substantially equivalent opportunity for observation.

35. For the 2007-2008 school year, District operated two autism focus preschool classes located at Ceres Elementary School (Ceres), one operated by Ms. Ainsworth and one by another teacher. In addition, there was a severely handicapped (SH) preschool class at Ceres addressing intensive developmental delay in children with a variety of disabilities. In September 2007, in connection with the prior assessment dispute, Mother and Student's independent evaluators, Dr. Lenington, Ms. Abrassart, and Mr. Putnam, visited two special day preschool class at Ceres, including Ms. Ainsworth's autism focus class.

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<sup>10</sup> Parents' request for reimbursement in the sum of \$4,000 included a charge of \$750 for May 20, after Dr. Lenington's evaluation. There was no evidence that the charge was related to the re-evaluation.

36. In May 2008, in preparation for the July IEP, Parents wrote to the District and requested classroom observations for an unlimited amount of time on specified dates. On May 19, 2008, Dr. Schogur responded in writing that, while the District permitted in-class observations, the District's measure of an "equivalent opportunity" was not more than 30 minutes in a classroom in a single session, based on District's own observation practice when conducting assessments. Further, the observation was limited to the Parents and one additional adult, for a total of three adults. The primary purpose of the time constraints and group size limitation was to ensure minimal disruption of the classroom and the pupils' education.

37. Thereafter, Mother and Student's independent evaluators visited Ms. Ainsworth's class and another autism focus preschool class at Ceres on May 20, 2008. The District permitted 30 minutes per classroom visit for three adults (Mother, Dr. Lenington, and Ms. Abrassart) for a total of 60 minutes.<sup>11</sup> Mr. Putnam did not observe the classes to comply with the group size limit. On June 4, 2008, Parents and Mr. Putnam observed Ms. Ainsworth's class again for about 30 minutes. After both of these visits, Parents' team did not ask to talk to the District staff about their observations, and did not ask for further observation visits. During the spring 2008 visits, the Parents' team attempted to approach other pupils in the class at close range, and Mr. Putnam sat closely to another pupil in the class and began taking notes about him, which Ms. Anderson felt was intrusive.

38. As set forth in Factual Findings 24 through 28, Parents granted the District the opportunity to observe Student in the home ABA program, and District personnel conducted those observations on June 13, 2008. The District team observed Student for about 25 minutes in a one-to-one DTT session with a therapist, and, at the request of Ms. Anderson, for an additional 25 minutes with his sibling. Prior to these observations, the District team talked with Mother and Mr. Putnam and asked questions, and the entire visit took about one hour. Parents did not insist on the District staff observing from a distance; however, there were no other pupils whose education and privacy would have been disrupted, except for Student's sibling, and the District staff was also there to observe the sibling. Thus, as of the July 2008 IEP meeting, and excluding the September 2007 classroom observations, both parties conducted observations for substantially the same amount of time, and Parents actually had more time.

39. In October 2008, for the 2008-2009 school year, Parents requested to observe the autism focus preschool classrooms at Leffingwell Elementary School (Leffingwell), since the District had moved them there from Ceres. The appointment was arranged through the school principal, Scott Blackwell. Because of Parents' observers' intrusive observation conduct in the spring, the District limited their presence in the class to an area near the circle time rug, and Mr. Blackwell had to remind them several times to stay in that area. Parents

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<sup>11</sup> In addition to the classroom teacher and instructional aides, the District had two or three staff accompany Parents' group at each visit, which added more adults to each classroom. Hence, the observation group was divided into two, and each group saw 15 minutes of each class. Therefore, Parents' group observed each class for a total of 30 minutes.

contended they were asked to observe from too far a distance, since there were divider walls about two to three feet high between some sections of the room where the work stations were located. The observations lasted about 30 minutes. The evidence did not establish that Parents lost material information about the classrooms due to the distance they were asked to keep from the children.

40. Based on the foregoing, the evidence did not substantiate any material discrepancy, to Student's detriment, between the observation times or the quality of the observation periods allotted the District and those allotted the Parents in observing the classrooms, either as of the July 2008 IEP or as of the hearing. No procedural violation having been found, there was no denial of FAPE on this basis.

*Failing to Timely Hold the July 2008 IEP Meeting*

41. Student contends that the District should have held an IEP meeting within 30 days of a request from the Parents in May 2008. District contends that it was obligated by a settlement agreement to hold an IEP meeting not later than July 31, 2008, and that it complied by holding the meeting on July 1, 2008. The law requires that the IEP team meeting shall be held within 30 days from the date of receipt of the parent's written request, except as specified.

42. By virtue of a stipulation of the parties during the hearing, it is found that in connection with the November 2007 settlement agreement, the parties agreed to conduct Student's next annual IEP meeting not later than July 31, 2008. In a letter dated and served by certified mail on May 15, 2008, Parents wrote to Dr. Schogur requesting that an IEP meeting be held. Dr. Schogur's office received the letter on May 16, 2008. When the District team observed Student in the home on June 13, 2008, they learned from Mother of Parents' request for an early IEP meeting for the first time. Thereafter, the District staff immediately worked to coordinate the schedules of all IEP team members and scheduled the meeting for July 1, 2008. In this regard, the parties agreed to hold the IEP meetings for both Student and his sibling on the same day, in order to accommodate the schedules, if not the related time and expense, of all participants who would attend both IEP meetings. Based on the statutory timeframe, the District should have held Student's IEP meeting on or before June 15, 2008, in order to timely comply with Parents' request.

43. On July 1, 2008, Student's IEP meeting was held. The evidence established that July 1 was the earliest date on which all participants were available to attend the meeting. Since the IEP meeting was not held until July 1, 2008, a delay of two weeks past the statutory deadline, the District committed a procedural violation.

44. In order to find that this procedural inadequacy constitutes a denial of FAPE, there must be evidence that the delay impeded Student's right to a FAPE, significantly impeded Parents' opportunity to participate in the decision making process regarding the provision of FAPE, or caused a deprivation of educational benefits. There is no such evidence. Mother explained that the July 31, 2008 deadline was an outside date, and she

wanted the meeting to be held earlier. Parents did not establish any material reason to request an earlier IEP meeting to be held by the middle of June 2008. The District paid for Student's home ABA program during this time period. Hence, the delay did not cause a deprivation of educational benefits. Parents did not claim that any of their experts were unable to attend. Parents did not establish that a two-week statutory delay of a meeting they unilaterally advanced by a month and a half over the contractual deadline "significantly" impeded their opportunity to participate in the decision-making process. Therefore, the violation was harmless error, and there was no denial of FAPE.

*Absence of General Education Teacher from July 2008 IEP Meeting*

45. Student contends that the District should have had a general education preschool teacher at the July 1, 2008 IEP meeting. However, Student does not contend that there was any possibility of a general education placement; to the contrary, he contends he was not ready for any group class environment, and should have been taught privately at home. District contends that it does not operate a general education preschool program and was therefore not required to either employ a general education preschool teacher or have such a teacher at the IEP meeting.

46. A pupil's IEP team shall include specified participants, including not less than one regular education teacher of the pupil, *if the pupil is, or may be, participating in the regular education environment*. The purpose of the attendance of a regular education teacher is to obtain that teacher's input and participation, so that the parents and other members of the IEP team will have accurate information upon which to base a decision, and an LEA's failure to ensure this input seriously infringes on the parents' participation in the IEP team meeting. The general education teacher need not be the pupil's present teacher.

47. Thirteen people attended the July 1, 2008 IEP meeting, including Parents and their attorney, Mr. Lewis; private evaluators Dr. Lenington and Ms. Abrassart; Pacific's ABA supervisor Mr. Putnam; Ms. Ainsworth; Core Communications speech and language therapist Katie Bernal; Mr. Wenzel; general education teacher Valerie Proctor; Special Education Director Ms. Yasutomi; and District's attorney, Mr. Knauf. Ms. Ainsworth, the District's autism focus special education preschool teacher, was proposed to be Student's preschool teacher. The evidence established that the consensus of the IEP team was that it would not have been appropriate to consider a regular education preschool environment for Student. Hence, a general education placement was not an option proposed or discussed by anyone on the team and the law did not require a general education teacher to be present at the July 2008 IEP meeting. Although not required by law, Ms. Yasutomi nevertheless invited a general education preschool teacher to the IEP meeting.<sup>12</sup>

48. Based on the foregoing, the District was not required to have a general education teacher at the July 2008 IEP meeting and its failure to do so was not a procedural

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<sup>12</sup> The general education teacher, Ms. Proctor, was from another school district because the District does not operate a general education preschool and does not employ general education teachers.

violation under the IDEA. Because there was no violation, there is no need to determine whether there was a FAPE.

*Failing to Consider a Continuum of Placements*

49. Student contends that a procedural violation occurred because, at the IEP meetings, the District failed to consider a continuum of placement options for him. The District contends that it did consider a continuum of placements.

50. Each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services, as required by the IDEA.

51. The law requires only that a continuum must be *available*, not that the IEP team must consider a specific continuum for each pupil. No evidence established that the District or the SELPA did not have an appropriate continuum of placements available. Moreover, as determined in Factual Findings 45 through 58, and 73 through 75, the IEP team considered more than one option on the placement continuum. Because no procedural violation occurred, there was no denial of FAPE on this basis.

*Predetermining District's Offer and Failing to Consider Parents' Independent Educational Assessments*

52. Student contends that District predetermined its July 2008 IEP offer, which significantly impeded Parents' opportunity to participate in the IEP decision making process, and hence, denied Student a FAPE. Student contends that, in the July 2008 IEP, the District offered the same autism focus preschool class that it had offered in the 2007 IEP, never recommended a home ABA program for pupils, met privately before the IEP meeting, and did not consider Parents' independent educational assessments. District contends that it came to the July 2008 IEP meeting with an open mind, and considered Parents' concerns and their experts' opinions, and that the autism focus preschool class was offered because it was appropriate to meet Student's needs.

53. A school district violates the IDEA if it independently develops or predetermines an IEP, without meaningful parental participation, and presents the IEP to the parent for ratification on a "take it or leave it" basis. School district personnel may discuss their proposed options before the IEP meeting or may begin the meeting with initial proposals, provided there is open discussion. If the team does not reach consensus at the meeting, the team may decide to meet again. Ultimately, the District is responsible to formulate an offer.

54. District's IEP members, Mr. Wenzel, Ms. Anderson, and Ms. Ainsworth met about a week before the July 2008 IEP meeting, reviewed their home observations of Student, and reviewed prior records. (Factual Findings 24 through 28.) They agreed that they were impressed with Student's progress on his ABA goals over the past year, and that

they each had observed Student to have sufficient readiness skills to be able to successfully participate in the District's preschool program. They credibly and persuasively established that they would not recommend a home program for a preschool pupil unless the pupil had such severely maladaptive behaviors, or safety, or medical issues to warrant a restrictive home placement. They did not see or learn of anything prior to the IEP meeting that led them to believe that Student had severe maladaptive behaviors, serious medical problems, or other unique circumstances such that he should be kept home in a more restrictive environment. The fact that the District staff met and discussed options for Student's placement in advance of the IEP meeting was consistent with the District's obligation to review all material information and be prepared for the meeting, and did not establish that the District predetermined Student's placement.

55. The evidence established that the parties engaged in vigorous and adversarial discussion at the IEP meeting on July 1, 2008. The meeting lasted for over four hours until early afternoon, when it was ended in order to begin the IEP meeting for Student's sibling that was set for the same date. During the meeting, the written and oral reports and evaluations of both parties were discussed. The team reviewed the draft annual goals for the upcoming school year proposed by both the District and by Parents' experts. Core Communications' draft speech goals were rejected and the team asked Ms. Abrassart to help rewrite them. The team members discussed Ms. Abrassart's proposal to include a specific methodology, the "Links to Language" program, in a goal, and explained that the District does not incorporate particular methodologies into a pupil's annual goals. At some point during the IEP meeting, Dr. Lenington discussed the results of her observations and evaluations of Student, although she did not have a written report for the team.

56. The team discussed the District's proposed placement in the autism focus preschool class. While the District members of the team listened to the opinions of Dr. Lenington, Ms. Abrassart, and Mr. Putnam, saying that Student was not ready for preschool, they also listened to the opinions of Ms. Bernal, Ms. Ainsworth, Ms. Anderson, and Mr. Wenzel, saying that Student had sufficient readiness skills for preschool. Mother asked questions in regard to many of the topics, and Mr. Lewis was present as legal counsel for the family. There was a difference of opinion among the team members as to whether Student should remain in a home program or attend school. There was no consensus as to placement at the meeting, nor did the District indicate it had changed its mind in offering Ms. Ainsworth's class.

57. The team spent a significant amount of time during the IEP meeting listening to, and discussing all of the reports and opinions. The District staff credibly established that no information was presented during the meeting that Student had severely maladaptive behaviors, or medical or safety problems that would suggest that a school environment was not appropriate. For example, Dr. Lenington and Mr. Putnam based their opinions that Student was not ready for school on matters of ABA methodology, and not on matters of the school environment. The evidence does not establish that Student presented significant behavioral, medical or safety issues such that a restrictive home placement should be considered. There is no evidence that the District attempted to stifle Parents' opinions or

participation. The team took into consideration the Parents' information that Student benefited from discrete ABA drills, and incorporated it into the offer. As set forth in Factual Findings 59 through 65, when the meeting ended, the District agreed to consider modifying some of the goals based on Parents' concerns, and asked Ms. Abrassart to help rewrite the speech goals.

58. Based on the foregoing, the July 2008 IEP meeting involved open discussion and the District did not predetermine the offer of placement at the meeting or in finalizing the written documentation. There is ample evidence that the District considered all of Parents' and their experts' independent evaluations, concerns, and information presented before and during the meeting, and disagreed regarding salient points. Thus, the evidence does not establish a violation. Since there was no violation, there is not need to determine whether a FAPE was thereby denied.

*Failing to Provide a Copy of the IEP and Changing the IEP After the Meeting*

59. Student contends that Parents were not provided a copy of the IEP at the close of the meeting on July 1, 2008, and that the District thereafter made unilateral alterations to the IEP without their consent, which significantly impeded their rights to participate in the decision making process. The law provides that the parents should be provided a copy of the IEP at no cost to the parents.

60. At the beginning of the July 1, 2008 IEP meeting, the IEP team, including Parents and their attorney, had copies of the following documents which made up portions of the total IEP documents: a draft of 11 pages of the District's proposed annual goals; Core Communication Partners (Core Communications). Speech Language Therapy Annual Progress Summary dated June 24, 2008; Ms. Abrassart's Independent Evaluation for Speech and Language dated June 24, 2008; Core Communication's draft speech and language goals; and Pacific's Initial IEP Report dated July 1, 2008. The IEP signature page was routed for signatures of the participants, and there was also a draft of the first page of the IEP, containing some basic boiler plate information. However, the service options/instructional setting box in the lower left of the first page was not filled in with any specific offer of placement.

61. By the end of the meeting, District had several pages of hand written notes summarizing the meeting. District agreed to review the comments and concerns of Parents and their experts in order to finalize its proposed annual goals and the specifics of the offer for speech and language services, in light of Parents' concerns. The parties then proceeded to hold an IEP meeting for Student's brother. Accordingly, the evidence established that Parents agreed to have Ms. Abrassart help rewrite the speech goals, and agreed to receive District's final written IEP offer after the meeting. Parents neither requested a continuance of the IEP meeting, nor asked to reschedule another meeting.

62. On July 28, 2008, the District finalized the IEP and sent the documents to Parents. In addition to attaching copies of all written reports reviewed at the meeting, it

included 18 proposed annual goals, typed expanded meeting notes, and a completed first page with the services filled in. Ms. Anderson was persuasive that, with one exception, no material changes were made to the finalized IEP that had not been generally discussed at the IEP meeting. The one exception was that the draft minutes reported the wrong length of time for the extended day DTT services (150 minutes twice a week), when it should have been 300 minutes four times a week. The final IEP corrected that mistake.

63. A comparison of the draft IEP documents with the final IEP corroborates Ms. Anderson's testimony that no other material changes were made that required another IEP meeting with Parents. The District made modifications to some of the goals as a result of discussions during the IEP meeting. For example, draft Goal 58, in the area of play skills, provided that Student would independently choose a toy and play with it in a functional manner while next to a peer.<sup>13</sup> Student was then able to engage in simple toy play on a one-to-one basis for about one and a half minutes per Pacific's July 2008 data. During the IEP meeting, the team discussed changing the goal to interaction with a peer. Final Goal 58 was modified to be a turn taking goal with cues. (Factual Finding 90.)

64. As another example, during the July 2008 IEP meeting, Ms. Abrassart proposed using a particular program called Links to Language. She was asked to draft a proposed goal in receptive language with Links to Language, and did so. Ms. Abrassart testified that Ms. Bernal, the speech therapist from Core Communications, stated she had no experience with Links to Language but agreed with her recommendation. However, the draft IEP meeting notes recorded that other District members of the IEP team explained at the meeting that it was inappropriate to write any particular methodology into the annual goals, and that it would be up to the service provider to determine the programs or strategies used to attain the goal. At the end of the meeting, the District agreed to consider the *use* of Links to Language in Student's speech therapy, but did not agree to use it as a required element of the annual goals. Student contends that the District staff engaged in discussions about the Links program after the IEP meeting, and excluded Parents. The evidence established that the District was entitled to follow up to make inquiries about the program and discuss it among themselves in order to finalize the IEP offer, as they had informed Parents they would consider it. Thereafter, final Goal 65, in the area of receptive language, modified Ms. Abrassart's proposed goal and provided that Student would demonstrate understanding of prepositions. However, the reference to Links to Language as the program to use for the goal was eliminated. Hence, the District's modification of Goal 65 arose directly out of the IEP meeting, and another IEP meeting with Parents was not required. There was a minor alteration of the District's offered transition plan that did not change the total number of 12 hours offered for collaboration with Pacific. Finally, the services box on page one was filled in to complete the final offer but the transition plan was in the notes, not in the services box.

65. Based on the foregoing, Student's contention that the District made material, unilateral alterations of the IEP documents that significantly deprived Parents of meaningful

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<sup>13</sup> The proposed annual goals are evaluated by reference to the page number of the IEP, since they are not otherwise numbered in the IEP. For example, Goal 58 is on page 58 of the IEP.

participation in the IEP process is not substantiated by the evidence. District was required by law to make an offer of placement and services, after taking Parents' concerns into consideration. District's continued discussions after the IEP meeting in order to prepare the finalized offer did not constitute a secret IEP meeting without Parents' consent. Therefore, there was no violation of the law and no denial of FAPE on this basis.

*Failing to Make a Clear Written Offer of Placement*

66. Student contends that, by the close of the IEP meeting on July 1, 2008, the IEP failed to contain a clear written offer of placement and services, particularly with respect to the proposed placement and the transition plan. Student claims that the final July 28, 2008 IEP offers for placement and transition were unclear and therefore deficient. District contends that the finalized offer provided Student with clear written notice of its offer.

67. The IEP must contain a clear written offer of placement and services. The offer should contain sufficient information so that the LEA's commitment of resources is clear to the parent.

68. Student's contention that the District was required to have a clear, final written offer by the close of the IEP meeting itself is not supported by legal authority. As set forth in Factual Findings 59 through 65, there was not enough time on July 1, 2008, to finish the IEP meeting. The parties, represented by counsel, were capable of scheduling another IEP meeting but did not. Student's contention that the District refused to present a final, written IEP offer at the end of the meeting is belied by the evidence. There is no evidence that Mr. Lewis or Parents requested or demanded that the meeting continue to finalize all of the goals and clarify the placement offer. Parents and their counsel consented, at least by acquiescence, to forgo further negotiations, begin the sibling's IEP, and review the District's finalized offer when they got it.

69. The July 1 meeting notes clearly summarized District's placement offer made during the meeting: "The recommendation for District services is the Autism Focus Special Day Class Preschool 5 days a week, 4 hours a day, and also Extended Day 4 days a week for 75 min. each day." The fact that the services box on the first page was not filled in to reflect this placement offer until later does not render the offer vague. Thus, the evidence established that the District clearly communicated that it was offering Ms. Ainsworth's autism focus preschool class, and that the Parents wanted the home ABA program. The parties understood where they disagreed on the placement offer at the end of the meeting. Parents thereafter did not seek clarification of the placement offer.

70. Even assuming that the District did not present a clear, written offer on July 1, 2008, the failure to do so until the finalized IEP was sent on July 28, 2008, constituted a delay of about four weeks. The July 28, 2008 offer was made within the parties' agreed-upon deadline to hold an IEP meeting by July 31, 2008. (Factual Findings 41 through 44.) The 2008-2009 school year did not start until September 2008, District was funding Student's educational placement at the time, and Parents still had time to respond to the final

offer, request another IEP meeting, or negotiate further modifications. Parents' only response was to reject the offer on August 23, 2008. Therefore, Parents did not establish that their participation in the IEP process was significantly impeded, or that Student was denied educational benefit due to the delay. Accordingly, even if there was a violation due to the delay, it was harmless error.

71. Student contends that the July 28 placement offer was not clear because the wording of the offer in the meeting notes was equivocal, as follows: "...the District staff strongly recommend placement in the District's Preschool Autism Focus Special Day Class located at Leffingwell Elementary School..." Thus, in both the July 1 and July 28 notes, the District's offer was couched using the word "recommend" instead of "offer." However, the remainder of the placement offer page of the meeting notes clearly specified the exact location, frequency and duration of the placement in both the autism focus class and the extended day class for a total of 25 hours of classroom instruction. The evidence did not show that Parents were confused or did not understand the offer. The District notes went on to describe the autism focus class in detail and respond to Parents' concerns. In addition, the services box on page one clearly set forth the two classrooms, their frequencies and durations, but identified the location as "a separate class" instead of at Leffingwell. The fact that the school location was in the notes and not on the services page did not render the offer uncertain.

72. As to District's offer of a transition plan, as set forth in Factual Findings 59 through 65, Student contends that, in the final offer, the transition plan was not offered because it was not listed on page one of the IEP in the services box. This contention is also without merit, as the IEP meeting notes clearly specified the offer for a transition plan. The offer clearly stated the nature and scope of the services the District was offering. Based on all of the foregoing, there was no persuasive evidence that the District's written offers for placement and transition were unclear. Hence, there was no procedural violation on this basis, and no resulting denial of FAPE is found.

#### *Failing to Provide Prior Written Notice*

73. Student contends that the District failed to provide prior written notice of its refusal to continue to fund a home-based ABA educational program after August 23, 2008, when Parents submitted a written dissent to the July 2008 IEP. District contends that it did not need to deliver any additional written notice to supplement the July 2008 IEP.

74. Prior written notice under the IDEA 2004 is required whenever the LEA proposes or refuses to initiate or change the identification, evaluation, educational placement, or the provision of FAPE. The notice must include a description of the action proposed or refused by the district, an explanation, a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action, an advisement of procedural rights, a description of other options considered by the IEP team and the reason why they were rejected, and a description of the relevant factors. An IEP may constitute prior written notice if it contains all requisite information.

75. The July 2008 IEP contained all of the written reports described in Factual Findings 59 through 65, upon which the District team members considered and relied in making the offer. The meeting notes, as typed, set out more fully the District's proposals and the reasons for them, including why a school placement instead of a home placement was offered. Parents acknowledged receipt of their procedural rights at the beginning of the meeting. The July 28, 2008 IEP reflected that other options were considered and reasons why they were rejected. For example, the IEP contained the recommended speech and language services from Core Communications and Ms. Abrassart, and reflected District's decision to include co-therapy within the two hours of direct services instead of in addition to it. While an express statement of the reasons for rejecting Ms. Abrassart's extra hour of co-therapy was not included, the District explained that it thought the offer of two hours, including co-therapy, was appropriate, and the IEP included an explanation why the Links to Language program would not be used in the speech goals. Hence, the July 2008 IEP contained all required components of a prior written offer. The District was therefore not legally obligated to send Parents any further response after receipt of Parents' August 2008 rejection of the offer. The evidence thus did not establish any violation of the prior written notice requirement and no denial of FAPE occurred on this basis.

*Violations Regarding District's July 2008 Offer of Placement and Services*

76. Following the procedural analysis, the second test in evaluating the District's July 2008 offer is whether the IEP was reasonably calculated to provide Student with educational benefit, and thus substantively appropriate. An LEA must provide a pupil with an educational program that is reasonably calculated to provide some educational benefit in the least restrictive environment. Offers are to be evaluated as of the time the IEP team designed them, in light of the information available at the time the offers were made, and are not to be judged in hindsight.

*Failing to Determine Student's Unique Needs*

77. Student contends that because the District did not adequately reassess him in the area of cognitive functioning, it did not have sufficient information regarding his unique needs related to his disability in order to evaluate his levels of academic achievement and functional performance and develop appropriate goals. District contends that it had sufficient data from Student's prior assessments and District's observational reassessment in order to design appropriate annual goals to meet his unique needs.

78. An IEP must include a statement regarding the child's present levels of academic achievement and functional performance and measurable annual goals designed to meet the pupil's needs that result from the disability to enable him or her to be involved in and make progress in the general education curriculum and meet the pupil's other educational needs that result from the disability.

79. As set forth in Factual Findings 21 through 32, since the District did not have Dr. Lenington's 2007 evaluation, it did not have adequate information about Student's levels of cognitive functioning in the spring of 2008. Hence, the District should have decided to conduct a new assessment in the area of cognitive functioning. At the July 2008 IEP meeting, Dr. Lenington verbally reported to the team the results of her 2007 and May 2008 evaluations. She assessed Student's cognitive, social/emotional, adaptive, and pre-academic skills. Dr. Lenington administered the Bayley Scales but Student was above the age range for which standard scores could be derived. She found his overall cognitive functioning to be at an age equivalency of 22 months. On the WPPSI-III, Dr. Lenington found a performance intelligence quotient (IQ) of 71 in the third percentile, a gain from his prior score of 70 in the second percentile. However, a full scale IQ score could not be obtained because Student exhibited "considerable distress" during the assessment. She noted variability in Student's scores, which ranged from the mild IQ deficit range to borderline to below average. On the DAS-II, Dr. Lenington attempted to measure the same four subtests of the lower preschool level, but again had difficulty due to Student's distress; she discontinued the test and used behavioral observations instead. Dr. Lenington concluded that, overall, Student had improved since September 2007 in increased recognition and enjoyment of interaction with people, with increased eye contact, and playing with toys in a functional manner. Dr. Lenington did not propose any specific annual goals for him. The evidence did not establish that the additional data on Student's cognitive functioning, while necessary to evaluate his annual progress, had any practical impact on determining what Student's unique needs were in July 2008, and what annual goals would be necessary to address those needs.

80. The evidence, including Student's records and evaluations, District's home observational assessment, and Pacific's annual data, established that as of July 2008, Student had unique needs in the areas of stereotypic, perseverative, and tantruming behaviors, gross motor movements, cognitive performance, eye/hand integration, self help (feeding and toileting), classroom participation to participate at table activities, and to transition from one activity to another, play skills and social skills, including taking turns, imitation, matching, transitioning, expressive language, receptive language (including focus and joint attention) regarding both preschool-level preacademic concepts and prepositions, oral motor skills, and speech articulation.<sup>14</sup>

*Failing to Have Accurate Levels of Performance and Measurable and Understandable Annual Goals*

81. Student contends that the District did not accurately develop his 2008 present levels of academic achievement and functional performance because District ignored the data in Dr. Lenington's and Mr. Putnam's evaluations, and that, as a result, his present levels of academic achievement and functional performance in District's proposed annual goals were inappropriate. Student claims that the proposed goals do not adequately address his needs and are vague, not measurable, and not understandable. District contends that the proposed

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<sup>14</sup> Student also had fine motor and sensory needs that are not at issue in this proceeding.

goals are measurable and understandable, accurately reflect Student's levels of functioning, and address his unique needs to enable him to be involved in and make progress in the preschool curriculum.

82. For the most part, the District's 18 proposed annual goals establish a mastery level at 80 percent, or four out of five trials over time, generally measured over two consecutive weeks. The goals were written with the expectation for Student to be successful and achieve mastery within one year, accompanied by two short term objectives for interim progress, the dates of which were aligned with the school's trimester reporting periods. The goals provide that the basis of measuring progress will be by teacher data and observation. The goals are accompanied by a statement of Student's present level of performance or functioning related to the goal, otherwise referred to as the "baseline."

83. Student had needs in the area of behavior common among children with autism, such as stereotypic, perseverative, and tantruming behaviors. The District did not propose any goals in this area because, as Ms. Anderson and Ms. Ainsworth established, the autism focus preschool class addresses reducing and replacing autistic-like behaviors with positive behaviors throughout the school day in all settings, using a variety of strategies. In addition, Pacific reported to the IEP team that Student did not need an annual goal to address escape or access-related tantrums for the 2008-2009 school year because he had met his annual goals and successfully reduced tantruming to minimal occurrences. Student's incidents of stereotypic behaviors had been reduced to less than once every two hours, and his nonfunctional routine behaviors had been eliminated. Ms. Ainsworth credibly established that three proposed goals also worked on negative behaviors by using positive replacements, including working on sitting at a table longer, visual cues for transitioning activities, and picture communications for requesting desired items. In addition, as set forth in Factual Findings 123 through 125, the District offered a transition plan so there would be collaboration with Pacific in introducing Student into the classroom. Thus, the evidence established that Student did not need more behavior goals to meet his behavior needs in the autism focus class.

84. Goal 52 is an annual gross motor goal for Student to play with three different types of school playground equipment independently on four out of five opportunities for two consecutive weeks as measured by teacher data and observation. The goal shows Student's baseline levels of functioning as being able to throw a ball from an overhead position for a distance of five feet, and to kick a ball over five feet (but without a backward leg swing), and that he has not had access to school play equipment before. These data were reported to the July 2008 IEP team by Mr. Putnam and Pacific's IEP report. Dr. Lenington's opinion that this goal was not measurable, vague, and inappropriate is not persuasive. She did not appear to be aware that it was directly derived from two Pacific goals in use for a year with significant progress shown. Although the type of equipment was not specified, District established that its playground equipment appropriate for preschoolers would be selected, such as a slide or a tricycle. The goal meets Student's needs in gross motor movement and play skills, is understandable, and measurable.

85. Goal 53 is a cognitive performance goal for Student, when verbally, prompted to give the correct shape from a field of six basic shapes on four out of five opportunities weekly for two consecutive weeks. Student's baseline was that he required a visual cue in order to receptively give a correct item. The baseline came from Pacific's report. Dr. Lenington's opinion was that the goal was inappropriate because shapes, such as a circle or a square, are abstract, and the goal should be designed to use Student's body parts, or functional items such as shoes. In contrast, Ms. Ainsworth credibly established that she successfully works on shapes using both abstract shapes and objects with children in the autism focus preschool class in the academic centers, at circle and play times, with a "shape of the month" theme that is repeated throughout the day. Ms. Ainsworth's testimony is given more weight in light of her experience as a special education preschool teacher in the autism focus class. The goal meets Student's needs in both cognitive performance and receptive communication, is understandable, and measurable.

86. Goal 54 addresses eye/hand integration for Student to imitate a four piece block structure with the same measurable criteria as Goals 52 and 53. Student's baseline was his ability to imitate block patterns with three blocks, according to Pacific's July 2008 annual report, showing Student's progress from the year before. Dr. Lenington pointed out that since this goal addressed imitation skills it was unclear how it addressed eye/hand integration. However, many of the District's goals address more than one area of need. The evidence established that the goal works on improving Student's eye and hand coordination by using the task of building blocks. District's increase to four blocks was reasonable, the goal is understandable, measurable, and meets Student's eye/hand integration and imitation needs.

87. Goal 55 is a self help goal for Student to feed himself independently (cup, fork, spoon) during mealtimes, measured by the same criteria as the above goals. Student's baseline was that he then used a straw with a cup, was able to bring a spoon to his mouth but had difficulty scooping food out of it, and had difficulty picking food up with a fork. Dr. Lenington objected that this should be broken down into two goals and that it was not measurable, but she did not explain her reasoning. District established that the goal is workable in the classroom, meets Student's needs in the area of feeding, is understandable, and measurable.

88. Goal 56 addresses classroom participation and requires Student to participate in a table top activity with peers for four minutes with verbal prompts on three out of four opportunities over a two week period. The baseline was his ability to sit for at least 10 minutes on a one-to-one basis for table top activities, as observed by the District in the June home observation. In addition, the goal noted that Student had no baseline experience in a group setting in a classroom. The use of prompting is consistent with Pacific's report indicating that after about 30 seconds, Student requires prompting to maintain on-task behavior. Parents claim that Student is not ready to be in a group setting, since he is not presently able to interact with any other pupil at the table. However, this goal does not require Student to interact with another pupil at the table, and seeks to assist Student in learning to sit in a group at a table in the class and work on an activity. Ms. Ainsworth

established that prompting was used where appropriate throughout her class. Thus, the goal meets Student's needs in the area of classroom table activities and behavior, is understandable, and measurable.

89. Goal 57 in the area of classroom participation provides for Student to use a visual cue/schedule to transition to different areas around the classroom and campus with verbal and/or gestural prompts for four out of five opportunities daily for two weeks. Dr. Lenington objected that there was no baseline for Student's performance and he was not ready for preschool, the goal was too complex, and that she did not know what a visual cue/schedule was. The goal accurately recognizes Student's baseline as not having experience in transitioning in a classroom. Ms. Ainsworth established that the autism focus class uses visual cue transition cards (color-coded photo, icon, or word) about where to go next in the classroom, with a check-in envelope to put the card in at the next station. The goal thus meets Student's needs in the area of transitioning, and also supports his behavior by providing structure and transitioning skills to reduce frustration. The goal is understandable to a special education teacher and is measurable.

90. Goal 58 in the area of play skills provides that Student would take turns with a peer for four turns, with visual or verbal cues, in four out of five opportunities for two weeks. His baseline was his ability to engage in simple play with a toy on a one-to-one basis for about one and a half minutes per Pacific's July 2008 data. Dr. Lenington's opinion was that age-inappropriate toys or manners of play could be allowed as the goal was unclear. In addition, she was critical that it did not reflect Student's baseline of only being able to engage in parallel play (playing next to a peer but not interacting with him or her). However, this opinion was incorrect as Pacific's data established that Student could engage in taking turns with simple ball play for a short time. Ms. Ainsworth established that play goals are worked on at the beginning of each day in a special play area in the autism focus preschool class. The children in the class have varying degrees of skill in taking turns since it is a core area of deficit for autistic children. The goal expressly recognizes Student's limited baseline, and provides a year of daily classroom work to achieve it, which District believes is a realistic goal. Student did not establish otherwise. Therefore, the goal meets Student's needs in the areas of play and social skills, as well as receptive language in following directions, and is understandable and measurable.

91. Goal 59 requires Student to imitate three gross motor movements to common preschool songs independently on four out of five opportunities for two weeks. Student's baseline was that he had imitated on a one-to-one basis but not in a group setting without one-to-one prompting. Pacific reported that Student has successfully imitated on a one-to-one basis, both in manipulating objects and in gross motor movements. Dr. Lenington's testimony that there was no baseline data for this goal was thus incorrect. Ms. Ainsworth established that this goal is worked on at group circle time, using objects and instruments. In extended day class, DTT strategies are also used to break the song and the movements down into discrete components and pre-teach each segment, using the children's song "head, shoulders, knees and toes" as an example. The goal appropriately meets Student's needs in the areas of gross motor, imitation, and social skills, and is measurable and understandable.

92. Goal 60 addresses perception and provides that Student would independently match picture to picture in a field of six on four out of five opportunities weekly for two weeks. The baseline data was Student was able to match objects (three dimensions) to pictures (two dimensions) in a field of six pictures. These data were directly from Pacific's report. The evidence established that Student was not yet able to match picture to picture (two dimensions) and this goal was designed to assist him in learning to do so. Pacific recommended to the IEP team that Student was ready to progress to this goal. Ms Ainsworth established that ABA strategies would be used to include reinforcements and prompts in the early stages of working toward the annual goal of independent matching. There was no evidence that this goal is inappropriate, it meets Student's needs in the areas of matching and perception, is understandable and measurable.

93. Goals 61 through 65 are District's proposed speech and language goals, addressing expressive language, oral motor skills, speech articulation, receptive language (preschool concepts), and receptive language (prepositions), all of which also worked on Student's needs in the areas of focus and joint attention. In addition, Goal 61 supported Student's behavior needs. Student's position in his closing argument criticizing the expressive and receptive language goals is puzzling since Student's own expert, Ms. Abrassart, designed the content of these goals and dictated them to Ms. Bernal after the meeting, using both her evaluations of Student and Core Communications' baseline data for each goal. The only dispute during the IEP meeting was that Ms. Abrassart recommended using a specific program in what became Goal 65, discussed below. The evidence established that the proposed goals, with Ms. Abrassart's expertise and input, meet Student's needs in each area, are understandable and measurable.

94. Ms. Abrassart is well qualified, and has over 30 years of experience as a licensed speech and language pathologist, with the last 14 years in private practice, and over 20 years of teaching speech and language courses at the college level. Ms. Abrassart evaluated Student privately in July 2007, and again in June 2008. She recommended using the Links to Language program in working on Student's receptive language in Goal 65 because it uses small, sequential tasks that she believes are cognitive precursors to the development of linguistics, moving from structured tasks using pictures and boxes, and progressing to words. However, she did not establish that Links to Language was the only program that would provide Student educational benefit.

95. Goal 65 provides that Student will demonstrate understanding of four prepositions (over, under, on, and in) by manipulating objects or point to a choice of four pictures, achieving 80 percent accuracy as measured by data across three sessions. Student contends that Goal 65, a receptive language goal working on prepositions, does not meet his needs because it does not include the Links to Language program recommended by Ms. Abrassart. District contends that Links to Language is a methodology, or a specific program, which does not belong in an annual goal. District's witnesses uniformly testified that annual goals should be designed to address an area of need and deficit, and that the specific tools to be used in working on the goal are generally left up to the teacher or service provider involved. As persuasively established by Ms. Yasutomi, the absence of a fixed method or

program in the IEP allows the professionals involved to have more flexibility to choose among various tools, strategies, and programs to work on the goal and meet the child's unique needs. The evidence did not establish that the use of Links to Language was necessary to meet Student's unique needs. The District was persuasive that the Links to Language program should not be written in the goal, but could be considered by the service provider. Based on all of the foregoing, Goal 65 was appropriately designed to meet Student's needs in the area of receptive language regarding prepositions, and is understandable and measurable.

96. Goals 68 through 70 are proposed annual goals in self help, addressing Student's needs in putting on and taking off his shoes and socks (68, 69), and eating one of three new food items (70). Student did not contend there were any specific deficiencies in these goals, they are understandable, measurable, and meet Student's needs in the area of self help.

97. Dr. Lenington opined that there should have been a goal for toileting. Similar to the reasons found in Factual Finding 83 for not proposing behavior goals, the District did not propose a specific goal in the area of toileting. The toileting needs of all pupils in the autism focus preschool class are regularly addressed. In addition, Pacific reported Student had made great progress over the past year and was successfully able to sit on the toilet, urinate, and have bowel movements, although he still wore diapers. Thus, the evidence did not substantiate that Student's unique needs regarding toileting require an annual goal in order to have those needs met in the classroom.

98. District witnesses persuasively established that the District's proposed annual goals are measurable and capable of being understood by a substitute teacher should the need arise. Dr. Lenington's criticisms of the goals were accorded less weight than that accorded District witnesses because she did not have an educational background and her unfamiliarity with the educational components of some goals led her to conclude they were not understandable, when the District established that they were understandable and workable to a teacher. District members of the IEP team took Dr. Lenington's, Ms. Abrassart's, and Mr. Putnam's evaluations and opinions into consideration in proposing the annual goals, albeit in a classroom setting. Baseline performance data were accurately obtained from Pacific's report and District's home observation. As set forth in Factual Findings 77 through 80, Dr. Lenington's cognitive assessment data did not result in a need for any material changes to the goals based on the data. Based on the foregoing, Student did not establish that the District's goals were vague, not measurable, or failed to meet his needs to enable him to obtain educational benefit in the autism focus preschool class. Accordingly, District's proposed annual goals met the legal criteria and did not deny him a FAPE.

#### *Violations Regarding District's 2008 Offer of Placement and Services*

99. A school district is required to provide instruction and related services that are designed to meet the student's unique needs and are reasonably calculated to provide the student some educational benefit. The IEP must contain a statement of the special education

and related services to be provided. A district is not required to provide the best education available or to provide instruction or services that maximize a pupil's abilities. An LEA must provide a basic floor of opportunity that consists of access to specialized instructional and related services, individually designed to provide an educational benefit. In developing a pupil's educational program, the district must provide a program that is based on peer-reviewed research to the extent practicable. The emphasis is on the appropriateness of the district's offer, and not on the appropriateness of a parent's preferred educational program.

*Offering an Inappropriate Placement in the Autism Focus Preschool Class*

*The Autism Focus Preschool Class*

100. Student contends that the District's July 2008 offer for placement in its autism focus preschool class at Leffingwell is inappropriate because the class is not based on peer-reviewed research and is not intensive enough in terms of total weekly hours, and because Student is not ready to be educated in a group setting in a classroom. District contends that the class uses research-based methodologies to the extent practicable, and that Student has sufficient readiness skills to attend this specialized class.

101. The District offered the autism focus preschool class five days a week for four hours per day, plus the extended day class four times a week, for an additional five hours weekly. In 2000, the District's autism focus preschool program was created through the leadership of WACSEP because the incidence of autism among young pupils was on the rise. WACSEP developed the structure of the program after researching "best practices" for teaching children with autism, including the length of each day's class, the ratio of pupil to adult support (two to one), and the strategies that would be used.

102. Ms. Ainsworth's autism focus preschool class has five students and Student would bring the total to six. Before the 2008-2009 school year ends, it is possible a few more pupils with autism who turn three years old may join the class. In addition to Ms. Ainsworth, there are currently three instructional aides in the class on a full time basis, for a very low teacher/pupil ratio of two to one, which is the WACSEP standard for the class. This obviates the need for a one-to-one aide unless the unique needs of a child call for extra support. If the number of children increases, the District will increase the aides to maintain the two to one ratio. In addition, the speech therapist and occupational therapist generally come into the classroom to provide those services to individual students and to the group. The class operates from eight o'clock a.m. to twelve noon each school day, and has a play area, a circle time area, and various stations or centers where activities are conducted in small groups on a rotating basis for short periods of time. The short time periods were specifically designed to address the attention deficits common for children with autism. The class is language-rich throughout and uses visual point boards and schedules. Each pupil has his or her own schedule to rotate through the centers. The class works on generalization of skills by repeating a newly learned skill in different activities. In addition, the staff keeps data records for each child regarding progress on their IEP goals. In addition, one day a week some typically developing general education peers from the SH preschool class visit

the autism focus class for peer modeling. In the event a pupil exhibits severely maladaptive behaviors, such as excessive tantruming or escaping, District staff consults with a behavior psychologist to work on strategies to extinguish the behaviors or develop a behavior plan. In sum, the autism focus class is designed to address core deficits for children with autistic-like behaviors in areas including social communication, behavior, play, imitation, and joint attention, while working on appropriate preschool preacademic skills. Ms. Ainsworth credibly established that the District utilizes DTT to break skills down into their component parts, and teach each component using drills occasionally throughout the day in the class. In addition, DTT is the primary focus of the extended day class where additional one-to-one discrete drills can be accomplished outside the group classroom for children whose autistic symptoms and behaviors require additional support.

103. Parents and Dr. Lenington were critical of just about every component of the District's autism focus preschool class and contend that Student is not ready for preschool because he does not yet demonstrate sufficient school readiness skills. However, Dr. Lenington conceded that most of the components of the class could be effective but that the District did not utilize them correctly, based on her classroom observations. Dr. Lenington's criticisms about the preschool class curriculum and methodologies are not accorded great weight because she does not have a background in education, and does not have much experience in the actual educational treatment of children with autism, since most of her practice is assessment. In her 2008 evaluation report, Dr. Lenington recommended that Student should not be put into a group environment in school until he is able to attend a regular general education preschool class but gave no indication when that might occur. Dr. Lenington admitted that whenever a parent of an autistic preschooler wants a home ABA program, she would support it, which indicates that her opinions may not be based on what is necessary to meet Student's needs. Dr. Lenington pointed out that Student is not presently capable of "incidental learning," that is, learning something incidentally or unplanned while doing something else that is interesting, without any apparent reinforcement. However, the evidence established that the ability to learn incidentally is not a prerequisite skill to attending preschool in the autism focus class, where the learning is highly structured, with teacher and aide-directions throughout the day.

104. During the June 2008 home observation of Student, District staff observed Student to be able to sit at a table top activity for 10 minutes with prompting. District's evaluation of Pacific's goals showed the staff that Pacific was working on emerging and progressing skills in the same areas that are worked on in the autism focus preschool class. As set forth in Factual Findings 24 through 28, Mr. Wenzel, Ms. Ainsworth, and Ms. Anderson observed Student engage in attending, matching, nonverbal imitation, successful toileting, good but inconsistent eye contact, responding to requests, fine motor skills, receptive instruction, receptive labels, self help, verbal imitation, and manipulating objects. The staff was unanimous in their praise for how well Student performed and how ready he was for the preschool class.

105. The District and WACSEP personnel who testified, including Ms. Anderson, Ms. Ainsworth, Mr. Wenzel and Ms. Torres, all with established knowledge of the

educational standards for preschool promulgated by the State of California Department of Education, persuasively established that school readiness skills in the autism focus preschool class consist of, not achieved, mastered, or perfected skills, but emerging abilities to learn basic preschool skills, such as sitting, attending, following one-step requests, and imitation. A pupil does not need to have mastered these skills in order to be ready for preschool. Hence, none of Dr. Lenington's heightened criteria are necessary for successful functioning in the District's autism class, as it is a place to learn and progress on these skills. The District staff was persuasive that they have had successful experience working with children with skill levels and needs similar to Student's.

106. Based on the foregoing, the evidence established that Student possesses sufficient basic readiness skills to function and be successful in the classroom, where more school readiness skills may be learned. Whether the offered program is appropriate also includes an analysis of its intensity or length of time each week, whether it was in the least restrictive environment, and whether it was based on peer reviewed research to the extent practicable.

#### *Length of the School Day Program*

107. Student contends that the offer of placement in District's autism focus preschool class did not provide sufficiently intensive services, in terms of the total hours per week, to address his need for intensive autism intervention. District contends that the autism focus preschool class was appropriate to address his needs.

108. The autism focus preschool class operates for four hours a day, five days a week, for a total of 20 hours a week of preschool academic and functional intervention and instruction for children with autism. As found in the 2001 National Research Council report, all of the leading methodologies for educating young children with autism reported 20 to 45 hours of intervention a week on a full year basis across several early childhood years.<sup>15</sup> The National Research Council (Council) evaluated the range of interventions and concluded by recommending "a minimum of 25 hours a week, 12 months a year, in which the child is engaged in systematically planned, and developmentally appropriate educational activity toward identified objectives...."

109. Regardless of what the Council recommends as the best practice in educating young children with autism, the question is whether the autism focus preschool class, at 20 hours per week, is sufficiently long to address Student's needs. Dr. Lenington testified that Student's deficits require 40 hours of one-to-one ABA therapy a week.<sup>16</sup> District asserted

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<sup>15</sup> *Educating Children with Autism* (Committee on Educational Interventions for Children with Autism, Division of Behavioral and Social Sciences and Education, National Research Council of the National Academy of Sciences, Washington D.C.; National Academy Press, 2001), p. 148, cited as the 2001 National Research Council report.

<sup>16</sup> For the 2007-2008 school year, the District funded 20 hours of the home ABA program, and the Regional Center funded another 20 hours.

that 20 hours a week in the preschool class was appropriate; however, WACSEP school psychologist Mr. Wenzel established that Student needed not less than 25 hours a week of autism intervention and instruction in order to obtain educational benefit. Weighing all the evidence, and given Student's significant developmental delays, including lack of verbal communication, the evidence establishes that he should receive at least 25 hours a week of intensive education and intervention. While more than 25 hours a week might be better to provide Student additional services, the District is not required to provide the best education available or to provide instruction or services that maximize Student's abilities. Based on the foregoing, the District's preschool placement offer of only 20 hours a week in the autism focus preschool class was insufficient to meet his needs.

110. In determining whether District's placement offer denied Student a FAPE, the evidence established that the District offered Student a total of 25 hours a week of total education and intervention, because it also offered him the extended day class for one-to-one intensive DTT therapy four times a week, for an hour and 15 minutes each time, for a total of five additional hours a week. Therefore, the District's offer of 25 hours per week of total education and intervention, utilizing sound methodologies for children with autistic-like behaviors, was sufficient to meet Student's needs and provide educational benefit, and did not deny him a FAPE.

#### *Least Restrictive Environment*

111. Student contends that he needs to be in a home-based ABA program on a one-to-one basis with an adult therapist, in isolation from a classroom or other preschool pupils, in order to obtain educational benefit because he is not ready for group instruction in a classroom setting and does not possess sufficient school readiness skills. District contends that it is required by law to provide an educational program in the least restrictive environment, and Student possesses sufficient readiness skills for its autism focus preschool class. In addition, the District asserts that a home placement is overly restrictive and does not meet the legal requirements for Student's educational placement.

112. 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, four factors must be evaluated and balanced, including the academic benefits of the proposed placement, with any supplementary supports and services that might be appropriate, the non-academic benefits of the proposed placement, the negative effects the student's presence may have on the teacher and other students; and the cost. Thus, the fundamental principles regarding the least restrictive environment apply to evaluate the entire continuum of placements.

113. The question is whether the least restrictive environment in which Student may access his education is the District's autism focus preschool or the Parents' home ABA program. Given Ms. Abrassart's extensive experience and qualifications, and evaluations of

Student's speech and language needs and levels of functioning, her concerns about Student's lack of readiness for preschool because of his significant weaknesses in his abilities to focus, communicate, and engage in joint attention are given serious consideration. In addition, Dr. Lenington testified that the District's autism focus preschool class is not appropriate for Student because he does not yet have school readiness skills. However, as set forth in Factual Findings 100 through 106, Student has sufficient school readiness skills to function and learn in the autism focus preschool class. Many children in the autism preschool class do not interact with other children due to their disability. Focus, joint attention, and social interactions, such as taking turns, are worked on during the day because these are core deficits for children with autism for which the class was specifically designed. Moreover, Dr. Lenington did not appear to be aware of or appreciate the District's legal obligation to educate children with disabilities with other children in the least restrictive environment. Consequently, Dr. Lenington's and Ms. Abrassart's opinions on this issue were not given as much weight as the opinions of the District staff who were involved in the autism focus preschool program and who observed Student at home.

114. Considering the legal criteria for the least restrictive environment, it is found that the academic benefits of placing Student in the autism focus preschool outweigh reasons to exclude him from the class and keep him at home. They include basic school readiness skills at the preschool classroom level, with kindergarten as a goal; the preschool curriculum; trained teacher and adult aides; short activity times; visually based transitions; language-rich environment; and application of autism methodologies throughout the day. The non-academic benefits of the placement include Student's exposure to typically developing peers at least once a week in structured visits, and access to daily exposure and lessons in how to function in a group environment, and begin to interact with other pupils in highly structured activities, such as taking turn and working at a table. These benefits outweigh any academic benefits Student may receive from an isolated ABA/DTT program in his home.

115. There is no indication of any severe maladaptive behaviors, or safety or medical issues that would interfere with Student's participation in the class. Remaining negative behaviors associated with Student's disability include occasional daily frustration, whining, and stereotypic and perseverative activities, such as spinning, and tantruming. Thus, there is no evidence that Student's presence in the preschool class would have negative effects on the rest of the class. Student is generally a gentle, loving, compliant child. Parents are worried that the behaviors of other pupils in the class might have a negative effect on Student, including the staff's alleged failure to actively intervene every time a pupil engages in autistic-like perseverative or stereotypic behaviors. However, the school staff are well trained in autistic-like behaviors, and Parents and District may work together to monitor Student's success in the class. Cost, the fourth factor in evaluating the least restrictive environment, was not addressed by either party and there is no evidence that it is a relevant factor in this case.

116. Based on the foregoing, the evidence did not establish that Student's home ABA program was the least restrictive environment in which he may be educated. Rather,

the evidence established that the District's offer of placement would provide him with a FAPE in the least restrictive environment.

*Peer Reviewed Research and Methodology*

117. The WACSEP and the District witnesses were persuasive that much thought, time, research, and ongoing training have been developed to create a public preschool program for children with autism. WACSEP program specialist Lisa Torres has many years of experience and training in special education and in behavioral approaches to teaching autistic children. She participated in the development of the autism focus preschool program in 2000. Ms. Torres persuasively established that the program incorporates best practice methodologies for treating and educating children with autism that are primarily based on a behavioral analysis intervention or ABA approach to learning and were selected because they have been shown to be successful. As the Council found, “[r]ather than being tied to specific procedures, applied behavior analysis includes any method that changes behavior in systematic and measurable ways.”<sup>17</sup>

118. The 2001 National Research Council report found that early intensive educational intervention made a significant difference in the educational progress of autistic children. No direct relationship was found between any of the intervention programs and progress made. The Council selected and reviewed ten “state of the art” university-based programs to compare. Regardless of the program, the consensus was that the intervention program, to be effective, needs to have intensive instructional programming in a variety of settings. Best practice ABA-based methodologies selected for the District's autism focus preschool class include the Treatment and Education of Autistic and Related Communication Handicapped Children (TEACCH) program, the Picture Exchange Communication System (PECS), Floortime, Social Stories, and Lovaas style ABA/DTT (DTT), and include strategies for de-escalation of severely maladaptive behaviors. Both the Lovaas-style ABA (UCLA Young Autism Project), including DTT, and TEACCH were among the Council's top ten programs. Accordingly, the District's autism focus preschool class is not based solely on one methodology.

119. TEACCH emphasizes structured teaching, organizing the physical environment, developing schedules and work systems, making expectations clear and explicit, and utilizing visual materials to develop skills; PECS is a program designed to develop early nonverbal communication through the use of icons, pictures or photographs to facilitate communication. It builds from a simple exchange of a picture icon to sentence structure, teaching the initiation of social communication for requesting and responding. Pacific has been successfully using PECS with Student in the home ABA program to assist him in requesting. District also uses PECS in the autism focus preschool class to facilitate requesting, including snack time and for rewards. Floortime, developed by Dr. Stanley Greenspan, is a specific methodology to follow the child's natural emotional interests (lead)

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<sup>17</sup> *Educating Children with Autism, supra*, p. 148.

and at the same time challenge the child towards greater mastery of social, emotional and intellectual capacities, working on six developmental milestones. The District uses Floortime primarily during play time. Social stories is an instructional method for children with autism that presents appropriate social behaviors in the form of a story. It is also used to instruct a child about what will happen next, to aide in transitioning. For Lovaas style ABA/DTT, the particular ABA program created by Dr. Ivar Lovaas, based on his 1987 research primarily involves intensive behavior modification therapy working on a one-to-one basis that breaks down tasks and skills into their component parts taught repetitively with DTT, and detailed daily data collection to monitor skill acquisition.<sup>18</sup>

120. District's autism focus teachers, including Ms. Ainsworth, have received 16 hours of training from WACSEP in the autism best practice methodologies and strategies to be used in the class, in addition to their other training and experience. Ms. Ainsworth's aides have also received such training. In recent years, the District has contracted with the Autism Partnership, operated by Dr. Ron Leaf, who has decades of experience in the field of autism, to provide professional training to the school staff in Lovaas style ABA/DTT methodologies. WACSEP also conducts monthly preschool meetings with school district staff to review autism strategies and methodologies and provides the staff with autism best practice research publications.

121. Dr. Lenington testified that there is no peer-reviewed research on the effectiveness of the TEACCH methodology. The concept of requiring peer-reviewed research in IDEA 2004 arose out of the requirement for scientifically based research in the federal No Child Left Behind Act of 2001. The U.S. Department of Education promulgated regulations in support of IDEA 2004 in August 2006, and the Commentary explains that peer reviewed research refers to research that is "reviewed by qualified and independent reviewers to ensure that the quality of the information meets the standards of the field before the research is published," and is either published as accepted in a peer reviewed journal, or approved by a panel of experts through a rigorous scientific review.<sup>19</sup> While the evidence does not establish published peer review prior to publication of TEACCH, it was developed based on research studies performed between 1964 and 1990 through the University of North Carolina School of Medicine at Chapel Hill, and, as indicated above, was selected in 2001 by the National Research Council as one of the top ten intensive autism programs for young children. There is no evidence that any peer reviewed research has debunked or discredited TEACCH as an effective tool to teach autistic children. The evidence established that the Lovaas method was not first affirmed by published peer review until 2001, and that there is ample praise and criticism of the methodology. The District uses Lovaas ABA/DTT in conjunction with its other approaches.

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<sup>18</sup> Dr. O. Ivar Lovaas, "Behavioral Treatment and Normal Educational and Intellectual Functioning in Young Autistic Children" (UCLA, 1987).

<sup>19</sup> *Analysis of Comments and Changes to 2006 IDEA Part B Regulations*, 71 Fed.Reg. 46664 (August 14, 2006).

122. Based on the foregoing, the District's autism focus preschool class is found to utilize accepted best practice methodologies in the treatment of autism, which are based on research to the extent practicable, and which address the core deficits of autism in an educational environment. Accordingly, the evidence established that the District's proposed placement was specifically targeted and designed to address Student's deficits arising from his disability and to provide him with meaningful educational benefit.

*Offering Inappropriate Transition from Home Program*

123. The law does not require a transition plan when moving a pupil from the home to a school environment. However, services to assist this transition are required where it would be appropriate to meet a child's unique needs related to his disability. It is undisputed that Student needs a transition plan to help him move into the District preschool class by fading out his Pacific therapist and home program, and fading in the District's classroom teacher and aides over a reasonable period of time.

124. District's July 2008 IEP offered the following transition plan: (a) up to 12 hours total, through August 2008, of direct transitional services, such as collaboration with current providers and parents, lessons and activities with Student, and the development of activities specific to his interests, by the preschool teacher and/or school psychologist; (b) opportunities for Student to visit the school site prior to the start of the school year to become familiar with the location and the classroom; and (c) one-to-one support by a District classroom aide (trained and experienced in working with pupils with autism) during Student's first 30 days in the classroom, and willingness to continue such support after the first 30 days if determined to be appropriate by the IEP team.

125. District's proposed transition plan is appropriate and meets Student's needs except for Pacific's collaboration. Although the 12 hours proposed for transition before school started includes collaboration with Pacific, Parents, and other current providers, there is no provision to fund Pacific's collaboration services. In addition, Student has been educated by Pacific's therapist and Mr. Putnam since March 2007, and the transition plan does not provide any reasonable period of fading their services after Student starts school; instead it provides for an abrupt change to the classroom aides. The evidence established that Student requires transition support, and his Pacific therapist should therefore accompany him to the classroom for the first few weeks to provide that level of familiar support. Pacific should, therefore, be funded by the District to assist Student for the first two weeks of his attendance at school and during that time to collaborate in the classroom with the teacher and the District aides. Therefore, the District's transition plan denied Student a FAPE and should be remedied by adding funding for Pacific's services and in-class transition support.

*Offering Inappropriate Speech and Language Services*

126. Student contends the District's July 2008 offer of speech and language services was inappropriate to address his needs because Core Communications provided unacceptable speech and language services during the previous year in using a controversial

methodology, facilitated communication, and in providing less weekly therapy than required to in his IEP. Student contends that the offer is also inappropriate because he needs an additional hour a week of co-therapy.<sup>20</sup> District claims that its offer for speech and language services was appropriate.

127. District's offer for speech and language services in the July 2008 IEP was as follows:

Speech and Language is recommended to continue at 2 hours per week (2 sessions of 60 minutes each, to include co-therapy), by [Student's] current provider, Core Communications Partners. Core Communications Partners will also provide up to one additional hour per month of consultation with the classroom teacher and aides.

128. On August 23, 2008, Mr. Lewis wrote to Mr. Knauf that the Parents disagreed with the July 28, 2008 IEP offer, but agreed to implement the IEP in the area of speech and language "with the one hour of co-therapy as discussed at the IEP meeting (not to be included in the 2 hours of individual speech therapy)." Since Parents' offer for the speech and language services did not accept the District's written offer but changed the terms, it constituted a counter offer. The evidence established that the parties agreed to the basic provision of direct speech therapy twice a week for 60 minutes a session plus monthly consultation, with Core Communications as the service provider.

129. District paid for Core Communications, owned by licensed and credentialed speech and language pathologist Darlene Hanson, to provide Student's speech and language services for the 2007-2008 school year. Ms. Hanson contracted with Katie Bernal to provide Student's direct speech and language therapy and supervised her. At the July 2008 IEP meeting, Ms. Bernal reported that Student had met two speech and language goals, and had made progress towards three others. She reported that he was emerging as a verbal communicator, and that his success was impeded by his difficulty imitating oral motor movements, indicative of dyspraxia.<sup>21</sup> Ms. Bernal was not a licensed speech and language pathologist but was performing one year of required internship under Ms. Hanson's supervision in order to obtain her license.

130. District's offer for the 2008-2009 school year named Core Communications as the specific service provider. As set forth above, Student and Parents accepted the District's

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<sup>20</sup> Core Communications terminated its services with Student in October 2008. Student claims that the District should now be ordered to hire his new private speech therapist, Robin Jones-Brown. However, Student's complaint did not include an issue that the District failed to implement speech and language therapy services, either regarding co-therapy agreed upon for the 2007-2008 school year, or by failing to contract with a new service provider for agreed upon services after July 2008. Therefore, these issues are not before the ALJ in this proceeding.

<sup>21</sup> Dyspraxia is a disorder involving motor skill development which is reflected in Student's difficulties holding eating utensils and cups, his fine motor skills to put on his shoes, and in his speech articulation and oral motor deficits.

offer to continue Student's direct speech and language services with Core Communications. Student now contends that Core Communication used a controversial methodology, facilitated communication, which is not based on scientific research. In addition, by July 2008, Student had only achieved two of his five 2007-2008 speech and language goals after a year of working with Ms. Bernal, using facilitated communication, and she failed to provide the extra weekly hour of co-therapy agreed upon between the parties.

#### *Co-therapy or Third Hour of Direct Services*

131. Ms. Abrassart, Student's private speech and language assessor, first evaluated Student in July 2007, and evaluated him again in June 2008. In 2007, standardized tests were not able to be administered to assess Student's communication skills and needs. Ms. Abrassart administered the Rossetti Infant Toddler Language Scale, which obtained data from interviews and observations. She found that Student's developmental age equivalency in receptive language was at the three to six month age level, varying to the six to nine month level. In expressive language, Student displayed a few items in all age groups up to 12 to 15 months of age. By June 2008, Student had made significant progress in all areas, including pragmatics, play, and language. His receptive language was in the 15 to 18 month level with some items in the 21 to 24 month range; and his expressive language was in the 15 to 18 month range. Student had emerging receptive skills at the 32 to 36 month level on another test, and was beginning to use some rudimentary "baby" signs to communicate his needs and wants. At the age of four, Student was still essentially nonverbal, and Dr. Abrassart was persuasive that he needed intensive communication services.

132. In 2007, while observing Student in the home program, Student's unfamiliarity with her impeded Ms. Abrassart's observations, and she chose to use the ABA therapist to successfully communicate with Student and obtain information about his levels of functioning. Thus, she developed the concept of speech and language co-therapy to be provided with the home ABA program therapist as an interdisciplinary approach for an extra hour a week. Ms. Abrassart was persuasive that it would be a good way to add more language to standard ABA tasks during the day, and that Student needed more intensive language services. Thus, it was her intent to add a third hour of speech therapy a week, using both the speech and ABA therapists collaboratively to address Student's communication needs. In November 2007, the District agreed to provide an extra hour of direct speech and language therapy as a collaborative co-therapy approach.

133. In its July 2008 speech report, Core Communications recommended "up to" one additional hour per week of both co-therapy and consultation. Ms. Bernal explained to the IEP team that during her provision of Student's therapy, she had misunderstood the speech service requirements and thought she had discretion to provide "up to" one extra hour a week of services to include the co-therapy. However, Ms. Bernal exercised her discretion not to provide the extra hour with the ABA therapist on a consistent basis each week. While Ms. Bernal opined that Student did not require three hours a week of direct speech and language services in order to make progress, she was not an experienced speech and

language pathologist. Ms. Abrassart persuasively established that Student needs three hours of direct speech and language services a week.

134. When the District made its July 2008 offer, it decided to include the co-therapy because Parents and Ms. Abrassart expressed their concerns at the IEP meeting; however, the District offered the co-therapy within the framework of two hours a week of direct therapy services. The District determined that Student would not need an extra hour of speech therapy in the classroom in order to obtain benefit. However, the evidence does not support the District's contention. Student only made progress on two of his five goals for the 2007-2008 school year. Thus, Student needed more than two hours a week to work toward progressing on his goals. The District's offer for co-therapy in the classroom did not specify the context in which collaborative direct speech and language would be provided, since Student would not have a one-to-one aide after the first 30 days or so. Accordingly, District's co-therapy offer was illusory and was inappropriate to meet Student's needs.

135. Ms. Hanson is a licensed speech and language pathologist who also trains school district staff, and used to be a program specialist with the District. The evidence established that Ms. Hanson failed to adequately supervise Ms. Bernal's provision of speech therapy to Student by failing to ensure that he received three hours of direct speech services a week. In light of Ms. Abrassart's extensive experience and evaluations, Ms. Hanson's testimony that Student could make progress with a reduction in therapy to two hours of speech a week was not accorded much weight. Because Student, at the age of four and a half years old, is still essentially preverbal, and he made limited progress over the past year, the evidence demonstrated that he requires three hours of direct speech services each week in order to progress. The evidence did not establish that the third hour of therapy needed to be delivered in conjunction with an aide or the classroom in order to meet his needs. Hence, District's offer to reduce Student's speech therapy to two hours of direct speech services weekly was inappropriate.

#### *Facilitated Communication*

136. Ms. Bernal's speech therapy services with Student included the use of facilitated communication that was written into the 2007 Core Communications speech goals to establish Student's baseline levels of performance. Facilitated communication is a methodology by which a facilitator supports a pupil's hand, wrist or arm as the pupil points, gestures, (or, for older children, types), while the pupil communicates. However, it is controversial as the facilitator may influence or direct the communication, and there was no evidence that it is based on scientific research. Core Communications approved Ms. Bernal's use of facilitated communication in working on Student's 2007-2008 speech and language goals, with data derived using facilitated communication procedures such as resisting or touching Student's elbow. For the July 2008 IEP, Core Communications' report was compromised based on the uncertainty of Student's true progress due to the use of facilitated communication. Nevertheless, Ms. Bernal proposed draft goals which continued to recommend using facilitated communication support. Based on Parents' and Ms. Abrassart's concerns regarding the appropriateness of using the controversial method, the

IEP team rejected those goals and Ms. Abrassart's professional expertise was called upon to design the speech goals the District offered. (Factual Findings 55 and 93.)

137. Based on the foregoing, the evidence supports a finding that the District's proposal to have Core Communications as the speech provider was also inappropriate. Core Communications did not adequately supervise or deliver appropriate speech services to Student. The evidence established that Student needs three hours of direct speech therapy each week. Therefore, District's offer for speech and language services was not designed to address Student's needs in the area of speech and language, and to provide him educational benefit. The evidence established that the speech offer was inappropriate and denied him a FAPE.

138. Accordingly, as an equitable remedy, the District shall reimburse Parents for the costs of Ms. Abrassart's June 2008 speech and language evaluation of Student, and her attendance at the July 2008 IEP meeting, in the total sum of \$2,087. In addition, since the District failed to provide three hours of speech and language services to Student since August 2008, Student is entitled to compensatory education in the total sum of one extra hour of speech and language services for every week since July 28, 2008, when the inappropriate offer was made, for a total of 25 hours of direct speech and language services through the date of this decision.

#### *Remedies and Reimbursement*

139. 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 a FAPE, and the private placement or services were appropriate and replaced services that the district failed to provide. A unilateral educational placement of a child is not required to meet all requirements of the IDEA. Factors to be considered when determining the amount of reimbursement to be awarded include the existence of other, more suitable placements; the effort expended by the parent in securing alternative placements; and the general cooperative or uncooperative position of the school district. Reimbursement may be denied or reduced based on a finding that the actions of parents were unreasonable.

140. As set forth in Factual Finding 32, Student is entitled to reimbursement for Dr. Lenington's May 2008 independent re-evaluation of Student because the District should have determined that additional data was warranted, in the form of a new assessment, to obtain updated information as to Student's cognitive functioning. The reimbursement is not reduced by reason of Parents' failure to tender Dr. Lenington's 2007 evaluation report to the District. The District was not required to have had notice of the contents of the report it paid for, but did not receive, before the July 2008 IEP. On the other hand, to here reduce or excuse reimbursement for Dr. Lenington's May 2008 evaluation would have the effect of rewarding the District for its own separate violation, which would not be equitable in the circumstances. As set forth in Factual Finding 138, Student is also entitled to reimbursement for Ms. Abrassart's June 2008 speech and language evaluation, and attendance at the July 2008 IEP meeting. In addition, Student is entitled to compensatory education in the total

sum of 25 hours of speech and language services, calculated based on when the inappropriate speech services were offered on July 28, 2008, with only two hours of services a week instead of the three hours of direct speech therapy a week Student required to meet his needs.

## LEGAL CONCLUSIONS

1. Student, as the party requesting relief, 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 FAPE under IDEA 2004. (20 U.S.C. § 1412(a)(1)(A); Ed. Code, §§ 56000, 56026.) 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). (20 U.S.C. § 1401(9); Ed. Code, § 56031; Cal. Code Regs., tit. 5, § 3001, subd. (o).)

### *Assessment*

3. Before any action is taken with respect to the initial placement of a child with special needs, an assessment of the pupil's educational needs shall be conducted. (Ed. Code, § 56320.) The student must be assessed in all areas related to his or her suspected disability, and no single procedure may be used as the sole criterion for determining whether the student has a disability or an appropriate educational program. (20 U.S.C. § 1414(a)(2), (3); Ed. Code, § 56320, subds. (e), (f).) Thereafter, special education students must be reassessed not more frequently than once a year, and shall be reassessed at least once every three years, unless the parent and the local educational agency (LEA) agree otherwise. A reassessment shall also be conducted if the LEA determines "that the educational or related services needs, including improved academic achievement and functional performance, of the pupil warrant a reassessment." (20 U.S.C. § 1414(a)(2)(A); Ed. Code, § 56381, subd. (a).)

4. As part of an annual reassessment, the IEP team and other qualified professionals, as appropriate, shall: (1) review existing assessment data on the pupil, including assessments and information provided by the parents, current classroom-based assessments and observations, and teacher and related services providers' observations; and (2) on the basis of the review and input from the parents, identify what additional data, if any, is needed to determine whether the pupil continues to be an individual with exceptional needs, the present levels of performance and educational needs of the pupil, whether the pupil continues to need special education and related services, and whether any additions or modifications to the special education and related services are needed to enable the pupil to meet the annual goals set out in the IEP of the pupil and to participate, as appropriate, in the general curriculum. If the IEP team and other qualified professionals, as appropriate, determine that no additional data are needed, the LEA shall notify the parents of that determination and the reasons for it, and the right of the parents to request an assessment.

The LEA is then not required to conduct an assessment unless requested by the parents of the pupil. (Ed. Code, § 56381, subs. (a)-(d).)

1. *Was District's assessment of Student in the spring of 2008 inappropriate because the District conducted an inadequate review of his prior records, and/or because it failed to determine that further assessment was warranted?*

5. As set forth in Factual Findings 4 through 20, and Legal Conclusions 3 and 4, the District conducted an adequate review of Student's prior records and assessments in the spring of 2008, as part of its responsibility to reassess Student for his first annual IEP in July. District was not required to review Dr. Lenington's 2007 evaluation report because the District never received it prior to this hearing.

6. As set forth in Factual Findings 21 through 32, and Legal Conclusions 3 and 4, in the absence of Dr. Lenington's 2007 evaluation, the District did not have sufficient assessment data as to Student's present levels of functioning in the area of cognition by the spring of 2008. Therefore, the District had an independent duty to conduct a new psychoeducational assessment in the area of cognition. District violated the reassessment law by failing to do so. Accordingly, the District shall reimburse Parents for Dr. Lenington's May 2008 evaluation in the total sum of \$2,500.

#### *Contents of the IEP and FAPE*

7. School districts receiving federal funds under IDEA 2004 are required 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. (20 U.S.C. § 1414(d)(1)(A)(i); Ed. Code, § 56345.)

8. There are two parts to the legal analysis of whether a local educational agency (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], cited as *Rowley*.) The second question is whether the IEP developed through those procedures was substantively appropriate. (*Rowley, supra*, at p. 207.)

## *Procedural Violations*

9. 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. (20 U.S.C. § 1415(f)(3)(E)(i) & (ii); Ed. Code, § 56505, subd. (j); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1483-1484.)

10. IDEA 2004's procedural mandates require that the parent or guardian be allowed to meaningfully participate in the development of the IEP. (*Rowley, supra*, 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); 34 C.F.R. §§ 300.321(a)(1) [parents are members of IEP team], 300.322 [district must ensure opportunity for parents to participate in IEP meeting]; Ed. Code, § 56341, subd. (b)(1) [parents are members of IEP team].) 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.) 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.)

2(A). *Did District deny Student a FAPE in connection with the July 2008 IEP by failing to provide Parents an opportunity to observe District's proposed placements equivalent to that permitted the District in its observations of Student's home program?*

11. The parents' right to participate in the IEP process also includes the right to have the parents' independent expert observe the LEA's proposed placement. (*Benjamin G. v. Special Education Hearing Office*, (2005) 131 Cal.App.4th 875, 32 Cal.Rptr.3d 366; see Cal. Ed. Code, § 56329, subd. (c).) If the parent obtains an IEE at private expense, the results of the assessment shall be considered by the LEA with respect to the provision of a FAPE, and may be presented as evidence at a due process hearing. In addition, if the LEA observed the pupil in conducting its assessment, or if its assessment procedures make it permissible to have in-class observation of a pupil, an equivalent opportunity shall apply to an independent educational assessment of the pupil in the pupil's current educational placement and setting, and observation of an educational placement and setting, if any, proposed by the LEA. (Cal. Ed. Code, § 56329, subd. (c).)

12. As set forth in Factual Findings 34 through 40, and Legal Conclusions 7 through 11, the District observed Student in his home ABA program for about one hour. Parents' team, including Parents and their experts, observed two of District's classes for 30

minutes each twice in May 2008, and again for another 30 minutes in October 2008. District had a legitimate interest in protecting the integrity of the classrooms and privacy rights of other pupils by ensuring that Parents' observers stood at a respectful distance. Student did not establish that he was deprived of an equivalent observation opportunity by a material discrepancy between the observation times or the quality of the observation periods allotted the District and those allotted the Parents in observing the classrooms, either as of the July 2008 IEP, or as of the hearing. The evidence does not substantiate any procedural violation and there was therefore no denial of FAPE on this basis.

*2(B). Did District deny Student a FAPE in connection with the July 2008 IEP by failing to hold the IEP meeting within the statutory time period?*

13. An IEP team shall meet whenever: (a) a pupil has received an initial formal assessment, (b) the pupil demonstrates a lack of anticipated progress, (c) the parent or teacher requests a meeting to develop, review, or revise the IEP, and (d) at least annually, to review the pupil's progress, the IEP, including the annual goals, the appropriateness of placement, and any necessary revisions. (Ed. Code, § 56343.) The IEP team meeting shall be held within 30 days from the date of receipt of the parent's written request, except as specified. (Ed. Code, § 56343.5.)

14. As set forth in Factual Findings 41 through 44, and Legal Conclusions 7 through 10 and 13, although the parties had agreed to hold the IEP meeting not later than July 31, 2008, Parents unilaterally advanced the deadline by a month and a half by requesting an IEP meeting on May 15, 2008. Since the meeting should have been held by June 15, 2008, the District committed a procedural violation by holding the meeting on July 1, 2008, a delay of two weeks past the statutory deadline. There was no emergency or any material reason to advance the IEP deadline, Parents did not claim that any of their experts were unable to attend the meeting; and they participated in the IEP meeting and were represented by counsel. Thus, this procedural violation did not result in a denial of FAPE because there was no evidence that the delay impeded Student's right to a FAPE, significantly impeded Parents' opportunity to participate in the decision making process regarding the provision of FAPE, or caused a deprivation of educational benefits. (*L.M. v. Capistrano Unified School District* (9th Cir. 2008) 538 F.3d 1261.)

*2(C). Did District deny Student a FAPE in connection with the July 2008 IEP by failing to ensure the participation of a general education teacher?*

15. A pupil's IEP team shall include specified participants, including not less than one regular education teacher of the pupil, if the pupil is, or may be, participating in the regular education environment. (20 U.S.C. § 1414(d)(1)(B); Ed. Code, § 56341, subd. (b).) The purpose of the attendance of a regular education teacher is to obtain that teacher's input and participation, so that the parents and other members of the IEP team will have accurate information upon which to base a decision, and an LEA's failure to ensure this input seriously infringes on the parents' participation in the IEP team meeting. (*Target Range, supra* at p. 1484; *Amanda J. v. Clark County School Dist., supra.*) The Ninth Circuit has

determined that the failure to have a general education teacher on the IEP team in these circumstances invalidates the IEP. (*M.L. v. Federal Way School Dist.* (9th Cir. 2003) 394 F.3d 634.)

16. As set forth in Factual Findings 45 through 48, and Legal Conclusions 7 through 10, and 15, in the present case, there was no procedural violation because there was no evidence that a general education environment was considered as a possible placement by the IEP team. At the July 2008 IEP meeting, both the District's autism focus special education preschool teacher, Ms. Ainsworth and Student's home program supervisor, Mr. Putnam, participated. Since there was no procedural violation, there was no denial of FAPE.

*2(D). Did District deny Student a FAPE in connection with the July 2008 IEP by failing to consider a continuum of placement options?*

17. LEAs must ensure that a continuum of program options and supplementary services is available to meet the needs of individuals with exceptional needs for special education. (20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.115; Ed. Code, § 56360.)

18. As set forth in Factual Findings 49 through 51, and Legal Conclusions 7 through 10, and 17, the law regarding a continuum of placements requires only that a continuum must be available, not that the IEP team must consider a continuum for a pupil at each IEP meeting. Thus, even if the District failed to consider a continuum of placement options for Student, it did not violate this procedural requirement. However, as set forth in Factual Findings 45 through 58, and 73 through 75, the IEP team discussed and ruled out both a general education preschool classroom and the Parents' home-based ABA program, when they offered the autism focus preschool class. Thus, options on the continuum of placements were considered. Because no procedural violation occurred, there was no denial of FAPE on this basis.

*2(E). Did the District deny Student a FAPE in connection with the July 2008 IEP by making a predetermined offer and failing to consider Parents' independent educational assessments?*

19. As set forth in Factual Findings 52 through 58, and Legal Conclusions 7 through 10, the evidence established that the parties at the July 2008 IEP meeting engaged in vigorous and adversarial discussion. The team spent a significant amount of time listening to, and discussing all of the reports and opinions, including those of Dr. Lenington, Ms. Abrassart, and Mr. Putnam, as well as District staff. The District members of the team considered the input of Parents' experts, and modified some of the proposed annual goals and services in response. District did not have the benefit of any written report from Dr. Lenington, but listened to her presentation and considered her opinions. Ms. Abrassart collaborated with the District speech services provider to draft the speech and language goals, which were adopted by the District for the most part. District's disagreement with Parents regarding the location of Student's educational placement in the school setting, instead of in a home program, was a good faith disagreement based on differing views of the

treatment and education of young children with autism, in light of Student's unique needs and deficits. Accordingly, the evidence did not establish that the District committed a violation by predetermining placement and disregarding Parents' private assessments, and there was no denial of FAPE on this ground.

*2(F). Did the District deny Student a FAPE in connection with the July 2008 IEP by failing to provide a copy of the IEP documents to Parents at the close of the IEP meeting, and by unilaterally changing the IEP documents after the IEP meeting without their consent?*

20. The public agency shall give the parent a copy of the pupil's IEP at no cost to the parent. (34 C.F.R. § 300.322(f); Ed. Code, § 56341.5, subd. (j).)

21. As set forth in Factual Findings 59 through 65 and Legal Conclusions 7 through 10, and 20, the District staff did not have time to finalize the goals and the offer at the end of Student's IEP meeting. The evidence established that the parties agreed to receive District's final written IEP offer after the meeting. The parties neither requested a continuance of the IEP meeting nor asked to reschedule another meeting. A comparison of the draft and final IEP documents, including goals, showed that the changes the District made arose directly out of the discussions during the IEP meeting. Based on the foregoing, Student's contention that the District made material, unilateral alterations of the IEP that significantly deprived Parents of meaningful participation in the IEP process is not substantiated by the evidence. Therefore, there was no violation of the law and no denial of FAPE on this basis.

*2(G). Did District deny Student a FAPE at the July 2008 IEP meeting by failing to make a clear written offer of placement?*

22. An LEA must make a formal written offer in the IEP that clearly identifies the proposed program. (*Union Sch. Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526.) This must include a statement of the special education and related services, and supplementary aids and services, including program modifications or supports, a statement of the anticipated frequency, location and duration, designed to address Student's unique needs. The offer should contain sufficient information so that the level of the district's commitment of resources is clear, but may be stated in a range if the IEP team determines that a range of service meets the needs of the child. (Ed. Code, § 56345.)

23. As set forth in Factual 66 through 72, and Legal Conclusions 7 through 10, and 22, the evidence established that District was not obligated to make a clear written offer at the IEP meeting on July 1, 2008, because there was not enough time to finish the meeting. The parties agreed that the District would finalize Student's offer after both IEP meetings and submit it to Parents. Even assuming that the District should have presented a clear, written offer on July 1, 2008, its failure to do so until the offer was finalized on July 28, 2008, constituted a delay of only four weeks. The District was currently funding Student's home program and related services, the 2008-2009 school year did not begin until September, and the IEP offer was made within the deadline agreed upon in the settlement

agreement. There was no evidence that the delay in delivering the written offer deprived Parents of meaningful participation in the IEP process or resulted in a denial of educational benefit to Student. As to the final IEP, there was no persuasive evidence that the District's written offers for placement and transition were unclear. Hence, there was no procedural violation on this basis, and no resulting denial of FAPE is found.

*2(H). Did District deny Student a FAPE at the July 2008 IEP meeting by failing to provide prior written notice?*

24. The district is required to provide prior written notice to the parents of the child whenever the LEA proposes to initiate or change, or refuses to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child. (20 U.S.C. §1415(b)(3); Ed. Code, §56500.4.) The notice given to the parents or guardian must meet the requirements specified in title 20 United States Code section 1415(c)(1). The LEA may give prior written notice in advance of an IEP meeting, and the LEA may use the IEP as the prior written notice as long as it meets all of the requirements of the IDEA. (34 C.F.R. § 300.503(a); 71 Fed.Reg. 46691 (August 14, 2006).)

25. As set forth in Factual Findings 73 through 75, and Legal Conclusions 7 through 10, and 24, District's July 2008 IEP constituted prior written notice of its proposals for placement, services, goals, and transition, and of its refusal to continue funding Student's home ABA program, additional hour of speech and language co-therapy, and Links to Language program. Since the IEP contained the requisite elements of prior written notice, no further written notice was required. Since there was no procedural violation, there was no denial of FAPE on this basis.

#### *Substantive FAPE*

26. 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, and be reasonably calculated to provide the student with some educational benefit. (20 U.S.C. § 1401(9).) 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.) The court determined that the IEP must be reasonably calculated to provide the student with some educational benefit. The IDEA does not require school districts to provide special education pupils with 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.)

27. 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). (*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.)

#### *Least Restrictive Environment*

28. 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. (20 U.S.C. § 1412(a)(5)(A), Ed. Code, §§ 56001, subd. (g), 56345, subd. (a)(5).) A placement must foster maximum interaction between disabled students and their nondisabled peers “in a manner that is appropriate to the needs of both.” (Ed. Code, § 56031.) The law demonstrates “a strong preference for ‘mainstreaming’ which rises to the level of a rebuttable presumption.” (*Daniel R.R. v. State Bd. of Ed.* (9th Cir. 1989) 874 F.2d 1036, 1044-1045; 20 U.S.C. § 1412 (a)(5)(A); *Rowley, supra*, 458 U.S. at p. 181 n.4; *Poolaw v. Bishop* (9th Cir. 1995) 67 F.3d 830, 834.)

29. The Ninth Circuit has held that when determining whether a placement is in the least restrictive environment, four factors must be evaluated and balanced: (1) the academic benefits of placement in a mainstream setting, with any supplementary aides and services that might be appropriate; (2) the non-academic benefits of mainstream placement, such as language and behavior models provided by non-disabled students; (3) the negative effects the student's presence may have on the teacher and other students; and (4) the cost of educating the student in a mainstream environment. (*Ms. S. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115; *Sacramento City Unified School District v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404.)

#### *Peer Reviewed Research and Instructional Methodology*

30. The *Rowley* opinion established that as long as a school district provides an appropriate education, methodology is left up to the district’s discretion. (*Rowley, supra*, at p. 209.) Subsequent case law has followed this holding in disputes regarding the choice among methodologies or programs for educating children with autism. (*Adams v. State of Oregon*, 195 F.3d at p. 1149; *Pitchford v. Salem-Keizer Sch. Dist.* (D. Or. 2001) 155 F.Supp.2d 1213, 1230-32; *T.B. v. Warwick Sch. Comm.* (1st Cir. 2004) 361 F.3d 80, 84.)

“Beyond the broad questions of a student's general capabilities and whether an educational plan identifies and addresses his or her basic needs, courts should be loathe to intrude very far into interstitial details or to become embroiled in captious disputes as to the precise efficacy of different instructional programs.” (*Roland M. v. Concord Sch. Committee* (1st Cir. 1990) 910 F.2d 983, 992 (citing *Rowley*, 458 U.S. at p. 202).)

31. IDEA 2004 added a new requirement that, in developing a pupil’s educational program, the LEA must provide a program that is based on peer reviewed research to the extent practicable. However, the law does not mandate that a district use a particular methodology, especially for autistic students. Courts have consistently rejected the proposition that an ABA-only program is the only effective method of instruction for autistic students. (*Deal v. Hamilton County Dept. of Educ.* (6th Cir. 2004) 392 F.3d 840, [containing a comprehensive summary of decisions discussing the matter].) In *Adams v. State of Oregon, supra*, the parents of a toddler with autism sought a one-to-one, 40 hour-per-week Lovaas-style ABA program. The Ninth Circuit found that there are many available programs which effectively help develop autistic children (citing E.R. Tab 9; Dawson & Osterling (reviewing eight effective model programs), and *Gregory K. v. Longview School District*, (9th Cir. 1987) 811 F.2d 1307, 1314).)

32. Courts have determined that the most important issue is whether the proposed instructional method meets the student’s needs and whether the student may make adequate educational progress. In *Deal v. Hamilton, supra*, 392 F.3d 840 at pp. 65-68, the federal District Court noted that the scientific evidence does not support the contention that there is only one correct way to educate an autistic child. The addition of the requirement to use peer reviewed research “to the extent practicable” does not mandate that an educational agency is prohibited from using an educational program or service that does not have peer reviewed research supporting its use. There is nothing in the legislative history of IDEA 2004 to indicate that the new provision’s requirement to use scientifically based programs “to the extent practicable” was intended to overturn the longstanding rule in *Rowley, supra*, that choosing among appropriate methodologies should be left up to the school district.

#### *Annual Goals for a Preschool Pupil*

33. The IEP for special education pupils must include measurable annual goals designed to meet the pupil’s needs that result from the disability to enable him or her to be involved in and make progress in the general education curriculum and meet the pupil’s other educational needs that result from the disability, including a description of how the pupil’s progress towards meeting such goals will be measured and when periodic reports will be provided. (20 U.S.C. § 1414(d)(1)(A), Ed. Code, § 56345, subs. (a)(2), (3).) For preschool children, the IEP must include, where appropriate, the manner in which the pupil’s disability affects his or her involvement and progress in appropriate activities, which suggests that the goals should be geared towards making progress in involvement and making progress in appropriate activities for preschoolers. (20 U.S.C. § 1414(d)(1)(A)(I)(bb), Ed. Code, § 56345, subd. (a)(1)(B).)

3(A). *Did District deny Student a FAPE for the 2008-2009 school by failing to have a statement of Student's present levels of academic and functional performance, and measurable and understandable annual goals that met Student's unique needs?*

34. As set forth in Factual Findings 76 through 98, and Legal Conclusions 26, 27, and 33, the IEP was based on accurate data from a variety of sources regarding Student's unique needs. The IEP contained accurate present levels of Student's academic performance and functional achievement related to each proposed goal, and there was no evidence that Student's baseline levels were inaccurate or misleading. The annual goals thus met Student's unique needs in all identified areas related to his unique needs. The evidence established that the District's proposed annual goals were measurable and understandable, and that they were designed to meet Student's needs arising from his disability to enable him to be involved in and make progress in preschool. Therefore, the evidence did not establish that District's proposed goals denied Student a FAPE.

3(B). *Did District deny Student a FAPE for the 2008-2009 school by offering an inappropriate placement in a preschool special day class in a group environment?*

35. As set forth in Factual Findings 100 through 122, and Legal Conclusions 26 through 32, the District's autism focus preschool class is small and highly structured, with a low adult/student ratio of two to one, and a language-rich curriculum which focuses on teaching school readiness skills similar to the skills Student has been working on in his home program. The staff is trained in best practices for autism, positive replacement of behaviors, and deescalating negative behaviors. Typically developing preschool children visit the class every week for peer modeling opportunities. Student's goals would be addressed daily and appropriate data would be taken. The extended day class was designed to address Student's need for more intensive one-to-one DTT drills to learn discrete stages of larger tasks in a repetitive manner. The 20-hour a week preschool class was below the minimum of 25 hours a week necessary for Student to receive a FAPE, given his global delays. However, since the DTT class added an additional 5 hours a week, the total placement offer of 25 hours a week meets his needs. While Parents prefer a 40-hour a week program dedicated primarily to ABA/DTT, they did not establish that Student could not obtain educational benefit with a 25-hour classroom-based week. Even if a 40-hour weekly ABA program were the best educational program to provide Student with optimal progress, District is not required to provide optimal services, but is required to provide a basic foundation of educational benefit. The evidence established that the autism focus preschool class provides Student's education in the least restrictive environment in that the academic and nonacademic benefits of the preschool setting outweigh any academic benefits Student may receive from an isolated ABA/DTT program in his home.

36. As set forth in Factual Findings 100 through 122, and Legal Conclusions 26 through 32, the District's autism focus preschool class utilizes best practice methodologies in the treatment of autism that are based on research to the extent practicable, and which address the core deficits of autism in an educational environment. The evidence established that the District's proposed placement was specifically targeted and designed to address

Student's deficits arising from his disability and to provide him with meaningful educational benefit. Therefore, the District's July 2008 IEP offer for placement in the autism focus preschool class with the accompanying extended day class was reasonably designed to provide Student meaningful educational benefit, addressed his unique needs, including social skills, and provided him a FAPE, as long as there is an appropriate transition plan.

*3(C). Did District deny Student a FAPE for the 2008-2009 school by offering an inappropriate transition plan?*

37. As set forth in Factual Findings 123 through 125, and Legal Conclusions 26 and 27, the District's transition plan was designed to meet Student's needs to have support in the transition from the home to the preschool. It appropriately provided 12 hours of collaboration with Pacific, parents, and other providers, and Student's visits to the school in the month before school started, and one-to-one support in the classroom with a trained District aide for at least the first 30 days. However, the transition plan was inappropriate to the extent that it did not provide for collaboration with Pacific during the first two weeks in the classroom after school started, and did not provide that the District would fund Pacific's collaboration and in-classroom support. Accordingly, the transition plan denied Student a FAPE.

*3(D). Did District deny Student a FAPE for the 2008-2009 school by offering inappropriate speech and language services?*

38. As set forth in Factual Findings 126 through 138, and Legal Conclusions 26 and 27, the District's offer of speech and language services was inappropriate to meet Student's needs. The District's offer for co-therapy in the classroom did not specify the context in which it would be provided, since Student would not have a one-to-one aide after the first 30 days or so. In addition, the offer provided that the co-therapy would be included in two hours of therapy a week, a reduction of one hour. The evidence established that Student needs a third hour of direct speech therapy in order to make progress on his annual goals. Accordingly, District's co-therapy offer was inappropriate to meet Student's needs, and District's offer of only two hours of direct speech services was not designed to meet Student's needs in the area of speech and language and was inappropriate. In addition, the evidence supports a finding that the District's proposal to have Core Communications as the speech provider was also inappropriate in that the company failed to supervise the daily therapist, failed to deliver all the direct speech therapy services Student needed, and developed goals and services using facilitated communication, which rendered the evaluation of Student's progress on his goals uncertain. Thus, the evidence demonstrated that the District's offer of speech and language services was inappropriate, denied Student meaningful educational benefit, and denied him a FAPE.

#### *Reimbursement and/or Compensatory Education*

39. When a LEA fails to provide FAPE to a student with a disability, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (*School*

*Committee of Burlington v. Department of Educ.* (1996) 471 U.S. 359, 369-371; 20 U.S.C. § 1415(i)(2)(C)(3).) Based on the principle set forth in *Burlington*, federal courts have held that compensatory education is a form of equitable relief that may be granted for the denial of appropriate special education services to help overcome lost educational opportunity. (*Student W. v. Puyallup Sch. Dist.* (9th Cir. 1994) 31 F.3d 1489, 1496.) The purpose of compensatory education is to “ensure that the student is appropriately educated within the meaning of IDEA.” (*Ibid.*) Reimbursement may be denied based on a finding that the actions of parents were unreasonable. (20 U.S.C. § 1412(a)(10)(C)(iii)(III); 34 C.F.R. § 300.148(d)(3).) For example, in *Patricia P. ex rel Jacob P. v. Board of Education* (7th Cir. 2000) 203 F.3d 462, 469, the Seventh Circuit Court of Appeals held that parents who did not allow a school district a reasonable opportunity to evaluate a child following a parental unilateral placement “forfeit[ed] their claim for reimbursement.”

40. As set forth in Factual Findings 32, and 138 through 140, and Legal Conclusion 39, as equitable remedies for District’s violations, Student is entitled to reimbursement for the costs of Dr. Lenington’s May 2008 evaluation and attendance at the IEP meeting in the sum of \$3,250; and for the costs of Dr. Abrassart’s June 2008 speech and language evaluation and attendance at the IEP meeting in the sum of \$2,087. Student is not entitled to any other reimbursement. In addition, because the District failed to offer or provide three hours of speech and language services to Student, he is entitled to compensatory education in the total sum of one extra hour of speech and language services for every week since July 28, 2008, when the inappropriate services were offered, for a total of 25 hours of direct speech and language services through the date of this decision.<sup>22</sup>

## ORDER

1. Within 45 days of the date of this decision, the District shall reimburse Parents for the costs of Dr. Lenington’s May 2008 evaluation and attendance at the IEP meeting in the total sum of \$3,250; and Ms. Abrassart’s June 2008 evaluation and attendance at the IEP meeting in the total sum of \$2,087.

2. District’s July 2008 transition plan denied Student a FAPE, and shall include District’s funding of Pacific’s collaboration with District staff for 12 hours in the month preceding Student’s attendance in the autism focus preschool class, and funding for Pacific’s daily one-to-one assistance to Student in the classroom, and collaboration with District staff for four hours a day, five days a week, for the first two weeks of school.

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<sup>22</sup> Although compensatory education need not be provided on an hour-by-hour basis, the evidence established that Student needed an extra hour of speech services every week, and the evidence does not reflect another rational basis of calculation.

3. District's July 2008 offer for speech and language services denied Student a FAPE, and shall include three hours of direct speech and language therapy services weekly, with an appropriate service provider other than Core Communications.
4. District shall provide Student with compensatory education in the total sum of 25 hours of direct speech and language services through the date of this decision.
5. All of Student's other requests for relief are denied.

#### PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that the hearing decision indicate the extent to which each party has prevailed on each issue heard and decided. Student partially prevailed on Issue 1, and prevailed on Issues 3(C) and 3(D) for hearing in this case. District prevailed on all other issues.

#### 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: January 13, 2009

**DEIDRE L. JOHNSON**  
DEIDRE L. JOHNSON  
Administrative Law Judge  
Office of Administrative Hearings