

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

WEST COVINA UNIFIED SCHOOL
DISTRICT,

v.

PARENT on behalf of STUDENT.

OAH CASE NO. 2008090480

DECISION

Administrative Law Judge Judith L. Pasewark, Office of Administrative Hearings, State of California (OAH), heard this matter in West Covina, California, commencing on November 6, 2008.

Courtney C. Brady, Esq., represented the West Covina Unified School District (District). Cheryl Lawson, Director of Special Education, attended the hearing on behalf of the District.

Maureen Graves, Esq., represented Student (Student). Student's mother (Mother) attended the hearing on behalf of Student.

The District filed its request for due process hearing on September 16, 2008. The hearing commenced on November 6, 2008, and continued on November 7, 12, 13, 14, and December 2, 3, 4, 8, and 16, 2008, for a total of 10 days. The record closed on January 13, 2009, upon receipt of written responses to the closing arguments.

ISSUE

The issue raised in the District's request for due process hearing (Complaint) is whether the District's offer of placement and services as described in the August 22, 2008 and October 17, 2008 Individual Education Plans (IEP) constitutes a free appropriate public education (FAPE).

CONTENTIONS

The District contends that the 40 page IEP developed on August 22, 2008 (August IEP), and October 17, 2008 (October IEP), presented Student with a FAPE for the 2008-2009 school

year. The offer proposes two periods a day of specialized academic instruction in the form of collaborative general education classes for English and Biology; two periods a day of Special Day Class (SDC) for Math Essentials and Directed Studies; and two periods a day of general education classes for U.S. History (History) and Physical Education (P.E.).¹ The IEP also provides Student with a one-to-one educational aide for six periods a day, and speech and language services 30 minutes, twice a week.² The IEP includes 11 goals, an individual transition plan (ITP), a behavior intervention plan (BIP), an offer of Assistive Technology (AT) support, and a list of accommodations/modifications for Student.

Student contends that the District continues to ignore his unique needs that require individualized, sequential, multi-sensory instruction, and that the District placed him in “standards-based” classes to which he lacks the basic prerequisites to access. Student further contends that he is not ready for CAHSEE³ review or algebra, and that his reading and writing requires basic skill remediation in a highly individualized format. Additionally, Student contends that the IEP team refused to include competitive sports competition in the IEP. Mother did not consent to the IEP in its entirety, thereby requiring the District to seek a determination of FAPE pursuant to Education Code, section 56346, subdivision (f).

FACTUAL FINDINGS

1. Student is a 17-year-old eligible for special education services under Other Health Impairment (OHI) due to a diagnosis of Opsoclonus-Myoclonus Syndrome (OMS), a rare neurological condition. OMS results in a range of neurological disorders that can impact fine and gross motor functions, balance, cognitive abilities, emotional functioning and speech. Student is also eligible under speech/language disorder and mild mental retardation.⁴

2. Commencing in the 2007-2008 school year, Mother unilaterally placed Student at the Stowell Learning Center (Stowell) for approximately three hours of individualized tutoring every morning.⁵ Student also attended three classes with a one-to-

¹ Student does not require an aide during general education physical education, and Mother consented to the P.E. class.

² Student’s IEP also contained an offer of speech and language services to which Mother did not consent. The District presented testimony regarding the proposed speech and language services at hearing. Upon conclusion of the hearing, Mother provided her written consent to the speech and language services contained in the IEP. Therefore, the speech and language component of the District’s Complaint is now moot, and will not be further discussed.

³ California High School Exit Examination.

⁴ Although Student’s eligibility for special education services is not at issue, the classification of mental retardation remains an underlying conflict between the parties.

⁵ The Stowell Learning Center is described in Factual Finding 73 herein.

one instructional assistant at West Covina High School (WCHS) each afternoon. The District highly disagreed with this arrangement.

3. On December 26, 2007, Student filed a request for due process hearing (OAH Case No. 2007120717) which contained numerous alleged procedural and substantive violations of the IDEA. This matter, involving the same parties and similar issues, encompassed the period of April 2006 through the end of the 2007-2008 school year. Testimony on this matter ended on April 25, 2008. On June 26, 2008, Administrative Law Judge Judith A. Kopec, issued a lengthy decision on this matter (Kopec Decision).⁶ Of particular note is the ALJ's multiple findings that Student requires specialized remediation using intensive, structured, multi-sensory interventions targeting his areas of need, including reading, math, and written expression.

4. On May 12, 2008, the District commenced Student's annual IEP meeting to develop Student's individualized plan for the 2008-2009 school year. After two additional IEP meetings on August 22, 2008, and October 17, 2008, the District consolidated the IEPs and finalized its offer of placement and services for Student. Mother did not consent to the IEP in its entirety, and continued Student's tutoring at Stowell each morning, thereby abandoning Student's core academic classes of English, Math and Science at WCHS. Currently, Student arrives at WCHS between 11:15 a.m. and 11:30 a.m. He attends only Directed Studies, History and P.E. The District contends that it is imperative that Student attend all of his classes at WCHS, particularly the core academic classes, in order to receive a FAPE. Further, it is argued that Student's continuing absence from core academic classes significantly jeopardizes his education and progress towards his IEP goals.

The IEP:

5. An IEP is required to include, (1) a statement regarding the child's present levels of academic achievement and functional performance; (2) measurable annual 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 towards meeting the goals will be measured; (4) a statement of the special education and related services to be provided to the child; (5) an explanation of the extent to which the child will participate with non-disabled children in the regular class; (6) a statement of any individual accommodations necessary to measure performance on state and district-wide assessments; and (7) other information, including the anticipated frequency, location, and duration of the services. Further, an IEP must be evaluated as of the time it was developed to determine whether it was reasonably calculated to confer an educational benefit to the student.

⁶ *Student v. West Covina Unified School District*, OAH Case No. 2007120717, a 77 page decision, addressed ten primary issues, with 44 sub-issues. ALJ Kopec made several determinations of denial of FAPE which affected portions of the May 12 IEP. The subsequent IEPs of August 22, and October 17, 2008, in part, address the specific findings and orders made in the Kopec Decision. Therefore, the current decision takes full judicial notice of the Kopec Decision and incorporates it herein where relevant.

6. While Student's primary eligibility for special education is Other Health Impairment (OHI), it is noted that the team also found secondary eligibility as "significantly below average general intellectual functioning existing concurrently with deficits in adaptive behavior" (mild mental retardation). While District assessments are not at issue in this matter, their interpretation is a source of disagreement between the parties with regard to Student's goals and placement. According to Ms. Lawson, the District's Director of Special Education,⁷ the IEP team focused on Student's unique needs which included cognitive limitations, speech and language deficits, difficulty focusing, difficulty with motor control and writing, and academic deficits in math, reading and writing. Correspondingly, the August 2008 IEP specified that Student's multiple disabilities, including cognitive delays, "prevent him from achieving in a secondary level general educational classroom without special education services/support." Mother and her independent assessors disagree with the District's classification of mental retardation, and believe it is inconsistent with Student's recent assessments. Instead, Mother finds that Student is able to do work with skilled, intensive support, and his basic skills are gradually and significantly rising. The District's limited review of Student's progress towards his prior IEP goals, however, reflects that Student did not meet five of his eight goals on his last IEP. In spite of their own concerns regarding Student's cognitive level, and partially in response to the Kopec Decision, the IEP team determined that Student could participate in the high school general education curriculum leading to a Diploma without the remediation strategies requested by Mother. Mother insists that Student requires intense, direct instruction using specialized multi-sensory techniques. She emphasizes that Student can complete his academic studies (1) where he has few choices; (2) a manageable workload; (3) in settings where he can concentrate; and (4) with close monitoring and reinforcement for understanding.⁸

7. Jeanne Venetianer is Student's special education case carrier.⁹ As a case carrier, it is her duty to attend IEP meetings, administer triennial academic assessments, develop goals and teaching plans, and meet with the Student's teachers. Based upon her job description, Ms. Venetianer appears to be the party most directly responsible for monitoring Student's special education needs. She has known Student since the ninth grade when he was placed in her special education classroom.

8. Ms. Venetianer was instrumental in preparing Student's proposed IEP for the 2008-2009 school year. She admits that difficulties ensued. Student's last signed IEP had

⁷ Ms. Lawson has been a school psychologist for 30 years. She has a B.A. in Psychology and M.A. in Guidance and Counseling, with a Pupil Services Credential. She has a teaching credential and previously taught five years as a special education teacher. Ms. Lawson has attended Student's IEP meetings since October 2007, and is familiar with Student and his Mother.

⁸ It is noted that Mother is a Pediatric O.D. She has a B.A. in Psychology, as well as a teaching credential in Elementary Education. Mother's concept of Student's needs closely resembles ALJ Kopec's findings that Student needs systematic, research-based, multi-sensory remediation on an intensive basis.

⁹ Ms. Venetianer has been a special education teacher since 1969, and has been employed as a special education teacher at WCHS since 1985.

been developed in May 2006. Since that time, Student has not attended WCHS classes in English, Math or Science. As a result, Ms. Venetianer indicated that she had no information on which to determine Student's progress on prior goals or determine baselines for Student's 2008-2009 IEP. Mother points out that although the District had possession of or access to an abundance of information regarding Student, it chose to ignore most of it. Ms. Venetianer indicated she was aware Student had been receiving tutoring from Stowell, but she did not contact Stowell or request their records. She also indicated that she did not know who was responsible for implementing the IEP goals. Additionally, the IEP team never discussed the independent educational evaluations (IEE) prepared by Dr. Mitchell Perlman or Dr. Caroline Bailey,¹⁰ which were provided to the District in March 2008. Ms. Lawson testified that, although not mentioned in the IEP notes, the IEP team considered Dr. Perlman's assessment. This omission in the IEP notes is weakly explained by Ms. Lawson's assertion that the August IEP meeting was not a triennial review of eligibility or cognitive ability.¹¹ Therefore, the IEP team did not officially discuss Student's cognitive levels at the 2008 IEP meetings. Instead, the IEP meetings focused only on Student's annual review and the revision of annual goals.

9. As a result, instead of relying on information at hand, Ms. Venetianer administered the Woodcock-Johnson III (WJ-III) to Student on May 8, 2008, to obtain his present levels of performance. The WJ-III measured Student's skills in broad reading, word identification, reading fluency, passage comprehension, broad written language, spelling, writing fluency, writing samples, broad math, calculations, math fluency, and applied problems. While the possibility of other standardized testing was discussed, Mother consented to the (WJ-III). Further, while Mother contends that the District's determination of Student's present levels is incomplete and does not conform to Dr. Perlman's findings, there is no evidence of a procedural violation regarding the assessment or proof that Student's WJ-III scores are inaccurate.

10. An IEP must present meaningful baselines, and develop measurable goals. The August IEP contained 11 goals. Each goal contains a baseline determined by Student's WJ-III scores, followed by an annual goal and short term objectives. The goals indicate how Student's progress will be measured, i.e., standardized or teacher made testing, work samples or observations, and generically determines who is responsible for measuring Student's progress, i.e., general education teacher or special education teacher. Mother did not consent to the proposed goals.

11. An IEP is required to include a statement of the child's present levels of academic achievement and functional performance which indicates how the child's disability affects the child's involvement and progress in the general education curriculum. Mother

¹⁰ Mitchell Perlman, Ph.D., and Clinical Psychologist, administered a neuropsychological assessment of Student on March 4 and 6, 2008, and prepared a 31 page report of his findings and recommendations. Caroline Bailey, Ph.D., conducted a School Observations and Education Consultation, and submitted a written report on March 17, 2008.

¹¹ This was also the excuse for not inviting Dr. Perlman to the IEP meetings.

avidly insists that the District does not understand Student's disabilities, and therefore it cannot develop valid goals. Mother repeated the Kopec Decision finding that Student requires specialized remediation using intensive, structured, multi-sensory interventions targeting his areas of need. It is noted that Student's IEP fails to mention or identify Student's unique need as defined in the Kopec Decision.

12. As previously noted, Ms. Venetianer admitted she was unable to truly describe Student's present levels of performance; however, little factual evidence was presented to render the District's determination of baselines substantially inaccurate. Ms. Venetianer further added that the goals were created with "leeway." They could be adjusted up or down. As example, one can use lower level reading materials to teach higher concepts. Lastly, Ms. Venetianer defended the goals, indicating that she wrote the goals to address Student's unique needs, and presented them, with discussion, at the IEP meeting, which Mother attended. Mother did not express any objections to the goals at the IEP meeting. Mother unconvincingly defended her limited comments at the IEP meeting by noting that the IEP was not presented to her prior to the IEP meeting. Therefore, she did not have time to fully read and digest the goals in order to meaningfully comment.

Math Goals:

13. It is undisputed that Student lacks the basic math skills necessary to understand Algebra, and is in need of continuing remediation in math. Ms. Venetianer reported Student's baseline skills, based upon his WJ-III scores, placed his abilities on a 5th grade level, and created three math goals.

14. Ms. Venetianer developed the Math Computation goal for Student to review and master long division skills. Mother responds that this goal is inappropriate, as Student has already developed division skills. Additionally, the parties disagree on whether the goal sufficiently provides a means of increasing Student's level of math concepts, beyond division. Even assuming, however, that the goal is appropriate for Student, Mother further questions the lack of clarity in defining *how* this goal is to be accomplished in the Math Essentials class given Student unique learning needs. Mother emphasizes that in order for Student to reach an independent level in any math skill, he needs a great deal of repeated instruction on math concepts in a variety of ways. Student needs to verbalize each step of what he is doing, and he needs individual guidance in order to think through steps. Math is very difficult for Student and he needs to be able to ask for help or be corrected immediately. Although Student has a one-to-one educational aide with him to assist with reinforcing lessons and keeping Student on task, Mother does not believe that the Math Essentials class is set up to provide sufficient intensive, structured, one-to-one instruction to make progress on this goal.

15. Ms. Venetianer indicated that she based the Math Reasoning goal on Student's need to develop and master the ability to solve single and multiple step problems. He needs to learn how to break down math problems. Mother again expressed similar concerns to those with the Math Computation goal. Based upon her observation of the Math Essentials

class, Mother believes that the teacher utilizes an approach to reviewing math skills which draws on a student's existing knowledge. This "scattershot" approach is contrary to Student's need for sequential learning and individual assistance.

16. Ms. Venetianer indicated that the Math Fluency goal was created to increase Student's speed, and allow him to build confidence in his basic skills in order to move up to more complex math concepts. This goal is not related to any State standard, and Ms. Venetianer reported that it was created largely in an attempt to comply with the directives of the Kopec Decision. Mother found Student's Math Fluency goal to be inappropriate, and feels that Student should not be given timed tests. Student needs the thinking time to be successful. If forced to rush, he will become overwhelmed and end up making errors and skipping problems he actually can solve.

Reading and Language Goals:

17. It appears to be undisputed that Student has decoding and fluency difficulties that obstruct his reading comprehension. Student's reading comprehension is generally on a 5th grade level. Ms. Venetianer created Student's Reading Comprehension goal to assist him in mastering comprehension strategies, which is a major component of understanding and reading text for his general education classes.

18. Ms. Venetianer also developed Student's Reading Vocabulary goal on a 5th grade level. She noted that vocabulary is intertwined with reading comprehension. Ms. Venetianer created the vocabulary goal to strengthen Student's ability to identify and interpret figurative language and multiple meanings, which is necessary to be successful on the CAHSEE. Student's Reading/Decoding goal, created on a 6th grade level, was designed to increase Student's decoding skills, especially with multi-syllabic words. Ms. Venetianer noted that Student's other general education classes utilized larger words, and the choice of vocabulary would be individualized to his classes. The goal, however, only references 6th grade level words, and Student's classes are on the 10th and 11th grade level. There was little discussion of Student's Reading Fluency, or Spelling goals. All of these goals appear to be tied to increasing comprehension and vocabulary, and focus on expanding Student's use of multi-syllabic vocabulary. The goals, however, fail to provide any connection to Student's need for intensive, structured, multi-sensory intervention.

19. Mother argues that the District's focus on "comprehension strategies" which are CAHSEE oriented, are not appropriate to meet Student's needs for individualized, sequential, multi-sensory instruction. Mother defines "multi-sensory instruction" as "visualize, discuss, and analyze." Further, Mother also emphasizes that Student will not be successful with these goals in a group setting of any kind due to his attention, avoidance, and comprehension challenges. He needs a very engaged and very motivating instructor who can present material in a variety of ways to assist Student's comprehension and keep him fully engaged. As example, on Student's Reading Comprehension goal, Mother's notes that, given Student's needs to visualize, analyze and discuss the words within the text, he will require one-to-one dialoguing throughout the process. Mother does not strongly object to

Student's spelling and reading decoding/word recognition goals; however, she again emphasizes the need for one-to-one instruction. Student needs immediate feedback in order to learn and correct his mistakes. Based upon her classroom observations, Mother indicates the proposed English II class is not set up to provide the type of instruction Student needs in these areas.

20. Mother does not disagree with Student's Writing Strategy goal per se; however, she does not believe it can be accomplished without substantial one-to-one coaching on the pre-writing and outlining activities. She believes that if Student is given a writing assignment in a group setting and then receives it back at a later date with comments provided by the teacher, he will continue to practice writing incorrectly and will not likely connect the comments with future assignments. Again, Mother contends that Student will require a tremendous amount of individualized dialoguing and questioning in order to increase the sophistication of his writing.

21. Ms. Venetianer created the Writing Fluency goal for Student to increase his speed and accuracy in written language skills. The goal is measured by timed tests. Mother is not in agreement with this goal, as she does not think Student's writing is at a point in which speed should be stressed. Being able to do the task well is more important than speed. Further, she believes that the goal would be very intense for Student, and the proposed exercises could only be worked on one-to-one with consistent guidance.

Placement:

22. A child with a disability must be educated with children who are not disabled to the maximum extent appropriate, and should not be removed from the regular educational environment unless the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

23. Mother reported that in the 8th grade, prior to moving to the District, Student had only one SDC class in reading. Student attended the remainder of his classes in a general education setting with a special education teacher as a shadow for Student and the other special education students. Mother considers this placement to have been life changing for Student. Further, Mother acted as part of a team with Student's special education teachers. As a result, Student made dramatic improvements and showed he was capable of achieving much. Mother also told the District that she wanted Student placed in a challenging environment.

24. Ms. Lawson explained that the District has several educational placement options available within its high school general education system. Those options include immersion in a general education class with (1) a special education aide available in the classroom; (2) a one-to-one aide for the student; and (3) co-teaching with both a general education and special education teacher. All classes provide standards-based curriculum, but each class can be modified to meet a student's unique needs.

25. The August 2008 IEP contained the District's offer of placement for the 2008-2009 school year which offered Student two periods of Special Day Class (SDC) (Math and Directed Studies); two periods of collaborative general education classes (English and Biology); and two traditional general education classes (U.S. History and Physical Education), a total of six periods a day.

26. Ms. Lawson opined that the IEP team believed that their placement offer would provide Student with access to education and support him in a general education setting. Further, the general education classes constituted the least restrictive environment for Student which would provide him with opportunities for discussions and interactions with peers, as well as provide him with the tools for post-high school life. Additionally, Ms. Lawson indicated that she considered that Student's programs were based upon "peer-reviewed research" because they were based on State-approved standards and curriculum. The IEP provides no information regarding teaching methodologies or programs to be utilized by teachers, and the District failed to present any definitive evidence of actual peer-reviewed research even contemplated for any component of Student's education.¹² The IEP team consolidated all of these proposals in the August and October 2008 IEPs. Mother consented to Student's placement in the traditional general education History class, but did not agree to his placement in the collaborative English II and Biology classes or the SDC Math Essentials. Mother also consented to Student's placement in Directed Studies, and P.E.

27. Again, it is undisputed that Student lacks the basic math skills necessary to understand Algebra at the present time. The IEP team believed that Student required the SDC Math Essentials class to remediate his math skills. According to Ms. Lawson, the Math Essentials program provides modification of the curriculum by breaking down math concepts, in a smaller classroom setting. She further indicated that the class provides multi-sensory teaching and accesses visual learning as well as technology. Additionally, it is the most basic academic math class available for Diploma Track students.¹³ Ms. Venetianer concurred and believes Student will benefit from Math Essentials. SDC math is more individualized and not strictly standards based. While she indicated that Student is not ready for algebra concepts, Math Essentials is designed to work on the basics.

28. Jason Heilman¹⁴ teaches the Math Essentials class. Although Math Essentials is a SDC, Mr. Heilman tries to avoid making it feel like a special education class. Math Essentials is designed to be individually passed. It is multi-sensory, using visual aids, audio materials, manipulatives, and highlights. The class also has an educational aide. Students have very little homework, usually the material not completed in class. Given Student's lack

¹² There is no evidence that Stowell bases its programs on peer-reviewed research either.

¹³ Although there appears to be a substantial difference of opinion as to Student's cognitive abilities, Ms. Lawson indicated Student is currently on the diploma track.

¹⁴ Jason Heilman has a M.A. in Education and Special Education, Mild to Moderate. He is currently the Special Education Department Chair at WCHS.

of basic math skills, the Math Essentials class is intended to assist Student in recognizing math concepts quickly and prepare him for Algebra I. Many of the students in the class have previously taken Algebra or the CAHSEE; however, they are also in need of remediation or reinforcement. Given that the CAHSEE encompasses seventh grade math and basic Algebra, it is not extraordinary to find that a basic math program would encompass some concepts covered on the CAHSEE. Further, Mother's primary objections to Math Essentials class and math goals lie more in the teaching methodology, not in the subject itself.

29. The IEP team determined that Student would be placed in general education classes for both English and Biology. Each of these classes would be collaborative classes, team-taught by a general education and special education teacher or aide.

30. Student's Biology class is a general education/collaborative class. Richard Bernard¹⁵ is the general education teacher, and he co-teaches with Valencia McPherson,¹⁶ a special education teacher. He has not met Student. According to Mr. Bernard, Biology is a college prep class in which the textbook, workbooks and worksheets are based upon the state standards curriculum. There are currently 33 students in the class, seven of which are special education students. Although the textbook is written on a ninth grade level, several of the students can read only at an elementary school level. He describes the teaching style as a "tag team," in which both teachers will participate daily. Ms. McPherson will often "piggyback" or reinforce what he provides in lectures. The class agenda and assignments are posted daily. Mr. Bernard indicated that the class is multi-sensory, and utilizes lectures, power point, DVDs, visuals review games, and labs. The assignments are literary based, and "pretty much the same for all students." Mr. Bernard believes his class procedures are designed to reinforce each lesson, and he includes time to clarify and re-explain concepts. He encourages dialog between students as a method to confirm understanding. He has time in class to interact with students individually; however, this does constitute an extensive time devoted to one-to-one teaching.

31. For special education students, Mr. Bernard and Ms. McPherson communicate with the student's case carrier and parents. Both he and Ms. McPherson have the same conference period, and they work together to determine modifications for students, if needed. Mr. Bernard reported that reading assignments may be broken down for special education students, but they are not shortened. Ms. McPherson will assist students with vocabulary when needed. Homework is given every day, which is estimated to require no more than an hour to complete at home. Homework is not shortened for special education students. Each student keeps a notebook, and is given at least one week prior notice of tests, and many of which are open book. Modifications may include limiting choices on multiple choice tests,

¹⁵ Mr. Bernard has a M.A. in Education and Administrative Leadership. He received his teaching credential in 1996, and has taught at WCHS for 13 years. He has had substantial training in special education, and has been involved in collaborative teaching for six years.

¹⁶ Ms. McPherson has teaching credentials in both multi-subject and severely handicapped. She has been teaching since 1990, and has worked for the District since 1994. She has been teaching collaborative Biology for two years.

simplifying essay question language, or reading questions to students. The grading criteria require a score of 60 percent to pass. Mr. Bernard indicated that a student will receive a 70 percent if he/she does all of the work, even if he/she “bombs the tests.”

32. Ms. McPherson added that her primary role in the classroom is to facilitate the special education students. She will enforce their accommodations, and modify their teaching when needed. She also makes certain the students understand the materials and remain on task during class. She keeps the special education student participating in class, and she can pull a student “out” to work individually, if needed. Mother opined from her classroom observations that Ms. McPherson “functioned like an aide.” In her other observations, Mother was extremely critical, and indicated that “were [Student] to take this class, it would be purely in the spirit of meeting a requirement.” She felt the teaching may have been engaging, but the methodology was very confusing and unsuitable for Student.

33. Ms. McPherson has previously been a special education case carrier, and has experience developing IEP goals; however, she does not write goals for Biology. She indicated that IEP goals are generally written to skills, such as reading and writing, and those goals support a student’s work in Biology. Mother disagreed, and instead wanted an individual plan developed for Student to actually understand key concepts and information. She wanted his participation to be meaningful.

34. Mother also indicated that the Biology class occurs first period in the morning, and would totally disrupt Student’s schedule at Stowell. Further, she wanted him to concentrate on only one general education class, U.S. History. Mother indicated that she did not expect Student to graduate in four years, therefore she did not find it critical that Biology be completed this year.

35. Phoebe Chao¹⁷ teaches English II. The class is considered collaborative, and has an instructional aide rather than a special education teacher present in class. Ms. Chao indicates she consults with special education teachers regarding her special education students, usually with their case carriers. English II is a 10th grade class which focuses on World Literature. The IEP team placed Student in 10th grade English as the subject is sequential, and Student had not attended an English class since the ninth grade. Student has not attended this class. Ms. Chao reported that she presents students with a daily agenda and assignments at the beginning of each class. Students then read for 10 minutes and work on a worksheet related to the reading. At that point, she begins the new lesson. Students are given handouts which provide information regarding what is expected of them and when tests will be given. A student’s progress is measured by his/her participation in class, completion of assignments and test scores. She gives quizzes to monitor comprehension of the material. Ms. Venetianer indicated that English II would be difficult for Student, and his success would depend upon his desire to work.

¹⁷ Ms. Chao has a B.A. in Sociology and a teaching credential. She has been teaching English since 2008.

36. Mother observed this class over a three-day period. Again, she is highly critical in her comments, and indicated that she was disturbed by both Ms. Chao's skills and her treatment of students. Mother determined that it was hard to characterize what was going on in the class, and concluded it was not an environment in which Student could receive individualized, multi-sensory instruction. Further, it would be impossible for Student to make progress on the targeted skills identified in his IEP goals. The District provided no evidence that Student's goals were anything but broad concepts incidentally covered by the regular lesson plan. As example, all students are required to read *Animal Farm* in English II, and Student's goal requires him to read. Student would be provided assistance and accommodations when needed; however, the class does not provide for specific remediation.

37. Given Student's previous success in a traditional general education World History class, the IEP team determined that Student would be placed in a traditional general education U.S. History without special education assistance, other than his aide. In spite of Mother's descriptions of the amount of time and effort, family frustrations, and financial detriment, Student's participation in World History had been, Mother consented to this placement.

38. Phuong Hoang¹⁸ teaches Student's U.S. History class. Student attends this general education History class with no supports other than his one-to-one aide. Student is the only special education student in the class. Ms. Hoang considers her class to be multi-sensory and geared to 11th grade California standards.

39. Ms. Hoang attended the August 2008 IEP meeting and described her class. The class generally consists of power point lectures which supplement the textbook. Students work on their homework 15 to 20 minutes a day in class. She estimates homework is assigned three days a week, and consists of three to four questions from the textbook or work sheets. A typical student can complete the assignment during class or within a total of 30 minutes. Although she feels Student's written skills are not up to grade level, she believes Student could be successful in her class if he completed his assignments. She is uncertain if Student understands the material, because he does not turn-in his assignments. Ms. Hoang indicated that Student does poorly on tests, but she is informed that a score of 20 to 30% is average for Student; therefore, she considers it to be consistent with Student's past performance. Judged from a general education perspective, however, she does not believe Student is successful in her class.

40. Ms. Hoang demonstrated an acute unfamiliarity with Student's IEP. Many of her responses were contradictory. At one point she indicated that Student could be successful in her class, and later indicated that Student lacks the skills to be successful. She admits that she has not read Student's IEP, and she is uncertain as to which IEP is actually in play. Her only information comes from the FastFacts. She believes she has enacted Student's accommodations and modifications. As part of Student's accommodations, Ms. Hoang provides Student with a copy of her power point lecture notes at the beginning of each

¹⁸ Ms. Hoang has a M.A. in Education and received her single subject teaching credential in 2006.

class. She also has shortened Student's assignments; however, he is still required to master the general education standards. She is also aware that Student has a behavior plan, which she believes is implemented by Student's aide; however, she does not know what is actually contained in the behavior plan. Ms. Hoang does not directly work with Student on his IEP goals nor is she aware of each of his goals. She indicates, for example, that if Student needed help decoding, she would help him, but she does not teach decoding or any of the other goals as part of her class. Student receives no individual instruction and she relies on Student's aide to reinforce the lesson with Student and check his comprehension during lectures.

41. Initially, Ms. Hoang freely communicated with Mother; however, Mother made continual demands for overly detailed explanation of what was discussed and taught each day. This became overly burdensome, and the District instructed Ms. Hoang to cease corresponding with Mother. Student's aide writes down Ms. Hoang's daily class agenda and assignments in Student's Journal which is sent home each day.

42. In order to support his participation in general education classes, the IEP team determined that, as an elective, Student would attend the SDC Directed Studies class. The IEP team anticipated that one period of Directed Studies would provide Student with a smaller classroom setting in which he could ask questions and obtain assistance with his three general education/collaborative studies.

43. Jason Heilman also teaches Student's Directed Studies class. According to Mr. Heilman, the purpose of Directed Studies is to (1) complete work on current collaborative class assignments; (2) get help with those assignments when needed; (3) provide CAHSEE preparation, and (4) work on IEP goals. It is not the duty of the Directed Studies teacher to formally instruct in any given subject, for example, History. The purpose of the class is to reinforce what Student is learning; to make certain he understand the work he is doing; and to oversee his organization and completion of assignments. Working on Student's IEP goals is secondary to providing class support. Further, Mr. Heilman acknowledges that Student's Directed Studies class is designed to support his three collaborative classes, and not all of Student's work can be covered in each class period. While Mr. Heilman may work with Student on his goals, time allowing, it appears that there is seldom time to do so. There is no evidence of a specific time in which Student works on his goals or evidence of a means of monitoring Student's progress. Again, it appears that Student's goals are incidental to his regular class work, and progress is only measured by his grades in each class.

44. Individually, the IEP team members disagreed about Student's placement; however, they did not express their concerns at the IEP meeting. Betty Benitez, a School Psychologist at WCHS, opined in her interview with Dr. Elliott, that collaborative classes are NOT appropriate for Student. Student does a lot of work with one-to-one support, but she does not believe that he is "learning" or retaining the information. Ms. Benitez is of the opinion that Student would best be served in "pull-out" classes. In SDC, Student would retain more information and learn more efficiently.

45. Lynda Gordon¹⁹ is Student's counselor. Although she attends Student's IEP meetings, she indicated that the IEP team usually goes by the case carrier's recommendations. Therefore, she was neither asked nor provided her opinion at any of the IEP meetings. At hearing, however, she did provide her opinion of Student's proposed placement. Ms. Gordon questioned the idea of Student having too many collaborative classes. She felt that last year's World History class was a stretch for Student. If asked, she would have recommended pull-out for Math and English, and she would not recommend a general education venue for any academic class, except, perhaps a collaborative class for history. Ms. Gordon believes that "Student is not making adequate progress if he is failing with an aide." She further indicated that it was doubtful that Student could learn the material in general education history. Student's history teacher had also commented that the material was above Student's abilities. In her comments to Dr. Elliott, Ms. Gordon further opined that Student will not pass the CAHSEE, and recommends that Student pursue a Certificate of Attendance.

46. Ms. Gordon believes that it is imperative that Student return to school full-time for six periods a day. He is being short-changed without a full day of school. As a result, she indicated to Mother that the collaborative programs were excellent and recommended that she give the school a chance with Student. Ms. Gordon further believed that the IEP team placed Student in general education History at Mother's request, therefore she took no action to change the class. She indicated that she did not feel she could convince Mother otherwise, anyway.

Accommodations:

47. The subject 2008 IEP contains many accommodations and modifications which affect Student's lesson preparation, test taking, organization, assignments and assistive technology use. The accommodations include simplifying complex directions, checking for understanding, providing extra time for test taking, providing written copies of notes and lectures, allowing work to be completed at home without penalty, and accepting work up until a day prior to grades being due in core classes. Modifications include shortening written assignments, if needed.

48. Mother believes the accommodations/modifications are generic and too vague. Student requires consistency, and the accommodations are inconsistent, because each teacher is allowed to determine his/her own definition of the accommodation and enforce it "as needed." Mother expressed concern that there was "no meeting of the minds" between the teachers and her as to what was appropriate for Student to accomplish in his studies. As example, Mother reported a prior incident where Student worked long and hard to finish an assignment that involved drawing a map. Student did not color the map, and therefore failed the assignment. Mother believed that completion of the map alone should have been accepted (by accommodation) or the coloring directions should have been reinforced with

¹⁹ Ms. Gordon has a B.A. in Education and M.A. in Guidance/Counseling. She has previously been a special education teacher for 11 years, and has been a Counselor at WCHS for 15 years.

Student and reported to Mother (by accommodation). An IEP is not a contract. There is no requirement for the District to obtain an educational consensus with Mother in order to provide an appropriate education to Student.

49. Mother requested that Student not be penalized for turning in late assignments. The IEP team granted this request and included an accommodation that Student would be allowed to turn in his assignments up until the day before grades were due. Mother indicated that she only wanted an extension of perhaps five days; however, she did not voice this opinion at the IEP meeting.

50. Mother also wanted an accommodation to allow Student to have a cell phone in class, as he could use it for calendaring. It would be a good tool for learning organization. The IEP team would not consider this request, and there is a District-wide policy prohibiting the use of cell phones in class. Mother insists that she wants Student treated the same as other Students. She believes, however, that the policy against cell phones is not universally enforced, and Student should be an exception to the rule.

51. Most importantly, Mother expressed extreme concern and frustration regarding the implementation of the Journal. The accommodations page of the IEP simply indicates that Student's aide will write assignments in a daily planner (Journal). There is a substantial difference of opinion as to the purpose of the Journal.

52. Student's aide, Mr. Sherman, is responsible for communicating with Mother through the Journal. Currently, the Journal is the only means of communication with Mother. All of Student's teachers and staff have been instructed to avoid communication with Mother except at scheduled meetings with District representatives present. Mr. Sherman communicates daily with Mother by writing in the Journal. While he feels his primary focus should be working with Student, the Journal is a time consuming activity, which he considers ineffective. Mr. Sherman believes Student can be more independent. Each day, Mr. Sherman writes down Student's class agendas. He believes that by doing the writing for Student, Student is often unaware of what he needs to do. Further, often Student does not want his aide and Mother to compare notes. As a result, Student may "forget" to take the Journal home or "forget" to bring it to class.

53. Through the Journal, Mother has requested that the aide communicate information to other staff members and coaches and has requested that he monitor what food Student purchases at school. These requests are outside the scope of the duties of an educational aide. Of more concern to Mr. Sherman is the level of detail Mother expects in their daily communication. Mr. Sherman, as instructed by the District, writes Student's daily assignments and pertinent notes in the Journal. Mother, on the other hand, desires more information regarding what was covered in class so she can continue the lesson at home. Additionally, she requests that he provide her with feedback on Student's behavior so she may be involved with providing consequences at home. Mother has also requested that Mr. Sherman communicate through e-mail, a means of communication he finds overly burdensome, given his daily schedule.

54. Mother indicates that, prior to the litigation, she could freely communicate with Student's teachers, directly, through e-mail and by the Journal. Now her only means of communication with District teachers and staff is through the Journal. Teacher testimony supports this claim; however, their rationale for the cut-off is based upon Mother's overly detailed, time consuming, and highly critical demands requested in daily Journal communications. In spite of Mother's objections, the accommodations appear to be adequately connected to Student's unique needs and are designed to provide him with adequate support in his classes.

Supports:

55. In order to provide Student with academic support in his classes, the August IEP offered Student the additional support of a one-to-one educational aide, who would be available to clarify Student's lessons and redirect him when needed. Ms. Venetianer indicated that Student requires a one-to-one educational aide in class to keep him on task, clarify and explain directions, and keep him organized.

56. Mike Sherman²⁰ is Student's primary one-to-one aide. He has been a special education instructional aide for five years. His specific job description is to assist students with academic work at the direction of the teacher. Mr. Sherman currently assists Student in Directed Studies and U.S. History. Student does not need an aide in P.E., nor does he currently attend his morning classes at WCHS. It is undisputed that Student and Mr. Sherman have a positive rapport. Further, Mr. Sherman spends more school time with Student than anyone else, and his observations of Student are the most complete.

57. In Directed Studies, Mr. Sherman helps keep Student focused and on task. They work on class work and homework. Additionally, they may work on Student's skills by doing drills in vocabulary or math. Mr. Sherman also oversees Student's organization skills. Given that 60-70 percent of Student's time in Directed Studies is spent on his one History class, Mr. Sherman does not believe that Student can handle three general education classes.

58. In U.S. History, Mr. Sherman assists Student with his reading assignment and answers his questions. He also supervises his tests. The teacher provides Student with a daily lecture outline. Mr. Sherman will discuss the lessons with Student and simplify vocabulary when needed. Mr. Sherman believes Student can read the text book. Student is currently failing History because he has not turned-in his assignments.

59. In general, Mr. Sherman notes that Student's inappropriate behaviors are dropping off. Student is not defiant, disruptive or violent, but he is non-compliant and will

²⁰ Mr. Sherman is currently working on his A.A. degree. He also has a previous military career spanning over 12 years. Mr. Sherman's special education training includes District trainings on restraints, autism and special education strategies.

not complete his work. He no longer cares about pleasing adults and no longer takes pride in completing work. Much of this Mr. Sherman attributes to Student's accommodations which provide him leeway in turning-in assignments. Student senses a lack of consequences. There is no negative impact for doing nothing, so he does nothing. Further, Mr. Sherman, when interviewed by Dr. Elliott, commented that Student did not need a one-to-one aide for behavioral control or monitoring, nor did he need an aide in SDC. Instead, Student needed one-to-one aide support for academic assistance in collaborative classes because he needs prompts and has difficulty focusing and organizing his assignments.

The Experts:

60. Dr. Robert Elliott²¹ testified on behalf of the District. In preparation for his testimony, Dr. Elliott reviewed volumes of Student's documents, reports, and tests. Based upon comparison and interpretation of Student's test scores, Dr. Elliott estimated Student's cognitive functioning to be in the borderline range. Overall, Student's reading scores have improved over the years, and he demonstrated a significant improvement in reading comprehension between 2006 and 2008. Student's mathematic scores have ranged from the significantly impaired to low average; however, his most recent testing places his math skills in the borderline range, which is consistent with ongoing remediation. Student's processing scores reveal substantial variation in performance. Student's adaptive functioning scores indicate a significant decrease in socialization skills; however, those scores are inconsistent with his observations and the observations of those who work with Student.

61. Dr. Elliott also observed Student at Stowell. In general, he found that Student manifests slow information processing skills and is easily distracted. His cognitive skills appear to be in the borderline rather than the mildly retarded range based upon information processing capabilities. He is obviously a neurologically involved young man who has a combination of information processing difficulties, learning difficulties, memory deficits, and language-based weaknesses. It is evident that he has difficulty formulating abstract concepts. He is concrete in his problem solving approach. He quickly forgets information he has learned, revealing a significant weakness in memory consolidation. While Dr. Elliott believes that Student benefits from a structured learning environment, he does not believe that Stowell is an appropriate learning environment for Student. He agrees with Ms. Stowell, however, that Student needs to work more on living skills and that reinforcement of these independent living skills is critical to Student now. The District has only 18 months of high school left to teach Student the skills necessary for independent living and employment.

62. Dr. Elliott does not agree with Dr. Perlman's opinion that Student cannot benefit from a general education classroom. Instead, he believes that a collaborative

²¹ Dr. Elliott has a B.A. and M.A. in Psychology. He received his Ph.D. in Counseling Psychology in 1975. Dr. Elliott is a licensed Clinical Psychologist and Educational Psychologist. He also holds credentials in School Psychology and Administration. Dr. Elliott is qualified to report on educational testing. He has over 30 years of experience administering over 100 types of tests, and lectures on the subject.

classroom setting with a one-to-one aide may be appropriate. While Student is not at grade level, he should still be exposed to grade level standards. He opines that Student can participate in a collaborative class and learn with an aide, but he is not going to get as much out of the class as his peers. Past, unmet standards should be dealt with in remediation and possible modification of class work expectations. Remediation would be provided by the special education teacher and Directed Studies class. Further, it should be the duty of the aide to (1) make certain Student understands and retains information; (2) supplement Student's instruction ; and (3) be adaptable to Student's needs at any given time.

63. Dr. Elliott concluded that Student should attempt placement in a collaborative classroom as his least restrictive environment. Clearly he will benefit from the interaction with his peers. Further, the collaborative environment is challenging to Student, and more like how things function in the real world. If Student fails to function in the collaborative classes, then another IEP can be set to consider a more restrictive environment.

64. In his discussion of Student's goals, Dr. Elliott provided limited information, and did not fully contradict Mother's contentions that Student had more important reading goals to address than were contained in the IEP. Dr. Elliott indicated that he would have preferred to have seen goals which addressed broad skills rather than discrete skills embedded in a program. Although he would like to have seen goals for all classes, he indicated that Student could advance with the existing goals. As example, by reading a history text assignment, Student is working on the remedial skills of reading as well as learning the content of the text, which is history.

65. Dr. Elliott observed the classroom settings for the classes the District had proposed for Student. His descriptions are generally positive regarding the teaching strategies utilized, the integration of other special education students, and the general classroom environment.

66. At Mother's request, Dr. Caroline Bailey²² prepared an Educational Consultation Report to assist in determining an appropriate placement for Student that allows him access to typical peers and curriculum, while simultaneously addressing his clear need for intensive remediation. Dr. Bailey initially prepared her report on March 17, 2008, and updated it as of November 9, 2008, in preparation for her testimony in this matter. She is a compelling witness. Further, Dr. Bailey is the only professional, other than Mother, who has fully researched and referenced OMS in her assessment of Student. She reports that, based upon the research available, studies suggest that educational interventions for children with OMS need to be highly specialized and individualized and can include a variety of

²² Dr. Bailey has a M.A. in Psychology and a Ph.D. in Clinical Psychology, Child and Family Specialization and Developmental Psychology. She has been a Post Doctoral Fellow at the Mental Retardation Research Center, Department of Psychiatry and Behavioral Sciences, UCLA School of Medicine, and she is currently an Assistance Research Psychologist at the UCLA Department of Child and Adolescent Psychiatry.

interventions ranging from full inclusion with support, to placement in special education classrooms.

67. Student's records indicate that he is performing well below grade level in reading, written language, and mathematics; however, he has shown a slow and steady degree of progress over time, which is consistent with OMS recovery.

68. Dr. Bailey observed Student in his therapy at Stowell. She reports that the quality of instruction Student receives at Stowell is high. The methods used are structured, and delivered using multiple sensory modalities and are sequential, in that they introduce skills and scaffold up to the next level of mastery. Dr. Bailey finds that the program at Stowell is adequate to meet Student's educational needs in that it provides him with one-to-one multi-sensory remediation in the areas of academic deficit; however, she finds that there are limits to the appropriateness of this program. She opines that Student would benefit from teaching methods with a stronger research base, such as Lindamood-Bell or Fast for Word. Additionally, Stowell does not address Student's speech and language or his social needs. He needs access to his typical peers.

69. Dr. Bailey also observed Student's proposed academic placement at WCHS. While she finds that the proposed placement offers exposure to typical peers and inclusion in the social milieu which would be beneficial to Student, she notes that the District's remediation strategies do not conform to Student's unique needs. As repeatedly emphasized by Mother and others, Student requires extensive remediation through an intensive, highly structured, multi-sensory interventions. The proposed placement at WCHS does not offer Student this type of instruction in any manner.

70. Dr. Bailey points out that multi-sensory structure intervention is more than multi-media presentation formats. Multi-sensory intervention requires that Student use his auditory, visual and kinesthetic senses in a structured, systematic, simultaneous manner in order to digest his lessons. A true multi-sensory intervention, as described by Dr. Bailey, has been peer-reviewed by the International Multi-sensory Structured Education Counsel. Further, the District's multi-media format does not offer direct instruction in the sense that each skill acquired builds upon the next skill attempted. Several other structured remedial programs, such as Lindamood Bell and Orton Gillingham, are peer-reviewed and appropriate for Student.

71. Ultimately, Dr. Bailey determined that neither Stowell nor WCHS presented an appropriate placement for Student, and neither offered sufficient options to allow Student to make appropriate educational gains to facilitate his transition into adulthood. She recommended that non-public schools be explored which provide intensive academic remediation to students with learning disabilities, and that Student's academic courses should be standards-based and meet criteria for a high school diploma.

72. Jill Stowell²³ is the Founder, Executive Director and Clinical director of the Stowell Learning Center. Stowell is a non-certified tutoring center designed to provide support to special education students. As indicated on her C.V., Ms. Stowell states that Stowell is a diagnostic and tutorial center which specializes in the remediation of learning disabilities and related learning challenges. Based upon information gained through reviewing records, parent and client input, and assessment results, she will, as appropriate, recommend and develop an individualized program of cognitive and educational therapy for the student. Cognitive and educational therapy is provided on a one-to-one basis. The services delivered by Stowell are not designed to replace core academic instruction. Stowell does not provide standards-based instruction, and its tutors are not credentialed teachers. The program is not created to teach curriculum, but rather to assist in remediation of basic skills.

73. Ms. Stowell charges \$250 per hour to attend IEP meetings. Neither the District nor Mother invited her to attend Student's 2008 IEP meetings. Had she attended the IEP meeting, she would have recommended that Student's basic learning skills be done through one-to-one tutoring at Stowell. Ms. Stowell indicated that Student needs a tremendous amount of immediate feedback and one-to-one details with fundamental skills.

74. She does not believe it appropriate for Student to be placed in the general education venue. In her opinion, Student needs support to get basic ideas and information. He is going to miss a lot of information in a group setting. In reading, writing and math, Student cannot afford to miss any components. If he misses the concept, there is no point in practicing, if he is doing it wrong. Further, Student will not make gains in core subjects, which in turn support other areas, if he is still working at basic skill levels.

75. Ms. Stowell thought it is conceivable that Student could pass the CAHSEE in possibly two to two-and one-half years. In order to pass, however, Student would need to develop reading fluency. In all areas, Student needs to analyze in order to understand, and organize his thinking in order to succeed.

76. Behaviorally, Student needs to develop motivational skills. He needs organization in order to understand "what" and "why." He needs to see his progress. Rewards for Student are social in nature. Accordingly, Ms. Stowell indicated that she was sad to see that Student could not participate in sports, as it was a "big deal to him."

77. In reviewing Student's goals, Ms. Stowell's biggest concerns related to how they were going to be implemented. She noted that all of the goals covered areas of need for Student, and Student was working on some similar goals at Stowell. The question, however, is how did the District intend to get Student to accomplish the goals.

²³ Ms. Stowell has a B.A. in Liberal Studies, and M.A. in Learning Handicaps. She has a teaching credentials in Multi-subject and Learning Handicaps. She has received certification for Dyslexia Remediation and as a Resource Specialist.

Student's Behavior Plan:

78. The Kopec Decision determined that the District had not met Student's behavioral needs. In order to address this flaw, Dr. William Bernhardt²⁴ was selected to administer Student's Functional Analysis Assessment (FAA). Dr. Bernhardt began the FAA in August 2008; however, he was unable to complete the assessment due to health issues. Although an FAA is not yet completed, Dr. Bernhardt provided the District with a written report of his observations and preliminary recommendations prior to the October 2008 IEP. The District did not share this information with Mother or the IEP team. In fact, Ms. Venetianer, Student's case carrier, admits she has not yet seen Dr. Bernhardt's report. Ms. Lawson ineffectually defended this omission by stating that Dr. Bernhardt's report was not shared because it was incomplete and "of little use."

79. Dr. Bernhardt indicated that an FAA is usually reserved for serious behavioral problems. Student's targeted behaviors referenced inappropriate or profane remarks and non-compliance. Dr. Bernhardt did not see those types of behaviors in his observations of Student in either his general education U.S. History class or in a smaller setting at WCHS.²⁵ He did observe some distractibility; however, Student's aide redirected him in an appropriate and positive manner. Teachers indicated that Student had exhibited inappropriate behaviors earlier in the year, but those behaviors had substantially decreased. Additionally, teachers reported on Student's non-compliance, primarily in the area of assignment completion. Dr. Bernhardt noted that Student's August IEP had two appropriate behavior goals in place. These goals, however, addressed Student's inappropriate language, and provided no plan for classroom compliance, task avoidance, or assignment completion.

80. While Dr. Bernhardt's report is incomplete, he does offer several valid observations and comments. Student's negative behaviors are often preceded by requests to perform non-preferred tasks or by being prompted to stay on-task. Historically, based upon review of Student's records, Student's inappropriate behaviors are more likely to be manifested in certain settings or tasks which he finds less than desirable, such as answering questions in class, reading or having to write. Inappropriate behavior is a method by which Student expresses his desire to escape or avoid these activities. Mother agrees with this conclusion and has described Student as an "escape artist" who will go to great lengths to avoid uninteresting tasks. Dr. Bernhardt noted that while there have been a variety of reactive strategies attempted in the school setting, none of those methods have ameliorated Student's inappropriate behaviors.

81. When asked, Dr. Bernhardt opined that Student's off-task behaviors would not bar his placement in general education. Student, however, would require a behavior plan to support him in the general education venue. For Student, SDC placement may prove to be a

²⁴ Dr. Bernhardt has a B.A. in Psychology, an M.A. in Psychology, and a M.S. in Psychology. He earned his Ph.D. in Psychology in 2001, and is a Board Certified Behavior Analyst (BCBA). He is currently in private practice, and has previously been employed as an Educational Psychologist for several school districts.

²⁵ He did not observe Student at Stowell.

stigma, while general education would improve his socialization and peer interaction skills. The key element in a successful behavior plan, however, is staff competence with regards to its implementation.

82. Dr. Bernhardt's preliminary report is not completely supportive of general education placement. He recommends that Student be provided RSP or SDC support. Specifically, Student's one-to-one educational aide could use support in having a written weekly lesson plan to follow when working with Student in the Directed Studies class. Such plan would be specifically tailored to a challenging, but not frustrating, level for Student and would require collaboration between Student's general education teacher, special education teachers, and aide. Further he noted that Student responds very well when a "hands on" approach is used. He also felt it important to note that Student's on-task behavior appeared to be significantly higher in the six student/three staff Directed Studies class rather than in the general education History class, even though the history class was well managed and reasonably quiet.

83. Dr. Bernhardt also suggested activity sequencing. For many people, knowing what to expect in the day's activities can help to reduce stress and target behaviors. A check list of daily activities which are checked off at the end of the day when satisfactorily completed, can give Student a "sense of accomplishment." Dr. Bernhardt suggested that the sequencing of Student's academic activities should be considered. The list should be developed each day and reviewed with Student each morning and prior to each class.

The Individual Transition Plan (ITP):

84. Student first contends that the District failed to provide a transition plan from Stowell to full-time attendance at WCHS. As stated in the Kopec Decision, the law does not require the District to address Student's transition *to* high school, only his transition *after* high school, unless he otherwise has a unique need concerning his transition to the high school program. Student is already participating in a general education setting, and has been fully included in typical peer activities for some time. There is no evidence to suggest that Student required assistance transitioning into the high school setting or educational program.

85. After age 16, however, the District has an obligation to provide transition services as part of a student's IEP. Transition services are a coordinated set of activities that are designed within an outcome-oriented process that is focused on improving the academic and functional achievement of the child to facilitate movement from school to post-school activities, including postsecondary education, vocational education, integrated employment, continuing and adult education, adult services, independent living, or community participation; is based on the student's needs, taking into consideration the student's strengths, preferences and interests; and includes instruction, related services community experiences, the development of employment and other post-school adult living objectives, and, if appropriate, acquisition of daily living skills and functional vocation evaluation.

86. The IEP team developed an ITP for Student which, on a superficial level, checked appropriate boxes, and covered the pro forma areas of consideration for Student's transition into adult life. The underlying considerations of Student's unique needs were not so simple.

87. Jill Cyhaniuk, the District's Transition Specialist, prepared Student's ITP.²⁶ Although invited, Student does not attend his IEP meetings. Ms. Lawson indicated that Student's attendance would be invaluable to the ITP; however, Mother indicated that Student's attendance would not result in a positive experience for Student.

88. Student is currently on Diploma Track. Mother envisions Student graduating from high school with a Diploma, although not necessarily in the standard four years. Ms. Cyhaniuk, in her interview with Dr. Elliott, reported that Student would be appropriate for a Transition class at a local junior college or at another site for a fifth year of high school.

89. It is apparent from all witness observations that Student desires a full-time career in law enforcement or the military. All parties agree that this career path is not appropriate for Student, yet none of them have discussed this reality with Student. Further, nothing is stated in the ITP to indicate that Student's vocational goals are unattainable. Based upon the written document, it must be assumed that the contents of the ITP are designed to support of Student's career goals.

90. Further, the cumulative testimony of the witnesses, suggests that great deal of their issue avoidance regarding appropriate vocational choices and transition skills lies in their continuing disagreement regarding Student's cognitive abilities.

91. Ms. Lawson's estimation of Student's abilities remains that of mildly mentally retardation. As she expressed to Dr. Bailey, Student has demonstrated a persistent pattern of academic delay over time and presents with a developmental lag that places him far below age expectations and limits his ability to reach age expectations in academic subjects. She pointed out that Student has had over 900 hours of remediation, yet has only made about one year's worth of progress, and continues to perform at a level that is reflective of his developmental level. As reported by Dr. Bailey, Ms. Lawson pointed out that the time has come to recognize that the hours directed towards remediation are taking away from the hours needed for Student to develop his practical life skills. Student has only a limited time remaining in high school and the District needs to stress the skills he requires to make independent decisions and engage in functional daily living tasks.

92. Although she disagrees with Ms. Lawson's conclusions regarding mild mental retardation, Dr. Bailey concurs with her determination that Student needs to develop personal independence and daily living skills.

²⁶ She did not testify at hearing.

93. Dr. Elliott believes that Student's cognitive abilities are limiting, and Student should be removed from the Diploma Track to focus on adaptive skills. He opined that Student's passing the CAHSEE would be highly unlikely, therefore, preparation for the CAHSEE is not a priority. Student's time could be better utilized in other areas, such as WorkAbility.

94. The ITP offered Student employment skills components, such as WorkAbility. Participation in the WorkAbility program, however, requires that Student maintain a 2.0 grade point average, a feat Mother points out is impossible with his placement in three general education/collaborative classes. On its face, the ITP may be appropriate; however, it does not comport with the implementation realities of the other portions of Student's IEP.

The Assistive Technology Offer:

95. The Kopec Decision determined that Student's AT assessment was not designed to provide all relevant information to assist the IEP team in determining whether Student's educational needs required AT, and therefore the District did not conduct a legally adequate assessment of Student. In order to correct this flaw, the District obtained the services of Assistive Technology Exchange Center (ATEC) to prepare an AT Evaluation Report.

96. ATEC considered a variety of assistive technologies and recommended a 30 day trial of the Kurzweil 300 Reading System (Kurzweil) for Student. The Kurzweil System is designed to assist struggling students with reading and writing. The report noted, however, that although Student may benefit from some of the features of assistive software, ATEC had serious concerns whether he would be motivated and willing to use a computer or specialized software. Student did not appear to be interested in the technology that was presented to him, and motivation is one of the many factors that influence a successful use of AT technology. Further, Student should be encouraged to use the computer and keyboarding, especially at home and in his Directed Studies class.

97. Although ATEC's report and recommendations were presented at the October IEP, a representative of ATEC did not attend the meeting. Ms. Lawson explained that it is not ATEC's policy to attend IEP meetings, but if the recommended program were approved by the District, ATEC would provide Student and staff with training. The District offered Student a 30 day trial of the Kurzweil System. Mother stated that she did not consent to the AT offer because a representative of ATEC was not present at the IEP meeting to answer her questions. She contends, therefore, a substantively adequate AT plan could not be developed at the IEP meeting. Mother, however, did not specify any concerns or questions she had regarding the Kurzweil System. Mother further objected to the trial period, and determined that 30 days would not be enough time for Student to become familiar with the program. Ms. Lawson indicated that if 30 days was insufficient to determine whether Student could successfully utilize the equipment, then the trial period would be extended. The report further indicated that ATEC might be able to loan a laptop computer for 30 to 60 days, if necessary. No specific goals were developed to utilize the Kurzweil System, considering

Mother's decision not to consider the program, and ATEC's emphasis and concern about Student's motivation. Given the concern over Student's desire to utilize the software, the District's offer to extend a 30+ day trial period, to include ATEC training for Student and staff was sufficient to constitute a FAPE.

Student's Participation in Competitive Sports:

98. In the Kopec Decision, Student unsuccessfully argued that Student's participation in competitive sports is necessary to provide him a FAPE. Neither the District nor Mother have established that there have been any changes in Student's unique needs since the Kopec Decision to merit further discussion. As indicated to Student's counsel during the hearing, unless new facts were to be introduced regarding the sports participation claim, the issue would not be relitigated. It is understood that Student zealously enjoys sports, and has experienced a loss without them. There is, however, no evidence to suggest that Student cannot access his education without sports included in his IEP.

LEGAL CONCLUSIONS

1. As the party seeking relief, the District has the burden of proving that it has offered Student a FAPE for the 2008-2009 school year. (*Schaffer v. Weast* (2005) 546 U.S. 49, 62 [126 S.Ct. 528].)

2. A child with a disability has the right to a free and appropriate public education (FAPE) under the Individuals with Disabilities in Education Act (IDEA) and California law. (20 U.S.C. §1412(a)(1)(A); Ed. Code, § 56000.) A FAPE is defined in pertinent part as special education and related services that are provided at public expense and under public supervision and direction, that meet the State's educational standards, and that conform to the student's IEP. (20 U.S.C. § 1401(9); Cal. Code Regs., tit. 5, § 3001, subd. (o).) Special education is defined in pertinent part as specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability that is needed to assist the child to benefit from instruction. (20 U.S.C. § 1401(29); Ed. Code, § 56031.) A child's unique educational needs are to be broadly construed to include the child's academic, social, health, emotional, communicative, physical and vocational needs. (*Seattle Sch. Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500.)

3. If a parent consents in writing to special education and related services but does not consent to all of the components of the IEP, the school district shall implement those components to which the parent consented so that the child's instruction and services are not delayed. (Ed. Code, § 56346, subd. (e).) If the school district determines that the component of the IEP to which the parent does not consent is necessary to provide a FAPE to the child, a due process hearing shall be initiated. (Ed. Code, § 56346, subd. (f).)

4. In *Board of Education of Hendrick Hudson Central School District, et. al. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L. Ed.2d 690] (*Rowley*), the United States Supreme Court held that "the 'basic floor of opportunity' provided by the IDEA

consists of access to specialized instruction and related services which are individually designed to provide educational benefit to a child with special needs.” As determined in the Kopec Decision, Student requires specialized remediation using intensive, structured, multi-sensory interventions targeting his areas of need, including reading, math, and written expression. The District presented no evidence to suggest that these unique needs have abated since June 26, 2008. Further, the cumulative testimony of Mother and Dr. Bailey continue to support this finding.

5. *Rowley* also expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Rowley, supra*, 458 U.S. at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is “sufficient to confer educational benefit” upon the child. (*Id.* at pp. 200, 203-204.) The Court concluded that the standard for determining whether a local educational agency's provision of services substantively provided a FAPE involves a determination of three factors: (1) whether the services were designed to address the student's unique needs, (2) whether the services were calculated to provide educational benefit to the student, and (3) whether the services conformed to the IEP. (*Id.* at p.176; see *Gregory K. v. Longview Sch. Dist.* (9th Cir. 1987) 811 F. 2d 1307, 1314 [*Gregory K.*].) Although the IDEA does not require that a student be provided with the best available education or services, or that the services maximize each child's potential, the “basic floor of opportunity” of specialized instruction and related services must be individually designed to provide some educational benefit to the child. De minimus benefit or trivial advancement is insufficient to satisfy the *Rowley* standard of “some” benefit. (*Walczak v. Florida Union Free School District* (2nd Cir. 1998) 142 F.3d 119, 130.)

6. Additionally, in determining whether the District provided Student with a FAPE, the analysis focuses on the placement and services offer by the school district, and not on the alternative preferred by the parents. (*Gregory K., supra*, 811 F. 2d at p. 1314.) As such, Student’s emphasis on the *services* provided at Stowell Learning Center is limited in relevance in a determination of the *District’s* offer of FAPE.

7. Further, as long as a school district provides an appropriate education, methodology is left up to the district's discretion. (*Rowley, supra*, 458 U.S. at p. 208.) Courts are ill-equipped to second-guess reasonable choices that school districts have made among appropriate instructional methods. (*T. B. v. Warwick School Commission* (1st Cir. 2004) 361 F.3d 80, 84.)

8. An IEP is a written statement that includes a statement of the present performance of the student, a statement of measurable annual goals designed to meet the student’s needs that result from the disability, a description of the manner in which progress of the student towards meeting the annual goals will be measured, the specific services to be provided, the extent to which the student can participate in regular educational programs, the projected initiation date and anticipated duration, and the procedures for determining whether

the instructional objectives are achieved. (20 U.S.C. § 1414 (d)(1)(A)(II), (III); 34 C.F.R. § 300.320(a)(2), (3)(2006); Ed. Code, § 56345, subds. (a)(2), (3).) It shall also include a statement of the program modifications or supports for school personnel that will be provided to the student to allow the student to advance appropriately toward attaining the annual goals and be involved and make progress in the general education curriculum and to participate in extracurricular activities and other nonacademic activities. (34 C.F.R. §300.320(a)(4)(i), (ii)(2006); Ed. Code, § 56345, subds. (a)(4)(A), (B).)

9. Title 34 of the Code of Federal Regulations, part 300.320(a) requires an IEP to include a statement of the child's present levels of academic achievement and functional performance which indicates how the child's disability affects the child's involvement and progress in the general education curriculum. While the IEP goals reflect Student's present academic levels at approximately the fifth grade, they do not reflect that Student requires specialized remediation using intensive, structured, multi-sensory interventions. (Factual Findings 3, 13, 17, and 18.)

10. Further, an IEP is required to provide a statement of measurable annual goals, including academic and functional goals designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum. (34 C.F.R. 300.320(a)(2)(i)(A)(2006).) The goals developed by the District each appropriately correspond to Student's targeted areas of need as evidenced by Student's WJ-III scores. Each goal provides a series of benchmarks to be achieved in order to measure progress. The IEP, however, fails to indicate how each goal is intended to meet Student's need for intensive, structured, multi-sensory intervention, or how the goals are designed to enable Student to be involved in the general education curriculum. By ignoring Student's unique learning needs, the IEP is not reasonably calculated to provide Student with educational benefit. (Factual Findings 3, 9, 11, 14, and 18.)

11. The IEP proposes that Student no longer have pull-out assistance where his goals could be specifically addressed in an intensive, structured, multi-sensory manner. Instead, Student is immersed in a general education setting, with no specific instructions or responsibility for working on goals which are assigned to no one in particular. Although Ms. Venetianer taught Student in the ninth grade and is currently Student's case carrier, she demonstrated relatively little knowledge about Student's abilities and needs. She indicated that she was unaware of who was actually responsible for implementing Student's IEP. While the IEP indicates that Student's one-to-one aide will reinforce his lessons, again, it does not indicate *how* the aide is expected to do this. Ms. Hoang, Student's general education History teacher, further illustrated this point. Although she knew Student had an IEP, she did not believe she has any responsibility other than providing accommodations and modifications. The aide was responsible for Student's remediation and understanding. While Dr. Bernhardt indicated that the aide might be capable of utilizing specialized, intensive, structured, multi-sensory interventions, the aide is not a teacher, and cannot create the lesson plan or teaching strategy for Student. An aide would require training in specific methodology pursuant to specific instructions created by Student's teachers or IEP team to work on or reinforce the goals. While the IEP includes the generic determination that the

goals shall be measured by the general education teacher and the special education teacher, it is apparent from the testimony that the IEP provides insufficient detail to identify those persons actually responsible for implementing Student's goals, i.e., history teacher, math teacher, case carrier or aide. (Factual Findings 3, 7, 8, 38, 40, 78, and 81.)

12. The intricate details requested by Mother are unnecessary to develop appropriate goals, and the District is not required to adopt the remediation strategies offered by Stowell. As stated in Legal Conclusion 6, the Court will not second guess a district's choice of methodology. However, as it has been established that Student's unique needs require specialized instruction using intensive, structured, multi-sensory interventions, the IEP team must still develop *some* means to implement the goals as they relate Student's unique learning needs. The goals fail to consider these unique learning needs, and therefore, the IEP is not reasonably designed to provide Student with educational benefit. (Factual Finding 3.)

13. To the maximum extent appropriate, a child with a disability must be educated with children who are not disabled and in the least restrictive environment (LRE). (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(2006).) When determining which placement is the LRE, consideration is given to any potential harmful effect on the child or on the quality of services he or she needs. (34 C.F.R. § 300.116(d)(2006).) Further, the district must consider: (1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect the child would have on the teacher and children in the regular class; and (4) the cost of mainstreaming the child. (*Sacramento City School District v. Rachel H.*, (9th Cir. 1994) 14 F.3d 1398, 1404.) A child with a disability should be removed from the regular educational environment only when the nature or severity of the disability of the child is such that the education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (*Ibid.*) California incorporates these requirements in Education Code sections 56031 and 56342, subdivision (b).

14. The parties agree that placement in the general education venue provides Student with beneficial social interaction with his peers. As Mother stated, Student's prior general education placement was "life changing." While Student requires a behavioral plan, there is no evidence that Student is violent or represents a harmful presence to either the teachers or his classmates. Cost is not a consideration in this matter. The disagreement between the parties lies in the determination of whether the IEP can provide Student with educational benefit in the proposed placement. The parties clearly disagree on Student's abilities. (Factual Findings 6, 22, 37, and 79.)

15. In the past, Student has been successful in general education classes, and Mother also has consented to placement in some general education classes for the 2008-2009 school year. The parties agree that a general education placement provides Student with substantial benefits in socialization skills and peer interaction. (Factual Findings 23 and 26.) Placement in general education/collaborative classes represents the LRE for Student, *provided* he receives adequate supports in accessing information and behavior. Based upon

Factual Findings 26 through 28, 30 through 33, and 35 through 39, each of the proposed classes has the potential for providing Student with an appropriate education. As Dr. Elliott opined, Student can participate in a collaborative class and learn with an aide, but he is not going to get as much out of the class as his peers. (Factual Finding 62.) The educational standards in *Rowley* do not require Student to achieve at grade level. Further, the general education classroom is presumed to be Student's LRE unless rebutted by a showing that the nature or severity of the disability of the child is such that the education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

16. The IEP, however, fails to provide the necessary goals, accommodations and behavior incentives to make the placement successful. Student's placement offer is intertwined with the goals, and other components of the IEP. As stated in Legal Conclusions 8, 9, and 10, the IEP fails to address Student's need for specialized instruction using intensive, structured, multi-sensory interventions. Further, the IEP requires no one to take responsibility for implementing Student's interventions, and, therefore, no one does. Additionally, it is abundantly clear that Student's academic success is often affected by his task avoidance behavior, yet no behavior goals were created to address this behavior. (Factual Findings 79, 80, and 81.)

17. Student's accommodations are not as flawed as Mother suggests. Accommodations are intended to maintain some flexibility for teachers to adjust materials to Student's needs as he learns. Student's academic abilities vary from subject to subject. It is not unreasonable to allow his teachers to mold his accommodations to meet his needs. Further, while Student might benefit from the use of a cell phone, the lack thereof will, by no means, reduce his access to education. On the other hand, as pointed out by Dr. Elliott, Student's placement in general education requires that Student's past unmet standards need to be dealt with in remediation and modification of class work expectations. (Factual Finding 62.) These concerns are not specifically addressed in Student's accommodations. (Factual Findings 47 through 53, and 62.)

18. The purpose of an accommodation is to help the *student* achieve access to his education. The Journal's specified purpose is to assist Student with his organization and to act as a reminder of assignments to be completed. It is not intended to become a hornbook of information provided to parent on a daily basis nor is it designed to act as an educational supplement in order to expand Student's education at home. While Mother's home involvement with Student's ongoing education is admirable, it is in no sense required in order to provide Student with the basic education described in *Rowley*. Therefore, the Journal accommodation, as minimally described in Student's accommodations, is appropriate. (Factual Findings 52 and 53.)

19. While the District's decision to cut-off Mother from casual communications with Student's teachers and staff is alarming, the IDEA does not require what amounts to almost daily questions and criticism. The District is required to encourage a parent's participation in the IEP process, consider the information and requests presented by the parent, and keep the parent informed of the student's progress in his education. While the

continuing cooperation and communication of the District and parent should be encouraged, Student has not provided any authority to suggest that such relationship is required outside of the IEP process. (Factual Finding 54.)

20. The 2004 Amendments to the IDEA express a policy that a special education program include the use of scientifically based instructional practices, to the maximum extent possible. (20 U.S.C. § 1400(c)(5)(e).) The Amendments also require IEPs to contain a statement of the special education and related services and supplementary aides and services, based on peer-reviewed research, to the extent practical, to be provided to the child. (20 U.S.C. § 1414(d)(1)(a)(i)(IV).)

21. The IEP does not mention peer-reviewed research. Ms. Lawson has erroneously determined that the State approved standards and curriculum qualifies as peer-reviewed research per se. It is the *special education program*, not the general education curriculum, which requires the use, or at minimum, the consideration of peer-reviewed programs and methodologies. The failure to consider such programs, again avoids the need to consider *how* Student, with a demonstrated need for intensive, structured, multi-sensory intervention, is to be educated in the general education class. Undeniably, Student cannot access the general education curriculum without assistance. By failing to even consider how Student is to be taught, the District leaves each teacher to their own devices to either create an individual plan for Student or ignore him completely. Further, if the District elects not to utilize a specific peer-reviewed program, it become imperative that the IEP provide Student's teaching staff with specified information or instructions regarding Student's unique learning needs. The IEP fails to indicate Student's need for specialized instruction. Without direction in the IEP, Student has no consistency or reinforcement other than his one-to-one aide. (Factual Findings 26 and 70.)

22. Beginning at age 16 or younger, the IEP must include a statement of needed transitions services for the child. (Ed. Code, § 56345, subd. (a)(8).) The IEP in effect when a student reaches 16 years of age must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment and, where appropriate, independent living skills, and the transition services needed to assist the student in reaching those goals. (20 U.S.C. § 1414(d)(1)(A)(i)(VIII); Ed. Code, §§ 56043, subd. (g)(1), 56345, subd. (a)(8).)

23. Transition services are a coordinated set of activities that are designed within an outcome-oriented process that is focused on improving the academic and functional achievement of the child to facilitate movement from school to post-school activities, including postsecondary education, vocational education, integrated employment, continuing and adult education, adult services, independent living, or community participation; is based on the student's needs, taking into consideration the student's strengths, preferences and interests; and includes instruction, related services community experiences, the development of employment and other post-school adult living objectives, and, if appropriate, acquisition of daily living skills and functional vocation evaluation. (20 U.S.C. § 1402(34); Ed. Code, § 56345.1, subd. (a).)

24. The District developed an ITP; however, the information gleaned for it could have been more detailed had Student, age 17, attended the IEP meeting. All parties and witnesses agree that Student has expressed a strong desire for a career in law enforcement or the military. All parties agree that this career path is not a reasonable expectation for Student. The District and Mother have both sadly failed Student by not involving Student in the decision making, and creating an ITP which, at least superficially, supports Student's inappropriate career choice. On this basis alone the ITP is not reasonably calculated to result in educational benefit to Student, and therefore, does not constitute a FAPE. (Factual Findings 86-94.)

25. Additionally, the ITP fails to adequately address Student's post graduation needs. Given that most of the District witnesses and experts believe Student's educational focus should be amended to emphasize life skills and employability, the ITP goals do not comport with Student's education plan which is based on academic success on the Diploma Track. As example, Student's participation in WorkAbility requires a 2.0 grade average. Should Student participate in his full-schedule general education classes, it is not anticipated he will maintain a 2.0 average. As such, the ITP does not comport with the other components of Student's IEP. (Factual Findings 35, 39, 44, 45, 60, 61, 88, and 91 through 94.)

26. An IEP team must consider whether a child's behavior impedes his or her learning or that of others. (20 U.S.C. § 1414(d)(3)(B)(i); Ed. Code, § 56341.1, subd. (b)(1).) If an IEP team determines that it does, the team must consider the use of positive behavioral interventions and supports, and other strategies to address the behavior. (Ed. Code, § 56341.1, subd.(b)(1).) There are many behaviors that will impede a child's learning or that of others that do not meet the requirements for a serious behavior problem requiring a behavior intervention plan. (See Cal. Code Regs., tit. 5, §§ 3001, subd. (f), 3052.) These less serious behaviors require the IEP team to consider and, if necessary, develop positive behavioral interventions, strategies and supports. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i)(2006); Ed. Code, § 56341.1, subd. (b)(1).) An IEP that does not appropriately address behavior that impedes a child's learning denies a student a FAPE. (*Neosho R V Sch. Dist., v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028; *County of San Diego v. California Special Educ. Hearing Office* (9th Cir. 1996) 93 F.3d 1458, 1467-1468; *Escambia County Bd. of Educ. V. Benton* (S.D. Ala. 2005) 406 F.Supp.2d 1248, 1265.)

27. The Kopec Decision determined that Student has serious behavior problems which necessitate the initiation of a Functional Analysis Assessment. It is understandable that Dr. Bernhardt was unable to complete the FAA. It is ironic, however, that the District would call Dr. Bernhardt to testify regarding Student's behavior, yet it failed to share his report or consider his preliminary recommendations at the October 2008 IEP. The observations and comments contained in his report are insightful and valid, as was a great deal of his testimony. The Kopec Decision stated that the District did not offer Student a goal in the area of non-compliance. Further, witness testimony in this matter, overwhelmingly reported that Student had serious non-compliance and task avoidance problems which clearly interfered with his ability or desire to complete and turn-in class

assignments. The behavior plan developed in Student's IEP addressed Student's inappropriate comments and profanity only. The IEP team still did not create a plan, interim or otherwise, to address Student's task avoidance and non-compliance, which are his most significant obstacles to learning. As such, Student's behavior plan once again fails to address his most significant behavioral needs, and therefore is a denial of FAPE. (Factual Findings 31, 35, 39, 55, 58, 59, and 79 through 83.)

28. AT devices or services may be required as part of the child's special education services, related services, or supplementary aid and services. (34 C.F.R. § 300.105(2006).) A school district is required to provide any AT device that is required to provide a FAPE to a child with a disability. (20 U.S.C. § 1412(a)(12)(B)(i); 34 C.F.R. § 300.105(2006); Ed. Code, § 56341.1, subd. (b)(5).) An IEP team must consider whether a child requires AT devices or services. (20 U.S.C. § 1414(d)(3)(B)(v); 34 C.F.R. § 300.324 (a)(2)(v)(2006); Ed. Code, § 56341.1, subd. (b)(5).) An AT device is any item that is used to increase, maintain or improve the functional capabilities of a child with a disability. (20 U.S.C. § 1401(1); Ed. Code, § 56020.5.)

29. Pursuant to the directives of the Kopec Decision, the District provided Student with an AT assessment administered by ATEC. The ATEC considered a variety of assistive technologies and recommended of the Kurzweil 300 Reading System. The District offered the program as recommended by ATEC. (Factual Findings 95 through 97.)

30. An IEP team is composed of the parents of the child with a disability; at least one of the child's regular education teachers if the student is or may be participating in the regular education environment; at least one of the child's special education teachers or, if appropriate, at least one of the child's special education providers; a representative of the school district who is qualified to provide or supervise the provision of specially designed instruction to meet the student's needs, and is knowledgeable about the general education curriculum and the availability of resources; a person who can interpret the instructional implications of evaluation results; other persons who have knowledge or special expertise regarding the student, at the discretion of the parent or school district; and the child, whenever appropriate. (20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. § 300.321(a)(2006); Ed. Code, § 56341, subd. (b).)

31. Student's contention that ATEC was a required party at Student's IEP meeting is unfounded. An IEP cannot address a child's unique needs if the people most familiar with those needs are not involved or fully informed. (*Amanda J. v. Clark County Sch. District* (9th Cir. 2001) 267 F.3d 877, 892.) However, there is no evidence to suggest that ATEC's participation was statutorily required, or that the written assessment report was insufficient to allow the IEP team to make a reasoned decision regarding its offer of AT. Further, the District did invite ATEC to attend, and Mother was informed that it is ATEC's policy, not the District's, to avoid involvement in IEP meetings. Mother's contention regarding the limited trial time for the program is likewise unmerited, and the District made it clear that the 30-day trial period could be extended if needed. The District's offer of AT services is a FAPE. (Factual Findings 95 through 97.)

