

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: PARENTS on behalf of STUDENT, vs. TEMECULA VALLEY UNIFIED SCHOOL DISTRICT,	OAH CASE NO. 2009040514
TEMECULA VALLEY UNIFIED SCHOOL DISTRICT, vs. PARENTS on behalf of STUDENT.	OAH CASE NO. 2009031335
TEMECULA VALLEY UNIFIED SCHOOL DISTRICT, vs. PARENTS on behalf of STUDENT.	OAH CASE NO. 2009050048

DECISION

Administrative Law Judge (ALJ) Darrell Lepkowsky, Office of Administrative Hearings, Special Education Division (OAH), State of California, heard this matter in Temecula, California on September 14 through 17, 21 through 24, 29 and 30, and October 13 and 14, 2009.

Peter A. Sansom, Esq., of Sansom Willis LaFoe LLP, appeared on behalf of the Temecula Valley Unified School District (District). Terrence Davis, the District's Special Education Director, attended each day of hearing. Student was represented by Ralph O. Lewis, Esq., of the Offices of Ralph O. Lewis. Student's Mother attended the hearing each day. Student's Father attended most of the hearing as well. Student did not appear.

This is a consolidated case. On March 27, 2009, the District filed its initial request for a due process hearing (complaint) in OAH Case No. 2009031335, naming Student as Respondent. In that case, the District sought an order from OAH that its March 12, 2009 offer of an individualized educational program (IEP) constituted a free and appropriate public education (FAPE) for Student. On April 14, 2009, Student, through his parents (Parents), filed a due process complaint in OAH Case No. 2009040514, raising procedural and substantive challenges to the District's offer of FAPE, and challenging the validity of the District's assessments of Student. OAH granted Student's unopposed motion to consolidate his case with the District's pending case on April 17, 2009. On April 30, 2009, the District filed a second complaint in OAH Case No. 2009050048, requesting that OAH make a finding that its assessments of Student were appropriate. OAH granted the District's unopposed motion to consolidate all three cases on May 8, 2009. OAH granted the parties' joint request to continue the case on May 21, 2009. On August 12, 2009, OAH granted the District's request to amend its complaint to add an allegation that its June 12, 2009 amendment of its IEP offer to Student constituted a FAPE. The hearing began as scheduled on September 14, 2009.

At the hearing, oral and documentary evidence was received. The following witnesses testified: Julie Gansko, Beth Ellevold, Ronnie Plotner, Cynthia Cottier, Deborah Vandenberg, Stephanie Cowell, Dwayne Lizar, Katie Hairabedian, Dr. Laura Schreibman, Joseph Trance, Karen Dillon, Blake Burnham, Melanie Hertig, Mother, Kari Scott, Dr. Robin Morris, Dr. Robert Patterson, Anne Fleck, Dr. Melanie Lenington, Romalea Manucal, Joanne Abrassart, and Dr. Beth Ballenger.

During the hearing, the parties requested and received permission to file written closing arguments. The parties also stipulated that the decision in this case would issue no later than November 23, 2009. Closing briefs were originally due on October 26, 2009. The ALJ thereafter granted Student's request for a one-week continuance for the parties to file their briefs. Both parties filed their briefs on November 2, 2009, at which time the ALJ closed the record and the matter was submitted.

ISSUES¹

District's Issues (Case Nos. 2009031335 and 2009050048):

1. Were the District's health, psychoeducational, speech and language, and occupational therapy assessments² appropriate?

¹ The ALJ has rearranged the order of the issues for purposes of clarity as well as in order to address the District's matters first in light of the agreement at the prehearing conference that the District would present its case before Student presented his.

² The terms "assessment" and "evaluation" are synonyms. Federal statutes and regulations generally use the term "evaluation". California statutes and regulations generally use the term "assessment". This decision will use the term "assessment" (except when referring to an IEE) since that is the common usage in California.

2. Does the IEP dated March 12, 2009, as amended by the June 12, 2009 IEP make a FAPE available to Student?

Student's Issues (Case No. 2009040514):

3. Did the District fail to provide Student with a FAPE for the 2008-2009 school year, the 2009 extended school year, and the 2009-2010 school year by:

- a) Conducting assessments that did not accurately reflect Student's abilities or needs?
- b) Predetermining Student's placement?
- c) Failing to afford Student's parents meaningful participation in the IEPS?
- d) Failing to consider the independent evaluations obtained by Student's parents?
- e) Refusing to consider the opinions of experts invited to the IEPS in the area of Speech and Language and Applied Behavioral Analysis (ABA)?
- f) Presenting goals and objectives which, in many respects, were inappropriate, not measurable and vague?
- g) Offering an inappropriate placement in a District classroom?
- h) Failing to consider a reasonable transition plan for Student?
- i) Failing to offer appropriate Designated Instructional Services in the areas of speech and language, occupational therapy, and adaptive physical education?³

4. Are Student's parents entitled to reimbursement for independent educational evaluations (IEES)?

5. Did Student's parents provide Student with an appropriate placement through the Center for Autism and Related Disorders (CARD)?

³ At hearing, Student stipulated that he no longer contended that the District had failed to offer appropriate augmentative communication services. That issue, originally part of Student's contentions for hearing, is therefore not addressed in this decision.

PROCEDURAL ISSUES

Student's Motion for Production of Assessors' Informal Notes

Speech and language pathologist Deborah Vandenberg, who administered a speech and language assessment to Student, and physical education teacher Katie Hairabedian, who administered an adaptive physical education (APE) assessment to Student, testified that they had taken informal notes during their respective assessments. Prior to the hearing in this matter, Student had made a request for his educational records but the District did not produce either Ms. Vandenberg's or Ms. Hairabedian's notes. The District was unaware that the notes existed. At hearing, Student made an oral motion for the production of the notes, which the District opposed. Student argued that the notes were part of his educational records and that he was therefore entitled to a copy of them. The District asserted that the notes were not educational records but rather informal notes that were not meant to be shared with anyone. Both parties submitted briefs arguing their respective positions.

The ALJ found that the notes were not educational records. In so finding, she relied on the definition of pupil records as found in Education Code section 49061, subsection (b), which states:

b) "Pupil record" means any item of information directly related to an identifiable pupil, other than directory information, which is maintained by a school district or required to be maintained by an employee in the performance of his or her duties whether recorded by handwriting, print, tapes, film, microfilm or other means.

"Pupil record" does not include informal notes related to a pupil compiled by a school officer or employee which remain in the sole possession of the maker and are not accessible or revealed to any other person except a substitute. For purposes of this subdivision, "substitute" means a person who performs the duties of the individual who made the notes on a temporary basis, and does not refer to a person who permanently succeeds the maker of the notes in his or her position. (See also 20 U.S.C. § 1232(g)(4)(B), under the Family Educational Rights and Privacy Act (FERPA).⁴)

California Code of Regulations, title 5, section 430(d), further defines pupil records as "information relative to an individual pupil gathered within or without the school system and maintained within the school system, regardless of the physical form in which it is maintained. Essential in this definition is the idea that any information which is maintained for the purpose of second party review is considered a pupil record."

⁴ The Individuals with Disabilities Education Act incorporates FERPA by reference.

There are few cases defining what constitutes a student's records. However, in *Owasso Ind. School Dist. v. Falvo* (2002) 534 U.S. 426, 432-436, 122 S. Ct. 934, 151 L.Ed.2d 896] (hereafter *Falvo*), the United States Supreme Court found that not every record in a school concerning a student is an education record. The court relied in part on the FERPA provision that requires agencies to keep a separate record listing those who request access to a student's education records, stating that "FERPA requires 'a record' of access for each pupil. This single record must be kept 'with the education records.' This suggests Congress contemplated that education records would be kept in one place with a single record of access. By describing a 'school official' and 'his assistants' as the personnel responsible for the custody of the records, FERPA implies that education records are institutional records kept by a single central custodian, such as a registrar . . ." The Supreme Court thus found that individual assignments handled by many student graders in their separate classrooms were not student records. (*Falvo, supra*, 534 U.S. at pp. 434-435.)

In *BRV, Inc. v. Superior Court* (2006) 143 Cal.App.4th 742, the Court of Appeal cited to the Supreme Court's decision in *Falvo* in finding that an investigative report of an incident involving a school superintendent which identified students was not a student record. The Court of Appeal found that pupil records are those institutional records relating to a student, maintained by a school in the normal course of business. The court cited the Supreme Court's finding that FERPA was directed at institutional records maintained in the normal course of business by a single, central custodian of the school, such as registration forms, class schedules, grade transcripts, discipline reports, and the like. (*Id.* at pp. 753-755.)

Most recently, in *S.A. ex rel. L.A. v. Tulare County Office of Education* (N.D.Cal. Sept. 24, 2009) 2009 WL 3126322, aff'd. *S.A. v. Tulare County Office of Education* (N.D. Cal. October 6, 2009) 2009 WL 3296653, the district court found that school district emails concerning or personally identifying a student that had not been placed in his permanent file were not educational records as defined under FERPA. The court, citing to *Falvo*, stated that Congress contemplated that educational records be kept in one place with a single record of access to those records. Since the emails student requested had not been placed in his permanent file, and were therefore not "maintained" by the school district, the emails were not educational records and the school district was therefore not required to produce them under a request for student records under the Individuals with Disabilities Education Act (IDEA).

Here, both Ms. Vandenberg and Ms. Hairabedian took the notes for their own use. Ms. Hairabedian only gave them to Ronnie Plotner when, as discussed below, he was designated her substitute at an IEP meeting she could not attend. Neither assessor intended for anyone else to view the notes, neither disseminated the notes to anyone else, nor placed the notes in any of Student's files maintained by the District. Therefore, based upon the wording of both the federal and state statutes addressing what constitutes a student record, as well as case law interpreting those statutes, the ALJ denied Student's motion for production of Ms. Vandenberg's and Ms. Hairabedian's assessment notes.

Unrecorded Portions of Testimony

On September 23, 2009, during the testimony of Kari Scott, the ALJ realized that she had failed to record approximately 45 minutes of Ms. Scott's testimony. On September 30, 2009, during Mother's testimony, the ALJ realized that the recording equipment was malfunctioning and approximately 35 minutes of Mother's testimony had not recorded. In both instances, the parties agreed to stipulate to the missing testimony rather than having to re-question the witnesses. The ALJ prepared written stipulations as to the missing testimony, which counsel for both parties signed. She marked and admitted into evidence the stipulation regarding Ms. Scott's testimony as Joint Exhibit 1 and the stipulation regarding Mother's testimony as Joint Exhibit 2.

Objections to Exhibits

At the close of the last day of hearing, the ALJ reviewed all exhibits and heard argument on objections from the parties to admission of some of the exhibits. In addition to objecting to several exhibits, which the ALJ either sustained or overruled, the District objected to the admission of Student's Exhibit 68, a revised assessment report by Student expert witness Dr. Robert Patterson. The District also objected to Exhibit 70, which consists of graphs created by Student witness Romalea Manucal, the CARD staff member who supervised Student's program. Ms. Manucal had created her graphs from data and other graphs in the CARD log books containing the data CARD staff compiled on Student's progress in the program. The ALJ admitted Exhibit 68 over the District's objection, but gave the parties leave to brief the issue of whether there was a valid basis for excluding Exhibit 70,⁵ and permitted the District to present legal argument on why Dr. Patterson's revised report should not be admitted. On October 15, 2009, the District withdrew its objections to Student's Exhibits 68 and 70. The ALJ therefore admitted Exhibit 70 into evidence as of that date.

CONTENTIONS OF THE PARTIES

These consolidated cases arise from an IEP process initiated by the District in order to offer an educational program to Student. The District conducted a multidisciplinary assessment of Student in February and March 2009, and convened an IEP meeting on March 11 and 12, 2009, after which it made an offer of placement and services to Student that included placement in an autism specific special day class (SDC) known by the acronym STEPSS ("structured education preparing students for success") at Tony Tobin Elementary School, along with related services in the areas of speech and language (SL), occupational therapy (OT), and applied behavioral analysis (ABA).⁶ Student's parents (Parents) declined

⁵ See, e.g., Evidence Code, section 1521.

⁶ ABA, as an intervention for the treatment of autism, is often associated with specific behavioral methods, such as: discrete trial training (DTT); intensive behavioral intervention; incidental teaching; pivotal response training; and verbal behavior analysis. A discrete trial is a single cycle of a behaviorally-based instruction routine. A

the IEP offer. The District subsequently assessed Student in the areas of assistive technology (AT), adaptive physical education (APE) and re-assessed Student's hearing. The District convened an amendment IEP meeting on June 12, 2009, in order to review the additional assessments. The District contends that all its assessments of Student were appropriate and that its IEP offer of March 12, 2009, as amended on June 12, 2009, met the legal criteria for a free appropriate public education.

Student challenges the propriety of the District's assessments and alleges that the District's IEP offer of March 12, 2009, as amended June 12, 2009, was both procedurally and substantively infirm. Student challenges all aspects of the IEP offer, including the placement and services the District offered to Student, the transition plan proposed by the District to transition Student from his full-time, in-home ABA program to the District STEPSS classroom, and the goals proposed in the IEP. Student further alleges that the District predetermined its placement offer and failed to permit Parents to participate meaningfully in the IEP process. The overriding theme of Student's contentions is that he was not, and is not, ready to attend school. Rather, Student contends that at the time of the IEP meetings and continuing to date, his proper placement is a full-time, in-home ABA program, with related services also provided in-home. Given his allegations that the District committed procedural and substantive violations, Student contends that the District should reimburse his parents for their out-of-pocket costs of his ABA program from March 2009, to date, as well as for the cost of parent-funded related services in the areas of SL and OT. Student also contends that Parents should be reimbursed for the cost of the independent assessments they funded for Student. Finally, Student contends that the District should be ordered to prospectively fund his in-home ABA program, along with in-home related services, at least through the 2009-2010 school year.

FACTUAL FINDINGS

Jurisdiction and Factual Background

1. Student is presently just over six years old. He is eligible for special education and related services under the primary eligibility category of autism, with a secondary

particular trial may be repeated several times in succession, several times a day, over several days (or even longer) until the skill is mastered.

The method and technique of ABA therapy requires that targeted behaviors be reduced to their most basic elements, and that the child is then trained by repetitious drilling in the redirected behaviors desired. Contextual factors, established operations, antecedent stimuli, positive reinforcers, and other consequences are used, based on identified functional relationships with the environment, in order to produce practical behavior change. Negative behaviors are generally ignored. Prompts or other assistance are timed and provided to assure correct responses, and then gradually "faded" to establish independence. The child is then urged to repeat each task until it has been learned. Overall, the treatment focuses primarily on developing language, increasing social behavior, and promoting cooperative play with peers along with independent and appropriate toy play. Concurrently, substantial efforts are directed at decreasing excessive rituals, tantrums and aggressive behavior. (*Student v. Solana Beach, et al.* (2008) OAH Case nos. 2007070255, et al., at fn. 3.)

eligibility under the category of speech and language impaired. The parties do not dispute that Student resided in the District at all times relevant to the instant case, and do not dispute Student's eligibility for special education.

2. Student was first diagnosed as autistic in October 2006, when he was three years old and living in the area of San Jose, California. The diagnosis was reconfirmed in January 2007. In January 2007, Student's parents also took him to be assessed by CARD, which is a certified non-public agency (NPA) that primarily provides in-home ABA services to autistic children. CARD's assessment consisted of observations of Student, interviews with his parents, and a review of his records. CARD found that its observations of Student were consistent with his diagnosis of autism. CARD noted that Student was non-verbal, presented delays in social interaction and communication skills, primarily played alone, and demonstrated inconsistent eye contact. CARD also noted that Student engaged in stereotypical and repetitive patterns of behavior and demonstrated maladaptive behaviors including noncompliance and tantrums. CARD further noted that Student engaged in eloping behavior, which means he tended to try to escape from situations by running away from them. CARD recommended that Student receive a 35-hour per week intensive, in-home ABA program with accompanying supervision and clinics attended by his ABA service providers and their supervisors, in order to address his significant behaviors and delays.

3. Student's parents wanted immediately to enroll him in a CARD program, but there was a waiting list. They briefly enrolled Student in a special day class offered by the local school district, but felt that it was not appropriate, and removed him from school. While on the waiting list for CARD, Student's mother (Mother) hired an autism consultant who taught her ABA methodologies and she began providing ABA therapy to Student. CARD eventually began providing services to Student in approximately late autumn of 2007, just after Student turned four years old. CARD provided the services in the San Jose area until Student and his parents moved to Temecula in January 2008. At the time of the hearing in this case, Student was receiving approximately 35 hours a week of in-home ABA services from CARD, half of which were funded by the Regional Center, and half of which were funded by Parents. As of the time of the hearing, Parents were also self-funding OT and SL services for him. Parents have not agreed to any portion of the District's IEP offer other than assistive technology (AT) through the use of a communication device which the District has provided to Student, along with training to Student and his Parents.

4. Student continues to have severe communication and social deficits stemming from his autism. He is presently fairly non-verbal, using mostly monosyllables, which he has just recently started to string together to form words. In his CARD program, he has been using a communication book with picture icons along with his rudimentary verbalizations to identify his wants and needs. Student continues to have difficulty with eye contact and attention, and does not learn incidentally. Because of Student's inattention and his non-verbal status, some of the District's assessors and some of Parents' independent assessors had difficulty administering standardized tests to him. Student continues to engage in maladaptive behaviors such as throwing tantrums, being noncompliant, and eloping. Student

also continues to engage in visual and verbal stereotypies, which are repetitive or ritualistic movements, postures, or utterances, which interfere with Student's ability to pay attention and/or focus on tasks.

Propriety of the District's Multidisciplinary Assessment (Issues 1, 3(a), and 4)

5. In preparation for Student's annual/triennial IEP review in March 2009, Parents agreed to have the District conduct a multidisciplinary assessment of him. The District assessors conducted the assessments over several days in February and March 2009, when Student was approximately five years, four months old. The District assessment team consisted of special education teacher Julie Gansko, school psychologist Joni Childers, occupational therapist Stephanie Cowell, and speech and language pathologist Deborah Vandenberg.

6. The procedural safeguards of the IDEA provide that under certain conditions a student is entitled to obtain an IEE at public expense. In the present case, the results of the multidisciplinary assessment were discussed at the IEP team meeting held on March 11 and 12, 2009. While Parents did not dispute the validity of the assessments at the IEP meeting, and never formally stated that they disagreed with them or formally requested that the District fund IEES, they filed a due process request in which they stated that the District had failed to assess Student in all areas of suspected disability, that the District assessments did not accurately reflect Student's abilities or needs, and that they were entitled to reimbursement for IEES. In response, the District filed a due process request to establish that its assessments were appropriate.

7. Under California and federal law, assessments must be conducted by individuals who are knowledgeable about a student's disability and competent to perform the assessment. The tests and assessment materials must be validated for the specific purpose for which they are used, and must be selected and administered so as not to be racially, culturally or sexually discriminatory. They must be provided and administered in the student's primary language or other mode of communication unless this is clearly not feasible. The assessors must use a variety of assessment tools including information provided by the parent.

Psychoeducational Assessment

8. The District's psychoeducational assessment of Student was conducted by special education teacher Julie Gansko in conjunction with school psychologist Joni Childers. Ms. Gansko administered the educational portion of the assessment and Ms. Childers administered the psychological portion.

9. Ms. Gansko is well-qualified to teach autistic students and to conduct assessments of them. As discussed more fully below, she has been teaching and assisting autistic students in public schools and in private ABA programs for 13 years. Her experience

as a special education teacher qualifies her to administer educational assessments to autistic students.

10. Ms. Gansko's assessment report was integrated into the District's multidisciplinary assessment team report. The team report indicates that the assessment team reviewed Student's records, including his educational, developmental, and his current behavior based upon observations and information from Mother. Ms. Gansko's educational assessment of Student also consisted of a two observations of him at his in-home CARD program, for a total of approximately two hours, and an attempt to administer the Brigance Inventory of Early Development – II to Student (Brigance).

11. Ms. Gansko had to modify the Brigance in order to obtain results from Student due to his lack of attention and her inability to get Student to respond to the standard format of the test. Since Student could not verbally communicate with her, she used word cards to test him and he responded well. She also used a token economy system, giving Student rewards for maintaining attention, so that she could get the best possible results from him.

12. The Brigance contains various subtests. One of the subtests tests the student's knowledge of body parts. Student was not able to point to requested body parts. Ms. Gansko modified the test to include a visual word cue that was paired with a verbal direction. Student was able to imitate actions to point to seven body parts modeled for him. Ms. Gansko observed that in Student's CARD program he was able to label several body parts by giving his instructor a card with a picture and written name of the body part.

13. With regard to a subtest of the Brigance which addresses the student's ability to identify colors, Student was not able to point to the same color on a second row when shown the color on a top row. However, he was easily able to match a color in a field of six colors when Ms. Gansko adapted the test to a matching, rather than pointing, skill. While Student was unable to identify a color from a field of three word cards, he was able to match a red word card to a red object given to him. Student demonstrated the same inability to identify shapes by pointing to them, but was able to quickly match shapes in the same way he could do colors when Ms. Gansko modified the test to assess Student's ability to match the shapes. Although Ms. Gansko had observed that Student could label shapes using word cards in his CARD program, he was not able to do so during her assessment of him. Student was also unable to demonstrate the ability to distinguish between "big" and "little." He also could not identify the correct category of an item in a field of 12 cards (such as pointing to an animal among the 12 pictures) but was able to do so when Ms. Gansko modified the field to three cards.

14. Student had similar difficulties pointing to different shapes or letters, but had the same success in matching shapes and letters as he had with colors. While he was unable to demonstrate any reading skills, Student was able to match sight words to the same word in a field of three. He also was unable to match a number with the word for the number, but was able to match the numbers themselves. Student was likewise unable to select correct

coins from a group of three when directed to do so, but was able to correctly match coin to coin.

15. Ms. Gansko observed that Student participated nicely throughout her assessment of him, and was able to stay on task, with prompts and reinforcement, for seven to 10 minutes at a time before needing to take a break. Where Student knew the correct response to a direction, he demonstrated a longer attention span than when he did not. The results of Ms. Gansko's assessment indicated that Student had a consistent strength in matching skills, categorization, and visual discrimination. He responded best when a visual cue was provided with auditory direction, using word cards to indicate his responses due to his difficulties with speech articulation.

16. Ms. Gansko appropriately modified the Brigance in order to obtain as close an understanding of Student as she could, given Student's limitations, since she was unable to administer the Brigance in its standardized form. In her professional opinion, it was not necessary to attempt other testing with Student since she believed that he would be unable to complete higher level tasks that required more advanced skills if he could not perform the lower level tasks required by the Brigance.

17. Ms. Childers's assessment consisted of a review of Student's records, observations of him, interviews with Parents, and administration of various tests.

18. The first test Ms. Childers administered to Student was the Psychoeducational Profile, Third Edition (PEP-3). This test includes non-verbal items, the administration of the test is flexible and contains untimed tasks, has language items that are separated from other function areas, and has several developmental levels that make it appropriate for children with developmental disabilities. The performance portion of the PEP-3 uses direct testing and observation of the student and is composed of 10 subtests, six of which measure developmental abilities and four of which measure maladaptive behaviors. On the six subtests measuring developmental abilities, Student's percentile scores ranged from a low of the second percentile in the area of expressive language, which indicated a developmental age of less than 12 months on that pretest to a high of the 27th percentile in the area of visual-motor imitation, which indicated a developmental age of 30 months. On the four subtests measuring maladaptive behaviors, Student's percentile scores ranged from a low of the third percentile in the area of characteristic verbal behaviors to a high of the 50th percentile in characteristic motor behaviors. The test results indicated that Student was at a severe adaptive level in all but the areas of characteristic motor behaviors and visual-motor imitation. The test results indicated that Student continued to have severe deficits in his cognitive abilities as well as in the area of communication and continued to exhibit behaviors typically associated with children with autism.

19. The test entitled Scales of Independent Behavior-Revised (SIB-R) measures the levels of a child's adaptive development. The child's measure of broad independence is determined by averaging four areas of adaptive functioning: motor skills, social interaction and communication skills, personal living skills, and community living skills. Overall, the

results of the SIB-R indicated that Student's functional independence was in the range of limited to very limited, with his performance comparable to that of a child aged one year, 10 months old. Student's only strengths noted on the SIB-R were in the area of gross motor skills, where he performed at an age equivalent of four years, eight months old, only eight months behind his actual age at the time of the testing.

20. As part of her assessment, Ms. Childers also administered the Vineland Social-Emotional Early Childhood Scales (Vineland). It is an individually administered assessment of usual social and emotional functioning for children from birth to five years, 11 months, and therefore was appropriately used to assess Student. The Vineland uses rating scales which, in this case, were completed by Mother. It provides a social-emotional composite that is composed of three scales: an interpersonal relationships scale, a play and leisure time scale, and a coping skills scale. On all three scales, Student's scores were very low when compared to other children his age. With regard to interpersonal relationships, Student showed low skills in beginning responsiveness, expressing emotions, responding to familiar people. In the area of play and leisure, Student's scores indicated that he would benefit from exercises for reinforcement in playing with toys, interest in his environment, and in sharing and cooperating. Student's scores in coping skills were significantly low as well. Overall, Student's composite score on the Vineland was in a percentile rank of less than 0.1.

21. Ms. Childers also had Mother complete the rating scales of the Social Skills Rating System (SSRS). The SSRS is a norm-referenced rating system for assessing the social, academic and behavioral competencies of children from preschool through secondary school. The test assists professionals in screening and classifying children suspected of having significant social problems and aids in the development of appropriate interventions for such children. It is designed to evaluate the frequency and the importance of social skills in the areas of cooperation, assertion, responsibility and self-control. The parent ratings measure social skills and problem behaviors. According to Mother's ratings of Student's social skills, Student had fewer social skills when measured against other children his age, displayed a heightened level of problem behaviors, and an elevated level of hyperactivity, although externalizing and internalizing behaviors fell in the average range based on Mother's scores. Overall, Student's social skills ratings on the SSRS converted to a score of less than the second percentile, meaning that Student displayed significant delays for social skills.

22. Ms. Childers assessed Student's attention and emotional development through observations of Student, interviews with Parents, and by administering the Behavior Assessment System for Children-2 (BASC-2). The BASC-2 is a norm-referenced, standardized behavioral assessment system designed to diagnose and classify a variety of emotional and behavioral disorders in children and to aid in the design of treatment plans for them. It is administered by giving rating scales to respondents that may include a child's teacher and parents and, sometimes, the child himself. The results are rated within the ranges of categories. If an area is rated as being "clinically significant" it suggests that the child has a high level of maladjustment in that area. A rating of "at risk" suggests either a significant problem that may not be severe enough to require formal treatment, or a potential of

developing a problem in the area that may need careful monitoring. Ms. Childers had Mother complete the parent rating scale and Romalea Manucal, Student's primary CARD supervisor who had also provided services to Student, complete the teacher rating scale. The areas of focus of the BASC-2 were externalizing problems, internalizing problems, behavioral symptoms index, adaptive skills, and functional communication on the parent scales. The scales completed by Ms. Manucal measured all but functional communication.

23. The parent ratings scale completed by Mother indicated that Student's composite score in externalizing problems was in the at-risk range, and that his composite score in internalizing problems, in the behavioral symptoms index, in adaptive skills, and in functional communication were all in the clinically significant range. The ratings scales completed by Ms. Manucal indicated that Student was in the at-risk range in the areas of externalizing problems, internalizing problems, and in the behavioral symptoms index. Ms. Manucal's ratings also indicated that Student measured in the clinically significant range for adaptive skills.

Occupational Therapy Assessment

24. Stephanie Cowell, a District occupational therapist, administered the occupational therapy portion of the District's multidisciplinary assessment to Student. Ms. Cowell has a Bachelor's degree in occupational therapy from the University of Southern California. She has been an occupational therapist for over 13 years, the last two and a half of which have been as a school-based occupational therapist for the District. She has administered assessments and provided OT to over 100 autistic children during her time with the District. She remains current in OT practices by attending outside seminars necessary to maintain her professional license.

25. Ms. Cowell conducted her assessment of Student having in mind the purpose of OT in the school setting: whether Student required OT in order to benefit educationally from his instructional program, based upon the California guidelines for occupational and physical therapy in the schools. Her assessment included reviewing Student's records, including his prior assessments and IEPs. Her review included an OT assessment report for Student from January of 2008. Parents had also obtained an IEE in the area of OT from occupational therapist Anne Fleck in December 2008. However, Ms. Cowell did not see that report until the day she testified in this case. Parents never discussed the Fleck assessment with her or even informed her they had obtained an updated OT IEE and the report was not part of Student's records when she reviewed his file as part of her assessment of him in February 2009.

26. Ms. Cowell assessed Student in his home in his ABA work room. There were minimal distractions during the assessment. Student easily transitioned from the family room to the work room for the assessment. During the assessment, Student was cooperative but easily distracted by Ms. Cowell's supplies and required verbal and physical prompts to return to tasks. Student's attention span during the assessment ranged from 30 seconds to about two minutes. He attempted most tasks Ms. Cowell presented to him with one verbal

prompt paired with a gestural prompt of two taps on the work table where the activity was placed.

27. Ms. Cowell first assessed Student using a method called “specific task completion,” which is not a standardized test. It consists of having the student complete a series of tasks during which the assessor makes observations of how the student’s body is functioning during completion of the tasks, how much difficulty the student has completing the tasks, and what, if any, fine motor skill deficits the assessor notes. During her informal observation of Student while he was engaged in specific task completion, Ms. Cowell noted that he appeared to have adequate muscle tone and bilateral gripping strength and had normal range of motion. Student was able to spontaneously cross the midline of his body during both gross motor and fine motor activities. He was able to string beads without a problem; he independently initiated the task by opening the plastic, removing the beads and the string, and stringing them without prompting from Ms. Cowell. She noted that Student readily used both hands during functional activities and, although impulsive, played appropriately with items.

28. Part of the specific task completion included assessing Student’s fine motor skills. While he was able to grasp writing tools, pick up small objects, and use scissors, some of Student’s scissor skills when attempting to follow a model by, for example, cutting curved lines, were not up to age expectations. Additionally, Student was unable to copy any of the pre-writing lines and shapes although he could trace most of the shapes given to him. As both Ms. Grasko and Ms. Childers had found during their assessments of Student, he was easily able to correctly match shapes and colors.

29. Ms. Cowell also gave Student tasks to complete to evaluate his handwriting skills. Student required physical assistance to lower his hand on the writing instrument. His posture when attempting to write was not proper and he did not hold a pencil or crayon correctly. He generally required assistance to stabilize the paper he was writing on so that it would not move around. Student displayed a preference for tracing items and a dislike for being asked to copy them. He was able to trace upper case letters of the alphabet with about 81 percent accuracy, but only had about 31 percent accuracy when tracing lower case letters. Although Student spontaneously attempted to copy the letters of his name from a model, his letter size was not uniform and some letters were not legible. After the first attempt to copy his name, Student would not attempt it again.

30. Ms. Cowell attempted to administer a standardized assessment called the Wide Range Assessment of Visual Motor Abilities (WRAVMA) to Student but was unable to do so because he was not yet able to follow the standardized directions.

31. In order to assess Student in the area of sensory processing, Ms. Cowell used the Sensory Processing Measures, a standardized test which, like the BASC-2, uses rating scales to identify the areas of sensory processing in which a child may have deficits or specific needs. The rating scales yield eight norm-referenced standard scores in the areas of social participation, vision, hearing, touch, body awareness (also called proprioception),

balance and motion (vestibular), planning and ideas (praxis), and total sensory systems, which includes taste and smell. Sensory processing refers to the ability to take in information from the environment and from your own body, to screen out what is important to organize yourself, and to act on the environment. Ms. Cowell had Mother fill out the rating scales for this assessment.

32. The results of the rating scales in the area of social participation indicated that Student never played cooperatively with friends, although he occasionally would play alongside them without disruption. Mother's ratings also indicated that Student behaved appropriately with family members, maintaining eye contact with them, keeping appropriate distances, and joining in family activities. Her scores indicated that Student had a definite dysfunction in this area.

33. The rating scales in the area of vision were designed to examine a child's responsiveness to visual stimulation, how much the child seeks visual input, and problems with perception and ocular-motor function (i.e., problems with the student's eyes). This portion of the assessment indicated that Student frequently enjoyed watching objects spin or move or looking at objects from the corner of his eyes, more than other children his age. Mother also indicated that Student was sometimes bothered by light and had difficulty recognizing how objects are similar or different based upon their color, size or shape. Mother also indicated that Student sometimes walked into people or objects as if they were not there. Her scores indicated Student had some problems in this area.

34. The hearing scales examined Student's responsiveness to auditory input. Mother indicated Student frequently seemed bothered by household sounds and was easily distracted by background noises. She noted he responded to loud noises by crying, running away, or putting his hands over his ears, and at times seemed disturbed by, intensely interested in, or frightened by sounds not usually noticed by other people. Mother's scores indicated that Student had some problems in this area.

35. The scales directed to the area of touch measured Student's responsiveness to tactile input, where over-responsiveness represented tactile defensiveness and under-responsiveness represented seeking behaviors such as seeking sensations other people would find painful. Mother indicated Student had a high tolerance for pain and enjoyed sensations that would normally be considered painful, and that he preferred touching things to being touched himself. Mother noted that Student occasionally became distressed by tactile things such as the feel of new clothing or having his nails cut, and that he occasionally avoided touching things that were "messy," such as mud. Her scores indicated that Student had a definite dysfunction in this area.

36. Body awareness or proprioception refers to the ability to sense the position in space of your body parts, and the seeking behaviors in which a child seeks intense inputs into his muscles and joints, as well as the disordered perception in which the child is not able to judge and control the forcefulness, direction, or speed of his motions. The results of Mother's ratings in this area indicated that Student frequently sought proprioceptive input,

engaging in motions such as jumping, pushing, pulling, dragging, and lifting, and that he occasionally grasped things forcefully, exerted too much pressure on items, and bumped or pushed other children. Mother's scores on this portion of the rating scales indicated Student had some problems in this area.

37. The balance and motion scales examined Student's ability to maintain his balance and upright postures by sensing his orientation with respect to gravity, as well as examined when Student sought out vestibular input. Student scored in the "typical" range in this area.

38. Planning and ideas (or "praxis") refers to a child's ability to conceptualize, plan, and organize movements in order to complete unfamiliar motor tasks. In her assessment report, Ms. Cowell explained that praxis is not a sensory system itself but rather is a higher level cognitive function that depends on the integration of multiple sensory systems in order to function efficiently. Being unable to complete tasks with multiple steps or having trouble coming up with ideas for new activities, and therefore tending to play the same activity over and over again are examples of deficit areas in this category. Mother's rating scales indicated Student had some problems in this area.

39. Student's total sensory systems score was based on a composite of vision, hearing, touch, proprioception, and vestibular, plus additional scoring in the areas of taste and smell. The aggregate of the scores in these areas indicated that overall Student had some problems when looking at all areas together.

40. Ms. Cowell's informal observation of Student also noted that he sometimes sought sensory input from objects such as crayons by brushing them against his cheek before using them, but that this did not interfere with the activity. She also noted that Student was frequently in motion and preferred sitting on the floor to sitting in a chair.

41. Based upon all assessment tools she employed in assessing Student, Ms. Cowell recommended that Student would benefit from OT to address his fine motor concerns. She also recommended that Student would benefit from a sensory diet developed in collaboration with his teacher to address his sensory processing needs. A sensory diet is a list of activities developed for a child that are scheduled routinely through his school day to address his sensory needs. Ms. Cowell believed that the sensory diet would help address Student's inattention by providing him with the sensory stimulation he seemed to need.

Speech and Language Assessment

42. District speech and language pathologist (SLP) Deborah Vandenberg administered the speech and language (SL) portion of the multidisciplinary assessment to Student. She has a Master of Science degree in speech-language pathology and is licensed as an SLP in California. Ms. Vandenberg has worked as an SLP since 1984; she has worked for the District for just over two years. During her career, she has assessed and provided services to autistic children both in the public and private sector. She remains current in her

field by attending educational seminars. In order to familiarize herself with Student, and as part of her assessment process, Ms. Vandenberg reviewed Student's records, including previous assessments of him, interviewed Mother with regard to how Student was communicating in the home, spoke with Student's CARD representatives, observed him at home and in her office during her assessment, and administered assessment tests to him. Ms. Vandenberg's total assessment took three to four hours over several short sessions. She changed tasks frequently while assessing Student, gave him breaks, let him play, and then brought him back to structured tasks. She observed that Student would look at pictured objects and actions but that he preferred real objects. He could sustain attention while playing with one object but she could only achieve attention when engaging Student in non-preferred tasks by using a token economy system whereby he could earn the right to play with a desired toy by working on the task required of him.

43. Ms. Vandenberg attempted to assess Student using the Preschool Language Scale-4 (PLS-4), which is a standardized, test normed on children ages zero to just under seven years old. The test presents items in picture form as well as through tangible three dimensional objects. It is composed of two subscales: auditory comprehension and expressive communication. The test assesses how well a child can communicate with others in a linguistic developmental sequence. It is a test Ms. Vandenberg had used 40 or 50 times before attempting to assess Student with it. She selected the PLS-4 because materials used in the test were visually engaging and included both pictures and real objects. However, when she attempted to assess Student, she was unable to do so without modifying the test protocols. Had she just done the standardized format, Ms. Vandenberg would not have been able to obtain any results that would properly indicate Student's present levels or which could be used to help develop goals for him. Modifying the PLS-4 helped her determine at what point or at what level Student could communicate and comprehend. Her scores were reported as age equivalents, but Ms. Vandenberg noted in her report that the results had to be viewed with some caution and in conjunction with the non-standardized testing she administered in order to properly describe Student's day-to-day performance in communication.

44. Ms. Vandenberg modified the PLS-4 by repeating questions posed to Student, by reducing the amount of tasks required or reducing the number of items Student had to select, and by using the token economy system to reward Student for attempting tasks. The auditory comprehension component of the test tested how well Student could understand single words and requests. Student was able to follow some simple verbal commands, such as "sit down" and "clean up," but not other more advanced commands such as "give me the ball." Overall, after having modified the test, Ms. Vandenberg's score indicated that Student was performing at an age equivalent of one year, three months in auditory comprehension.

45. On the expressive communication subtest of the PLS-4, Student's age equivalent score was one year, one month. Student babbled a variety of consonant patterns spontaneously throughout the test but had difficulty verbally imitating words or specific consonants. He spontaneously imitated some words but did not verbalize them alone

consistently. Student often would lead others to objects he wanted and would push items away that he did not wish to use.

46. In order to obtain a more complete picture of Student, Ms. Vandenberg also used a non-standardized informal assessment called the Functional Communication Profile-Revised (FCP-R) which is a rating scale designed to profile how a person conducts him or herself in the environment. She utilized the test to glean more information as to Student's expressive and receptive language skills, his attention skills, his speech, socialization, and functional communication.

47. The results Ms. Vandenberg obtained from Student from the FCP-R with regard to his attention skills indicated that Student preferred activities in which he could manipulate real objects, he could sustain a play activity beyond 10 minutes but that he was distracted by objects he could reach. His compliance and attention during non-preferred activities increase when rewards were offered. Using a token reward system, Student's receptive communication skills increased. He was also able to imitate gestures and actions, such as "clap hands," but would not perform the action if directed to do so with just a verbal command. With regard to expressive communication, Ms. Vandenberg noted that Student generally expressed his wants through the use of a communication book that, at the time of her assessment, contained about 40 pictures of real objects and food items.

48. Ms. Vandenberg also observed that Student was able to communicate a variety of pragmatic language intents. He was able to request toys, he could respond yes or no in some contexts, and protested his dislike for activities. Student could also be prompted to take turns and for social exchanges.

49. In summarizing her assessment results, Ms. Vandenberg found that Student had significant delays in both receptive and expressive language. She noted that he demonstrated strengths in play skills and in expressing his wants with his communication book. Her findings supported a diagnosis of Student of autism with verbal apraxia.⁷

50. The four assessors who comprised the District's multidisciplinary assessment team jointly found that Student still qualified for special education. They jointly summarized their assessment findings and recommendations for the type of educational program and related services that they felt Student required in order to benefit from his education. The preponderance of the evidence supports the District's contention that its multidisciplinary assessment met the requirements of the education statutes and regulations. The tests and assessment materials used in the assessment were selected and administered so as not to be racially, culturally or sexually discriminatory. They were validated for the specific purpose for which the District assessors used them, and were administered in accordance with the test

⁷ Verbal apraxia, also known as dyspraxia, is a speech disorder in which a person has trouble saying what he or she wants to say correctly and consistently. It is not due to weakness or paralysis of the speech muscles. (www.nidcd.nih.gov)

publishers' instructions unless the assessor needed to modify the test due to Student's inability to respond to standardized protocols. The tests and other assessment materials included those tailored to assess specific areas of educational need for Student. No single procedure was used to determine Student's eligibility for services or determine appropriate educational programming. Student's Parents, Student's independent assessors, and his CARD providers did not contest the District's assessment results during Student's IEP meetings.

51. The District's multidisciplinary assessment results were comparable to those obtained by Student's private assessors. For example, Dr. Robert Patterson, a neuropsychologist who conducted a psychoeducational IEE of Student in May and August 2009, found that Student's cognition functioning based on the results of a test entitled Southern California Ordinal Scales of Development-Cognition (SCOCD), was in the age equivalent range of 18 to 24 months old. Dr. Patterson also administered the Stanford Binet Intelligence Scales-Fifth Edition, to Student. Student's score was less than the first percentile, indicating an age equivalent of two years, one month. Dr. Patterson also administered a test using the Piagetian Type Tasks (Matching), where Student was required to match colors, forms, numbers, clothing, and people. Student showed relative strengths on this test, scoring an age equivalent of four years old on four of six subsets. All of Dr. Patterson's educational results were comparable to the results obtained by Ms. Gansko.

52. Dr. Patterson also conducted psychological and adaptive testing of Student. His scores in all areas were comparable to those obtained by Ms. Childers. For example, on the SCOCD-Gross Motor, Dr. Patterson found Student to be at a functional level of 18 to 24 months. This was comparable to the gross motor functional score obtained by Ms. Childers for Student on the PEP-3, which was 24 months old. A comparison of Dr. Patterson's testing with that of Ms. Childers's does not indicate any significant differences in findings with regard to Student's abilities or needs.

53. Likewise, a comparison of the testing done by District occupational therapist Stephanie Cowell with that done by Anne Fleck, an occupational therapist who administered an OT IEE to Student in December 2008, indicates that both received comparable results and made comparable findings as to Student's abilities and needs. For example, both Ms. Cowell and Ms. Fleck administered the Sensory Processing Measure (SPM) to Student by having Mother complete the scales. Although Mother's scales indicated that Student demonstrated "definite dysfunction" in the areas of social participation and touch on the scales she completed for Ms. Cowell about two months after she completed the scales for Ms. Fleck,⁸ rather than "some problems" on the scales she completed for Ms. Fleck, overall, Student's score on the SPM was "some problems" on both administrations of the test. Moreover, both

⁸ Parents did not inform the District that it had obtained an IEE in the area of OT prior to the District's OT assessment. Ms. Cowell was therefore unaware that the SPM had been administered to Student a mere two months before she assessed him using the same instrument.

OT assessments indicated results showing that Student had significant sensory needs. There is no significant difference between the two OT tests.

54. SLP Joanne Abrassart administered an SL IEE to Student on January 6, 2009, about two months before District SLP Deborah Vandenberg assessed Student. Ms. Abrassart's results were comparable to those obtained by Ms. Vandenberg. Both found that Student's expressive and receptive language skills were extremely low, with age equivalents at one year or less. Both assessors found that Student required speech and language intervention to address receptive and expressive language deficits and apraxia.

55. The District has therefore met its burden of proof of demonstrating that its assessments were appropriate. Conversely, Student has failed to meet his burden of persuasion that the District's multidisciplinary assessment did not accurately reflect his abilities or his needs.

56. It is also unclear why Student contests the appropriateness of the multidisciplinary assessment. Counsel for Student waived making an opening statement at hearing and Student's closing brief does not address the multidisciplinary assessment in more than a cursory manner. However, it appeared from questioning of witnesses at hearing that Student believes the assessments are not valid to the extent that an assessor did not use standardized tests with Student or to the extent that the assessor modified standardized tests and did not follow the specific directions from the test publishers. Specifically, special education teacher Ms. Gansko modified the Brigance, occupational therapist Ms. Cowell was unable to administer the WRAVMA to Student, and Ms. Vandenberg modified the PLS-4. During questioning at hearing Student appeared to posit that because Dr. Patterson, his expert independent neuropsychology expert, was able to administer standardized tests to him, any assessment that did not include unmodified standardized tests is invalid.

57. The evidence, however, supports the District's position that Student's autism so affects his ability to focus, pay attention, and communicate, that it was difficult to administer standardized tests to him. When Student could not follow the directions of the test, Ms. Cowell ceased trying to administer the WRAVMA to him. Likewise, Student's capabilities on the Brigance and the PLS-4 were so low that neither Ms. Gansko nor Ms. Vandenberg would have been able to obtain any results from him had they not modified the tests in order to obtain some results, although both assessors indicated that their results had to be viewed with caution and had to be viewed in conjunction with the other assessment tools they utilized.

58. Student's apparent reliance on the fact that standardized tests were not completed or were modified to support his argument that they should be invalidated is further undermined by the fact that some of his own independent assessors were unable to complete standardized assessments of him. For example, Dr. Robin Morris, who is a clinical psychologist, first assessed Student in approximately April and May 2008, when Student was four years, seven months old. She administered a battery of psychoeducational assessments to Student at that time. Dr. Morris attempted to administer the Bracken School Readiness

Assessment-Third Edition (BSRA-3) to Student. The BSRA-3 is used to measure academic readiness by evaluating a child's understanding of 85 concepts in the categories of colors, letters, numbers/counting, sizes/comparisons, and shapes. Dr. Morris attempted to administer each subtest to Student but had to stop due to his non-compliance and his lack of understanding of receptive directions.

59. Likewise, SLP Joanne Abrassart who administered an independent assessment to Student and provided SL services to him, deviated from some testing protocols during her assessment. For example, she administered to Student the Rosetti Infant-Toddler Language Scale, which measures receptive and expressive language skills in addition to various adaptive behaviors even though it is designed for children aged birth through three years old. Student was over five years old at the time. Ms. Abrassart utilized the test because in her professional opinion it was appropriate for Student given her knowledge of his developmental and speech delays. Since she was not able to obtain results from Student beyond a level of a 12 month old child, she did not continue with the test although the protocols normally required her to do so. Ms. Abrassart, like the District's assessors, administered as much of the testing as she could and stopped when she could not receive more results. As she stated at hearing, when an assessor is dealing with a child who has such significant delays, she attempts to obtain whatever results she can. The assessor tests to the extent she is able, seeks more information from observation, informal testing, and discussion with a child's parents and others who work with the child, and combines all information to get as accurate a picture of the child as possible. It does not mean that her other results are inaccurate.

60. There is no suggestion by Student that either Dr. Morris's assessment or Ms. Abrassart's assessment is invalid because, in their professional opinions, they either had to modify tests, cease attempting to administer them, or utilize tests designed for younger children. The same is true for the District's assessments: to the extent that the District assessors used their professional judgment to modify tests or to cease administering them, it was appropriate to do so and did not invalidate the assessments. The District's multidisciplinary assessment was appropriate, accurately reflected Student's abilities, and accurately identified his needs. Student's parents are therefore not entitled to reimbursement for independent psychoeducational, OT, or SL assessments they self-funded.

Other Contested Assessments

61. Student also contends that the District failed to assess him in all areas of suspected disability because it did not refer Student for a specific hearing or vision assessment until after the June 12, 2009 IEP meeting. Student contends that the vision and hearing screenings conducted by school nurse Karen Dillon, who is a registered nurse trained and qualified to conduct both screenings, were inadequate to address his needs. Student's contentions are not supported by the evidence.

62. Student offers the independent assessment he obtained from Dr. Beth Ballenger, who is a licensed optometrist, as support for his contention that the District should

have referred him for a vision screening. Dr. Ballenger assessed Student on April 14, 2009, and found that Student required special yoked prism glasses to allow him to focus better on tasks. Dr. Ballenger also found that Student required a program of vision therapy to remedy deficits Student appeared to have with regard to poor visual contact and discrimination.

63. However, there is no evidence that the District was aware or should have been aware that Student had any vision needs that were interfering with his ability to access his education. Ms. Dillon conducted a vision screening of Student in February 2009. She used a symbol chart to determine what his vision was. Her results indicated that Student's vision was 20-30, signifying that he was slightly farsighted. Ms. Dillon did not find this unusual and found no reason to refer Student for more vision screening or a vision assessment since children of Student's age are usually farsighted. Dr. Ballenger concurred that Student's level of farsightedness was normal for a child of his age. Additionally, none of Student's service providers or his Parents ever indicated to the District that they felt Student had a vision problem that was interfering with or affecting his education. Neither Kari Scott nor Romalea Manucal, the two CARD supervisors who have provided services to Student and who testified at hearing, believe that Student's attention issues and lack of focus on tasks stem from problems with his vision. They, like the District, deem Student's inattention to be the result of his autism. They did not inform the District or Parents at any time that they felt that Student's vision needed to be assessed.

64. At Student's IEP meeting of June 12, 2009, the IEP team, including Parents, discussed whether Ms. Dillon's vision screening was sufficient and whether Student needed further assessing. Although Dr. Ballenger had examined Student in April 2009, and had memorialized her findings in a written report, Parents chose not to inform the District of the report at the IEP meeting or to share the report with the District at that time. There was no further information for the District to review and no concrete reason at the time to believe that Student had a suspected area of need with regard to his vision. The District's failure to refer Student for a vision assessment therefore did not deny Student a FAPE.⁹

65. Student also contends that the District should have referred him for an audiology assessment by a trained audiologist.

66. As part of her health screening of Student, Ms. Dillon also screened his hearing. She attempted to do a formal hearing test, but Student refused to cooperate. He would not keep on his head the earphones that were necessary for the testing process, even when Mother tried to intervene. Ms. Dillon therefore could only do a functional hearing test. She discussed Student's hearing with Mother, who indicated that Student was sensitive to loud noises. Both she and Mother had difficulty getting Student to follow instructions and Student sometimes did not show that he heard Nurse Dillon when she spoke to him during

⁹ However, in order to address Parents' concerns and as a cautionary move, the District decided to refer Student for a vision assessment in late June 2009. As of the date of the hearing, the assessment had not been completed.

the testing process, but he did sometimes look up when his name was called and sometimes responded to verbal instructions.

67. The results of her screening, together with Mother's indication that Student responded to loud noises, and her review of Student's school records which indicated that he had passed prior hearing screenings, indicated to Ms. Dillon that Student had functional hearing. Nevertheless, because she was unable to do more than the functional hearing test, Ms. Dillon determined that she would attempt a second screening of Student's hearing. The second screening was delayed because Mother became ill and had to reschedule appointments. Ms. Dillon attempted her second screening of Student on May 20, 2009, but again was unable to test Student because he would not permit her to place the headphones on him. She therefore recommended at the June 12, 2009 IEP that the District refer Student to an audiologist. Her recommendation was adopted by Student's IEP team and a referral was made at that time.

68. As audiologist Dwayne Lizar persuasively testified at hearing, there was no reason for Ms. Dillon to refer Student for an audiological evaluation until she had at least attempted a second hearing test to obtain results from something other than a functional hearing test. There was nothing in Student's medical history, nothing from Mother or Student's ABA providers, and nothing in her observation of Student that indicated a hearing problem. Ms. Dillon appropriately attempted a second hearing screening of Student before recommending that he be assessed by an audiologist.

69. The District was unaware at the time of the June 12 IEP meeting that Parents already had Student assessed by audiologist Dr. Maria Abramson, who has a doctorate in audiology. Parents did not inform them of the fact and did not provide a copy of Dr. Abramson's report to any District IEP team members. However, Dr. Abramson also found Student's hearing to be within normal range, at least in the right ear, which appears to be the only ear she tested. Therefore, even assuming that the District should have referred Student for an audiology assessment after Ms. Dillon's first screening was attempted, Student has not shown that he has lost any educational benefit by the failure to do so because there is no evidence that his hearing is impaired. The District has therefore met its burden of persuasion that it had no reason to suspect that Student might have had a hearing deficit that needed to be addressed through an audiology referral earlier than June 2009, or through the IEP process.

Did the District's IEPs of March 12, 2009, and June 12, 2009, Offer Student a FAPE? (Issues 2, 3(a) – 3(i), 4, and 5)

70. There is no dispute among the parties that Student is autistic and that he suffers from severe deficits because of that. Nor is there really a dispute about the extent of Student's autism and that he requires on-going ABA services, speech and language services, occupational therapy, and assistive technology to assist him with communication. Rather, the disagreement between the parties is where Student's educational program, including designated instructional services (also known as related services) should be delivered and

how many minutes per week of those services Student requires in order to receive a FAPE. The only related service Student contends he requires which the District did not offer is adaptive physical education.

Procedural Aspects of FAPE

71. A school district must comply both procedurally and substantively with the IDEA. While not every procedural flaw constitutes a denial of FAPE, procedural flaws that inhibit a student's right to receive a FAPE, significantly prevent a parent's opportunity to participate in the IEP process, or cause a deprivation of educational benefit to a student, will constitute a substantive denial of FAPE. The IDEA provides that an IEP must contain a statement of the current levels of educational performance, measurable annual goals, and a means to measure progress towards the goals. Additionally, the IEP team must take into account the results of the student's most recent assessments in formulating the IEP in order to determine the student's present levels of performance and the student's unique needs, and to set appropriate goals. The failure of the IEP to include the required elements is a procedural violation of the IDEA. An IEP that is not properly formulated may also constitute a denial of a FAPE if the IEP thereby fails to address the student's unique needs, or is not reasonably calculated to provide the student with some educational benefit.

72. The District assessed Student in all areas of suspected disability between February and March 2009. As discussed above, the District administered occupational therapy, speech and language, psychoeducational, and health assessments to Student. Once the assessments were completed, the District convened an IEP meeting on March 11, 2009, in order for Student's IEP team to develop an educational plan based upon the District's assessments, the IIEES of which the District was aware, input from the assessors, from Parents, and from Student's CARD providers. The meeting was continued on March 12, 2009, after which the District made its complete IEP offer to Student. The IEP team reconvened on June 12, 2009, in order to review the assessments in the areas of AT, APE, and hearing which the District had administered to Student subsequent to the March 12 IEP meeting. The June 12 IEP meeting was an addendum meeting. After reviewing the assessments, the District modified its March 12 IEP offer by adding AT services for Student pursuant to the recommendations of Cynthia Cottier, the independent AT assessor with whom the District had contracted. As stated above, the District also agreed to refer Student for an assessment by an audiologist at that time. Based upon its assessment, and as discussed more fully below, the District did not believe that Student required APE services at that time. In all other aspects, the District's offer of FAPE remained the same as that in the March 12 IEP.

73. Student does not contend that Parents did not receive adequate notice of the IEP meetings, that the District failed to provide Parents with copies of their procedural safeguards, or that all required members of Student's IEP team were present at each meeting. In any case, the documentary and testimonial evidence demonstrates that the District met its obligations in each of those regards.

74. However, Student does contend that the District committed several procedural violations during the IEP process. He contends that the District predetermined its offer of placement, failed to consider the IEES obtained by Parents, failed to afford Parents meaningful participation in the IEP process, refused at the IEP meetings to consider the opinions of Student's experts in the areas of speech and language and ABA, and formulated goals that were inappropriate, not measurable, and vague. As will be elaborated below, the evidence supports a finding that the District did not commit the procedural violations alleged by Student.

Did the District Violate Parents' Procedural Rights by Predetermining its IEP Offer, Failing to Allow Parents to Participate Meaningfully in the IEP Process, Failing to Consider Student's IEES, or Failing to Consider the Opinions of Student's Experts? (Issues 2, 3(b), 3(c), 3(d), and 3(e))

75. Student contends that the District committed several procedural violations in connection with the March 2009 IEP meetings, as amended by the June 12, 2009 IEP meeting. A procedural violation occurs when a district violates one or more of the procedures set out in federal or state law for holding IEP meetings and developing IEPs. Parents are an integral part of the IEP team, and their opinions and concerns must be addressed and considered by the IEP team. If a district predetermines the offer of placement it prevents the student's parents from participating in the IEP process. A school district must also consider, but not adopt, the recommendations of a student's private assessors or experts.

76. The March 11 and 12 IEP team meetings took place over about three hours each day. The District representative at the meeting was Melanie Hertig, who is a special education coordinator for the District. Two District autism coordinators attended the meeting: Joseph Trance, whose responsibilities include overseeing the autism programs at Toby Tobin Elementary School, which is Student's home school, and Blake Burnham, who oversees the program at other District schools. Also attending were general education teacher Beth Ellevold, school nurse Karen Dillon, school psychologist Joni Childers, occupational therapist Stephanie Cowell, SLP Deborah Vandenberg, and special education teacher Julie Thompson. Both Mother and Father attended the meetings. Also attending were Romalea Manucal and Kari Scott, two CARD supervisors who had provided services to Student, and Student's private SL provider Joanne Abrassart who was only able to attend the first day of the meeting. Finally, both Ralph Lewis, Student's attorney, and Peter Sansom, the District's attorney, attended both days of the meeting.

77. Although she was the District's designated representative at the March IEP meetings, Ms. Hertig did not meet with any other District staff members prior to the meetings. The draft IEP document was prepared by Ms. Gansko and Ms. Childers with input from SLP Deborah Vandenberg and autism coordinators Trance and Burnham who had both observed Student in his home program. CARD had forwarded proposed goals to the District in late February 2009 and the District staff that had assessed Student reviewed them and incorporated those goals into the ones they proposed in the draft IEP. Although District IEP members met briefly with one or more other members to discuss what they had observed or

what their respective assessments indicated, there is no evidence that all District IEP team members met together before the IEP team meeting to formulate the IEP or to determine a placement for Student. For example, Mr. Trance met briefly with Ms. Gansko to discuss the possibility of Student attending her STEPSS classroom since it was at Student's home school, but without making any definite decision on whether that classroom would be the placement offered to Student. Mr. Trance, who was thoughtful and direct during testimony, and answered questions without evasion, credibly testified that it is important for him to discuss a student's history so that he is able to have a basic understanding of the student's needs before going to the IEP meeting.

78. The IEP document which the District brought to the meeting was merely a draft which underwent significant changes based upon input from Parents, input from CARD and Ms. Abrassart, and based upon the IEES Parents shared with the District at that time. CARD provided 16 revised proposed goals to the District prior to the IEP meeting. According to CARD supervisor Kari Scott, 15 of the 16 were similar or identical to the final goals proposed by the District, which were either contained in the draft IEP or added during the IEP meeting. CARD goal 1 is similar to IEP goal 17; CARD goal 2 is similar to IEP goal 27; CARD goal 3 is similar to IEP goal 28; CARD goal 4 is similar to IEP goal 8; CARD goal 17 is similar to IEP goal 29; CARD goal 8 is similar to IEP goal 1; CARD goal 9 is similar to IEP goal 11; CARD goal 12 is similar to IEP goal 12; CARD goal 13 is similar to IEP goal 13; CARD goal 14 is similar to IEP goal 14; CARD goal 15 is similar to IEP goal 30.¹⁰

79. The draft IEP, which is Student's Exhibit 23, was typewritten on a District computer program to generate IEP documents. The final IEP includes the many changes made at the March 11 and 12 IEP meetings based upon input from all IEP team members, including District staff, Parents, the CARD supervisors, Ms. Abrassart, and Mr. Lewis. The meeting started with Ms. Hertig presenting a copy of the procedural safeguards to Parents. She asked if they had questions at that time; neither they nor Mr. Lewis had any. The IEP team next spent substantial time discussing the assessments administered to Student. Each District assessor discussed her own assessment.¹¹ After each assessment was discussed, Parents were asked if they had any questions or input about the assessment. Parents did not have any questions and did not express any disagreement with the District's assessments. Neither did CARD representatives Scott and Manucal. Autism coordinators Trance and Burnham then discussed their observations of Student in his home program. Parents were given an opportunity to ask them questions but did not have any at the time.

¹⁰ See, District's Exhibit 10 (CARD's revised proposed goals) and District's Exhibit 16 (final proposed IEP).

¹¹ Ms. Gansko, who had administered the educational portion of the psychoeducational assessment to Student, was not able to attend the March IEP meetings. Special Education teacher Julie Thompson attended and discussed Ms. Gansko's assessment.

80. The IEP team then spent a significant amount of time reviewing Ms. Abrassart's assessment with her. Ms. Abrassart explained the tests she administered, her findings, and her analysis of Student's language deficits and strengths. The IEP team asked Ms. Abrassart to describe the services she was providing to Student and at what level of the picture exchange communication (PECS) system Student was functioning. Ms. Abrassart indicated that she was not using PECS with him. PECS is a system of alternative communication which is based upon a six level system where picture icons and later word cards and sentence strips are used by a person to communicate his wants and needs. The person using the system exchanges an icon or other card for the thing he wants or needs.

81. The discussion then turned to CARD's progress reports of Student. The IEP team spent considerable time reviewing the CARD progress reports, reviewing the strategies CARD used with Student in his home ABA program, and reviewing Student's maladaptive behaviors. The team then discussed Student's progress on his current CARD goals, parent training strategies used in the home, Student's play dates, the sensory breaks CARD provided to him, and Student's adaptive behavior skills. Student's Parents, who had been fairly silent to this point, discussed Student's ability to play with toys appropriately on his own.

82. The IEP team then spent the remainder of the March 11 meeting reviewing proposed goals. In addition to reviewing the CARD proposed goals, the team reviewed the District's proposed goals, compared the two, clarified baselines and objectives, and discussed Student's skills in the context of the goals, his present levels of performance, and where the team believed Student could progress in a year. Although Mother believed that Ms. Abrassart's goals were discussed on the March 12, the second day of the IEP meeting when Ms. Abrassart could not attend, the IEP meeting notes reflect that her goals were, in fact, discussed at least in part on March 11 before the meeting adjourned. The team discussed her proposed goals in the context of the goals the District team was proposing, which, in turn, were substantially based on or similar to the CARD goals. The IEP team discussed which of Ms. Abrassart's goals specifically needed to be added to the proposed goals. In the context of language use, the team spent time discussing Student's use of a PECS communication book and how and where Student used it to communicate. The meeting then adjourned for the day.

83. The IEP meeting resumed on March 12. Private speech provider Joanne Abrassart, and school nurse Karen Dillon did not attend. The team discussed the fact that Parents had revoked consent for the District to review the CARD log books the day before and still did not want to provide consent or to provide consent for the District to contact the Regional Center to discuss Student's needs.

84. The team then continued reviewing CARD's proposed goals and how the goals corresponded to the goals proposed in the draft IEP. Significant time at this IEP meeting was spent reviewing each of CARD's goals, matching it to a goal in the draft IEP, and adding goals or modifying them pursuant to the discussions at the meeting. For example, the team added to most of the goals that Student would meet the goal across people,

materials, and environments, something which had not been included in all but one of the District's draft goals. Some of the goal objectives were changed during the course of the IEP meeting as well as changes to when, how, and how many times Student would be prompted to complete a task. Baseline information was added to goals (for example, to final IEP goals 6, 9, and 13) as well. Several goals were changed substantially. For example, goal 11 was changed from Student being able to answer three social identification questions to being able to answer 10 such questions. In addition, more of what types of questions he would attempt to master were listed in the goal. The baseline information in goal 20 was substantially modified to reflect new information from CARD, as was the baseline in goal 21. The goal objectives in goal 21 were substantially modified as well. These are just some of the examples of the many changes made by the IEP team based upon input from non-District IEP members, primarily from Ms. Abrassart's report, and CARD verbal suggestions and its progress reports.

85. The IEP team then reviewed prior private assessments of Student. The team reviewed Dr. Morris's report, which was almost a year old, as well as a private OT report from January 2008.¹² OT Stephanie Cowell informed the team that the recommendations of the private OT assessment were addressed in the draft IEP. There was also a lengthy discussion concerning goal 30, a behavior goal addressed by the District autism coordinators. Goals 27 through 31 were added to the IEP as a result of the meeting.

86. Another indication that the District did not predetermine its IEP offer is found in reviewing the wording of the draft goals. Each form goal has a line where the team is to indicate the person responsible for implementing the goal. In the draft goals, this line is either blank or indicates a number of people. Where specific individuals are noted, the line includes "home program" as one of the responsible parties, since the IEP team had not determined as of the time the draft IEP was developed where Student would be receiving his education. Additionally, information regarding Student's present levels of performance were amended to reflect input from CARD and Parents.

87. The IEP team then began a lengthy discussion of placement options for Student based on the continuum of placements available. A placement in a general education classroom is the least restrictive environment for a child and Student's IEP team began its placement discussion with a consideration of placement there. However, all team members, including Parents and CARD, agreed that a full placement in a general education classroom was not presently appropriate for Student given his present needs and abilities, although it was a goal towards which he could work.

88. Mr. Trance and Mr. Burnham then gave their opinion about the structured environment they believed would benefit Student. They opined that their observations of

¹² For reasons never explained by Parents, they did not inform the District that Student had been assessed in OT by Anne Fleck in December 2008. Ms. Fleck's report was not provided to the District until the hearing in this case. It was not listed in Student's revised exhibit list.

Student indicated that he had skills that would enable him to benefit from a school-based program. Mr. Lewis then stated that there was research that supported the efficacy of programs provided outside a school setting. Mr. Trance then discussed the District's STEPSS program and how each of Student's needs could be met there. The CARD supervisors were asked their opinion about placement. They indicated they did not believe that Student was ready for a school placement at the time. They indicated they believed he should remain in his home-based ABA program. The CARD supervisors indicated that they did not believe Student should transition to a school program until he decreased his behaviors of throwing things, increased his attention, and generalized his skills more in the home environment. The CARD supervisor did recognize that there was a lot of structure in the District's STEPSS classrooms.

89. The team then discussed the aspects of Student's home program that would be present in a STEPSS classroom, such as a token economy reward system. The team also discussed whether transitioning mid-year to a classroom would be difficult for Student. Ms. Thompson stated that it would not be difficult. Since the other children in the class had already adapted to it, she believed more individual attention could be given to Student to assist him in the transition. Mr. Trance also discussed the fact that one-on-one discrete trial training would be available to Student as well in the STEPSS classroom.

90. The District assessors discussed their respective beliefs that their observations and assessments of Student indicated that he could benefit from a school-based program. Parents, through their attorney, reiterated that they did not believe Student was then ready to go to school, but that they might consider a transition in the autumn of 2009. The CARD representatives added that it might be feasible to transition Student to school over the coming summer.

91. The District team members reiterated that they felt Student was ready to transition from a home program. They proposed the STEPSS program based upon Student's needs as identified in his assessments, observations of him, input from Parents and input from CARD.

92. The draft IEP had not contained a transition plan since there had been no decision yet to transition Student to a school program. It was at the IEP meeting that the need for such a plan was discussed and then drafted. Based upon input from the autism coordinators and the District assessors, the District IEP team members drafted a transition plan that proposed transitioning Student from his in-home CARD program to the STEPSS program during a two-week period. Neither Parents nor the CARD representatives proposed any alternative transition plan. The District then made its final offer of placement and services to Student. A final IEP document including all present levels, goals, the District's offer, and the meeting notes, was provided to Parents about a week after the March 12, 2009 meeting.

93. It is difficult to identify exactly when and how Student believes that the District here predetermined its IEP offer. Ms. Hertig, the District representative at the IEP meetings who had the authority to agree to any of the placement and/or services determined necessary for Student by his IEP team, did not meet with other District staff prior to the meeting and did not develop the draft IEP. Mr. Trance met with Ms. Gansko, but it was only to discuss her impressions of Student, particularly since he knew she would not be able to attend the IEP meeting, and to discuss her classroom. There is no evidence that Mr. Trance met with the other District staff that assessed Student, although he did discuss Student with Mr. Burnham, who had observed Student at the same time as did Mr. Trance. There is no evidence that Ms. Gansko held a meeting with other staff prior to the IEP meeting to determine what the District's offer would be. Nor is there any evidence that the related services to be offered to Student, or the amount of time allocated to each service, was determined before the IEP meeting. No related services are indicated in the draft IEP.

94. The evidence also indicates that the District did not have any policy, either written or unwritten, that it would not fund home-based ABA programs. The District, in fact, has contracts with CARD for it to provide in-home services to other District students. The District has contracts with other ABA providers to also provide such programs to other students. The District also occasionally provides in-home ABA services through its own staff. The District simply believed, after reviewing all the information it had regarding Student at the time, that it could appropriately offer Student a FAPE in its STEPSS classroom.

95. Student suggests that the District predetermined its offer because it did not propose any other type of SDC classroom. However, there is no evidence that the other SDC classes the District has would be appropriate for Student. Student's argument that they should have been proposed puts the District in the position of being forced to discuss programs that are not appropriate for Student and risking parents then insisting that their child be placed there. Although a school district is required to have a continuum of placement opportunities available for students, there is no requirement that every placement on that continuum be discussed, particularly where the different alternatives are not appropriate for the child in question. For example, school districts sometimes place children at residential treatment centers. There is no suggestion in this case that such a placement would have been appropriate for Student and no suggestion that such a placement should have been discussed by his IEP team.

96. Parents were given many opportunities to participate in the IEP meeting. They were asked for their input during the discussion of every topic and asked if they had questions. Parents did not have questions and only occasionally responded to the request for their input. The fact they otherwise voluntarily chose to remain silent does not indicate that they were not permitted to participate in the process or that the process was predetermined. Parents' private providers, CARD and Ms. Abrassart, however participated fully in the discussions and in developing Student's present levels of performance, his baselines for the goals, and the goals themselves. The only evidence to the contrary was Ms. Manucal's testimony at hearing that she once raised her hand to say something but was not recognized.

However, she admitted that she did not try to interject anything at that moment. In all other aspects, her input was considered and often incorporated into the IEP document.

97. The IEP meeting notes contain many references to the fact that Parents were asked if they had questions, were asked for input, and were asked to address their concerns. The meeting notes indicate, and all District IEP members who testified at hearing stated, that CARD and Ms. Abrassart spent considerable time discussing their reports concerning Student, discussing his progress in their respective programs, and discussing their proposed goals in conjunction with the District's proposed goals. Although Ms. Scott, Ms. Manual, Ms. Abrassart, and Mother all testified that they thought the District was not paying adequate attention to their opinions or desires to participate more in the IEP meeting, none could state that they were prevented from participating or that their opinions and information were not able to be voiced. Present levels of performance, baseline information, and goal objectives were modified based upon the input of Parents, Ms. Abrassart and CARD staff, and new goals were developed as well. Additionally, the IEP team reviewed all known IEES provided by Student's parents, comparing, contrasting, and adopting information from them.

98. The same is true for the June 12 IEP meeting, which was merely an addendum to the March IEP to discuss the assistive technology assessments and adaptive physical education assessments which the District had administered to Student. The IEP team added two communication goals for Student based upon the AT assessment that were directed at training him to use an augmentative communication device. The meeting was not convened to review the IEP offer from March. To the extent that discussion occurred, the evidence indicates that all parties present, including Parents and the CARD representatives, participated in it, shared information, offered concerns, and discussed the possibility of attempting to mainstream Student at some point after he began school as well as Ms. Manual's opinion that Student might be ready to start transitioning to school in the fall.

99. At hearing, Mother was sincere in her belief that the District "listened to" but did not "hear" her during the IEP meeting.¹³ Mother believes that the District was playing lip service to their obligation to consider her opinions and input as a member of the IEP team. However, a district is not required to adopt parents' suggestions or implement parents' suggested goals or services if the district does not believe those suggestions are necessary in order to provide a student with FAPE. Here, the weight of the evidence does not support Parents' belief that the District's IEP was predetermined or that Parents were prevented from meaningfully participating in the IEP process. Rather, the evidence supports the District's contention that it did not predetermine Student's IEP and at all times considered the concerns, views, and information provided by Parents during the IEP process. Nor does the evidence support Parents' contention that the District did not consider their IEES or the opinion of Parents' experts at the IEP meeting. To the contrary, the evidence, including the testimony of the CARD representatives and Ms. Abrassart, indicate that they all participated significantly during the meeting and that their suggestions as to baseline information, goals,

¹³ Father did not testify at the hearing.

and Student's present levels were considered and often adopted by the District. The District has met its burden of persuasion that no procedural violation occurred as to the IEP process.

Were the District's Goals and Objectives Inappropriate, Not Measurable, or Vague? (Issues 2 and 3(f))

100. As state above, an IEP is a written statement that includes, among other things, 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 his 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. Student contends that the goals contained in the District's March 12, 2009 IEP offer were vague, inappropriate, and not measurable.

101. The IEP ultimately contained 33 goals addressing the following areas of Student's needs: writing (goals 1 and 2); fine motor skills (goals 3 and 4); career/vocational (goal 5); social/emotional (goals 6, 11, and 12); math (goals 9, 10, and 15); daily living skills (goal 14); and reading (goal 16). Student's IEP team had determined that his behavior and communication deficits were the most critical areas of need for him. The team therefore developed six behavior goals (goals 7, 8, 13, 17, 27, and 30) and 14 communication goals (goals 18, 19, 20, 21, 22, 23, 24, 25, 26, 28, 29, 31, and two unnumbered goals added in the June 12 IEP.) The goals are exhaustive. They address every area of need in one form or another that was determined through the District's assessments and the IEES Student shared with the IEP team.

102. At the IEP meeting, Parents wanted to include a goal to increase the different types of food Student was willing to eat. The District disagreed such a goal was necessary. Student is a very picky eater and was for a time totally eschewing proteins, causing him to loose weight and his health to falter. Parents had to consult with a specialist who assisted them in altering Student's eating habits. Mother was understandably very emotional when discussing this since Student's health was adversely affected by his refusal to eat certain foods. However, Student has failed to demonstrate that Student's food preferences should have been addressed by an IEP goal. *What* Student eats, as opposed to *if he is able to feed himself*, is more appropriately a health issue to be addressed by health professionals, such as the specialist with whom Parents consulted, rather than by a school district through the IEP process. As the District appropriately noted during the IEP meeting, introducing foods to Student could be done through collaboration between Parents and the teacher if Student began attending school. The failure to develop a goal to address expanding Student's food preferences did not deny him a FAPE.

103. Parents also wanted to include some type of articulation goal to address Student's oral motor goal needs in the area of apraxia. The IEP team discussed the issues at the March 12 meeting. However, as the District IEP team indicated then, and as

demonstrated in a review of the goals, Student's ability to verbally articulate responses is addressed by goals 20 and 21. Goal 20 indicates as an objective that Student would be able to respond to the question "What's this?" either verbally or with a picture icon. Goal 21 is a functional goal, with its objective being for Student to verbally approximate words. Both address the goal of having Student work on his verbalization. Student is almost non-verbal at this time, an issue recognized by all IEP team members, including Parents. This was the reason the IEP team, including Parents, determined that a communication device was necessary for Student to be able to communicate his wants and needs. There is thus a recognition that Student's verbal abilities are only just now emerging. The District's goals recognize this, recognize that it is too early to determine how best Student will be able to communicate, and therefore the goals address all possible means of communication: through the use of the PECS icons, gestures, pointing, a communication device, and verbalization. Certainly, should Student advance in his ability to verbalize (or in any other communication method) his IEP team can meet and revise goals or create new ones. However, at the time of the IEP meetings, the District adequately addressed Student's communication needs through the goals it proposed, based upon all the information it had available to it at the time.

104. As discussed above, each of the District staff members who assessed Student, as well as autism coordinators Trance and Burnham were instrumental in helping to develop the goals. But so too were Student's CARD providers and Ms. Abrassart. CARD provided 16 proposed goals, most of which were either adopted by or similar to the goals in the final IEP document. Each of the proposed goals was discussed over several hours during the two days of the March IEP. The IEP team modified baselines, modified objectives, and altered information in the goals pursuant to those discussions. At no time during the IEP meeting did Ms. Abrassart, the CARD representatives, Parents, or their attorney ever object to or ask for clarification of any of the goals based upon the fact that they were unmeasurable, vague, or inappropriate. Nor did they ever suggest changing a baseline or goal objective because they believed that whoever ultimately had responsibility for providing an educational program and services to Student would not be able to understand the goal, implement the goal, or determine if progress had been made on the goal.

105. However, Ms. Abrassart criticized many of the District's goals at hearing either because she agreed the baselines were too general or because she thought the goal was vague and/or not measurable. For example, she stated that the baselines on goals 18, 21, 24, and 25 were too vague. Dr. Melanie Lenington, a clinical psychologist with many years experience treating autistic children and being involved in the IEP process, testified for Student as an expert witness. She criticized the baselines of practically every one of the 31 goals in the March IEP. However, the District's only contact with Student had been through its assessments and observations of him, which offered only a brief snapshot into Student's present abilities. Most of the information used to develop the baselines was from CARD, either through CARD's proposed goals, its progress reports, or discussion at hearing. Each of the goals was discussed during the IEP. CARD supervisors, as well as Parents and Ms. Abrassart on March 11, had an opportunity to clarify any baseline information that they believed was incorrect or vague. They did not. The baselines contained all information that the District had the time and were sufficient enough to enable the goals to be implemented.

106. Ms. Abrassart and Dr. Lenington also spent considerable time at hearing criticizing each of the 31 goals in the March IEP because they believed they were not measurable. Dr. Lenington criticized goal 1 because it included three different tasks: tracing upper case and lower case letters within a one-inch wide line. However, the goal addresses one skill: legibly tracing the alphabet. There was no reason to split it into three separate goals as advocated by Dr. Lenington. Dr. Lenington criticized many of the goals for the same reason. However, had goals been written as she advocated, Student would have had close to 100 goals written for him, an unmanageable, cumbersome, and unreasonable amount of goals for any educational provider to address.

107. Dr. Lenington's analysis of the goals were overly critical and technical. Her credibility with regard to her testimony was diminished because even where she admitted that a baseline or an objective was appropriate, she criticized the content of the goal. For example, goal 2 states that Student "will copy his first name from a model with 100% legibility remaining within the parameters of a 1 [inch] wide line on 4/5 trials across people, materials, and environments." Dr. Lenington stated that the baseline was good and the goal was measurable, but she criticized the goal because it did not define what the model would be or from what distance Student would be copying it. This is just one example of how Dr. Lenington believed that each goal should be dissected and defined to its most minute detail. However, there is no requirement that IEP goals be as defined or as specific as Dr. Lenington advocates.

108. Ms. Manucal and Ms. Scott vacillated during their testimony with regard to whether the goals were appropriate. In response to questions from Student's counsel as to the different goals, they grudgingly stated that some were not as clear as they could be. Ms. Scott admitted during cross-examination, however, that if she had felt the goals were inappropriate, she would have so stated at the IEP meeting. Neither she nor Ms. Manucal voiced any such objections at the meetings. Since many of the IEP goals were based upon CARD goals, it is apparent that CARD IEP team members as well as the District IEP team members believed that the goals were clear and measurable enough for either to implement in their respective programs.

109. Ms. Abrassart voiced similar objections to Dr. Lenington's with regard to the communication goals. Nonetheless, she did admit during testimony that her proposed goals too could have been clearer. However, as she also stated, she would have no difficulty understanding or implementing her goals because she wrote them. Similarly, since the District developed the goals based upon CARD input, it is clear that either the District or CARD would have been able to understand and implement them. Ms. Gasko, Ms. Vandenberg, and Ms. Cowell all reviewed the goals during their respective testimony and all indicated that they understood and would be able to implement them should Student be assigned to their school programs. The District's proposed goals were measurable and specific enough for the objectives defined, and addressed Student's needs based upon the information known to the District at the time of the IEP meetings. It is reasonably clear what would be expected of Student under each goal.

110. It is conceivable that any goal developed could be found to be deficient in some respect. Some of Ms. Abrassart's goals could be criticized on exactly the same basis as she criticized the District's. For example, her proposed goal 2(A) does not state what type of command Student will be given to initiate his identification of the action pictures referenced. However, Ms. Abrassart indicated that in spite of that defect, she would be able to implement the goal. In much the same way, the District staff members indicated that they would be able to implement the goals proposed by the District.

111. To the extent that Ms. Abrassart criticized a goal because Student was already able to accomplish the task indicated, her criticism is not well-taken. For example, goal 22 states that Student will "approximate the word "more" in functional contexts throughout the day with only one visual prompt 80% of the time over 4/5 opportunities across people, material, and objects." However, even if Student was already doing this in his sessions with Ms. Abrassart, he was not able to do so consistently in his CARD program. As stated above, the District based much of its baseline information on input from CARD. If the CARD representatives believed Student had already met this goal they would have stated so at the IEP meetings. In any case, if Student in fact has met the goal, it would be indicated in progress reports and his educational providers could work on the other numerous goals developed for him.

112. Likewise, both Ms. Abrassart and Dr. Lenington criticized goals as being too difficult for Student. For example, Ms. Abrassart stated that it would be a "quantum leap" for Student to be able to meet goal 29, which states that Student "will be able to request necessary items to complete an academic task using a communication book in 4/5 opportunities across people, materials, and environments." Ms. Manucal, Ms. Scott, and Parents were all present during the IEP meetings and all were familiar with Student's abilities. None of them, however, stated that the goal would be too difficult for Student. In any case, if it was determined at some later point that the goal was too difficult, Student's IEP team could modify it accordingly.

113. Ms. Gansko, the STEPSS classroom teacher, helped to develop the District's goals. She was a credible and sincere witness whose dedication to her students and to her classroom came across fully during her testimony. She reviewed the goals during her testimony and demonstrated that each goal she addressed was appropriate for Student and was measurable. For example, goal 7 states that Student would be able to "independently request his need for help with a task with the use of his communication book in 4/5 occasions over 3 consecutive trial days across people, materials, and environments." As Ms. Gansko pointed out, this, and Student's other goals could be used to generalize asking for help. It is a skill Student was not independently doing at the time she assessed him. In meeting the goal, he would demonstrate meaningful progress toward independence. There was no goals under which either a teacher or service provider would not be able to measure progress.

114. Moreover, even assuming that some or all the goals were vague and/or not measurable as Student contends, he has failed to prove that Parents' opportunity to participate in the IEP process has been impeded, that his right to a FAPE has been impeded, or that he has, or would have been deprived of any educational benefits due to any deficiencies in the goals. Parents had an opportunity to participate in the formulation of the goals as did Student's CARD providers, who participated extensively in the discussion and development of them. With regard to whether Student would be deprived of any educational benefit because of the goals, the evidence proves to the contrary. CARD was working with Student on goals it had developed for him which were no more specific, measurable, or quantitative than those proposed by the District. Yet, all evidence presented by Student, and noted in CARD's progress report on Student's goals, is that he has progressed under CARD's tutelage, even if the goals were not as specific as Dr. Lenington and Ms. Abrassart advocate.

115. The weight of the evidence therefore demonstrates that the goals in the District's proposed IEPs were adequate to meet Student's unique needs, and were sufficiently understandable and measurable so as to enable him to progress towards meeting the goals and to benefit from his education.

Did the District Adequately Address Student's Present Levels of Performance? (Issue 2)

116. In addition to containing measurable goals, an IEP must also contain a statement of a student's present levels of performance (sometimes abbreviated as "PLOPS"). Student contends that the District's failed to develop current levels of functioning consistent with Student's disabling condition. However, the weight of the evidence does not support Student's contention.

117. As previously discussed, Student's IEP was developed from a variety of sources. As of the time of the March IEP, the District had conducted an OT assessment, an SL assessment, a psychoeducational assessment, and a health assessment of Student. These, along with information from District observations conducted by its assessors and autism coordinators, were reviewed by the full IEP team at the meetings. The IEP team also reviewed the August 2008 private OT assessment Parents provided to the team, Dr. Morris's assessment from May 2008, and Ms. Abrassart's SL assessment. Since Parents had withdrawn consent for the District to review the CARD data log books, the information that could have been specifically gleaned from them was not available to the team. However, the CARD representatives were present for all IEP meetings and their progress reports and observations of Student concerning his home ABA program with the full IEP team.

118. Based upon input from all these sources, the IEP team listed Student's present levels both in the body of the document and as baselines for his goals. If the information was incorrect or incomplete, Parents, CARD staff or Ms. Abrassart could have so indicated. No one at the IEP meeting stated that more information should have been included in the statement of present levels. Where anyone from the team thought that a baseline should be

modified, the team reviewed and modified it. There is simply no evidence that any District IEP member refused to add information on Student's present levels that should have been included. Nor was there any significant disagreement between the IEP team members as to what Student's present levels were at the time. The District was hampered by only having seen a brief snapshot in time of Student during the few hours each assessor or District observer had with him. If the assessments or observations had indicated that Student's present levels were different than what was perceived by Parents and CARD, the information should have been discussed at the IEP meetings. Nothing of that nature was brought to the District's attention. It is disingenuous to now argue that there was additional information that should have been included in the IEP but was not, when all Parents and CARD had to do was inform the District of what that information was.

119. Significantly, there is no evidence that any alleged failure to include additional information on Student's PLOPS would have impeded his ability to benefit from his education. The disagreement with the parties is not the extent to which Student has needs based on his autism. Rather, it is whether those needs can be met in a school classroom or if they can only be met in a home ABA program, and the amount of related services he needs, not whether Student needs those services.¹⁴ Student has failed to demonstrate that his present levels of performance were inaccurate or that more information regarding them was necessary in order for him to receive a FAPE.

Substantive Aspects of FAPE

120. For a school district's IEP to offer a student a substantive FAPE, the proposed program must be substantively appropriate, in that it is designed to meet the student's unique needs, is reasonably calculated to enable the student to receive educational benefit, and comports with the student's IEP, and places the student in the least restrictive environment. A school district's offer is analyzed in the context of what the district knew about the student at the time the offer was made. To constitute a FAPE, the district's offer must be reasonably calculated to provide the child with educational benefit based on the information available to the district at the time. However, school districts are not required to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities.

Did the District's Offer of Placement in its STEPSS Classroom Provide Student a FAPE in the Least Restrictive Environment? (Issues 2 and 3(g))

121. The primary dispute between the parties in this case is whether the District's STEPSS classroom, which is an autism-specific special day class where all students fall somewhere on the autism spectrum, was appropriate for Student at the time the District made its IEP offers, and whether it is appropriate now. Student believes that he then required, and continues to require, placement in a home-based ABA program providing a minimum of 35

¹⁴ With the exception of APE services, which are discussed below.

hours per week of ABA instruction. He believes that he does not have the requisite pre-academic skills that would enable him to progress in a school-based program and he believes that he continues to require a full-day ABA program. He contends that the program offered by the District, which consisted of full-time attendance in a K-2 STEPSS program, including two hours a day of individual ABA/discrete trial training, and specified related services, did not offer him a FAPE. He takes issue both with the fact that he does not believe he is ready for school and with the fact that the STEPSS program is not fully ABA-based. The District asserts that its STEPSS classroom is appropriate for Student and that despite Student's deficits, the program is capable of meeting his needs.

122. Julie Gansko presently teaches the STEPSS K-2 classroom at Toby Tobin Elementary School, Student's home school. In total, she has 13 years of experience working almost exclusively with autistic children. As of the time of the hearing, she was beginning her fourth year as a special education teacher with the District. She has been a special education teacher since 2001. She received a Bachelor of Arts degree in sociology and a Master of Arts degree in special education. She has both a multisubject teaching credential and a special education teaching credential. Prior to becoming a teacher, she received training in ABA, the picture exchange communication system (PECS) and in the Treatment and Education of Autistic and Communication-Handicapped Children (TEACCH) program. She first worked as a behavioral aide for an NPA similar to CARD, providing discrete trial training (DTT) to autistic students as part of an ABA program. She later worked as an inclusion aide at an elementary school, as a behavioral aide in an after-school socialization program for children with autism, and as a special education classroom assistant, where she provided DTT, pivotal response therapy, PECS and TEACCH instruction to students in a classroom setting. As a special education teacher with the District, Ms. Gansko's job duties include providing special education instruction in her classroom, using ABA principles including DTT, as well as sensory integration principles. She is responsible for implementing her students' IEP goals, dealing with special behaviors they have, attending IEPs, and assessing students. Ms. Gansko remains current in best practices through continuing education trainings and by staying in touch with pertinent literature.

123. Ms. Gansko's classroom integrates different methods of teaching during the school day. She uses ABA and DTT with some students, uses sensory integration techniques for students who have sensory needs, and uses pivotal response training as well. Ms. Gansko incorporates the TEACCH format into the structure of the classroom. TEACCH is based on a theory that a structured physical environment will make more sense to autistic children. It utilizes many visual supports, such as color coded work areas and visual schedules, so that the students know when and where each activity of their school day will occur. Each child in Ms. Gansko's classroom has a picture schedule which includes color coded icons. As the children become able, the visual schedule changes from icons to written word schedules.

124. Ms. Gansko also uses a color-coded system for the students to indicate that they have finished an activity. The child places a card in a basket after completing each activity or task. Each activity area in the classroom has a poster board with the color and a basket of the same color. The child matches the completed activity to the same colored

basket. Student has a strength in matching colors which was apparent from all assessments administered to him. He therefore would easily adapt to the color coding system in Ms. Gansko's classroom.

125. Ms. Gansko also uses a token economy system in her classroom whereby the students receive a reward, such as a sticker, for things such as transitioning to a new activity or accomplishing tasks. Ms. Gansko believes that Student would respond favorably to her use of a token economy in the classroom because her use of it during her assessment of him was a motivating factor in Student's completing the tasks Ms. Gansko requested of him.

126. Group activities in the classroom also incorporate TEACCH visual supports. For example, one group activity is calendar time, where icons are used to show the children what the class activities will be. During group time the children also sing a "hello" song which uses icons to support the words of the song. There are other visuals in the classroom, such as drawings of feet on the floor so that the children know where to line up. From the data CARD took on Student, Ms. Gansko knows that he can follow receptive commands.

127. Sensory needs of the students are addressed throughout the school day as necessary in the classroom. They are also addressed in a "motor lab" where the children can interact with different implements that address their individual sensory needs and increase their ability to interpret sensory information. Ms. Gansko takes the children to the motor lab early in the school day so that they can address sensory needs, which helps them pay attention during the remainder of the day. Later in the school day, after lunch, the children return to the motor lab to engage in sensory activities before returning to the afternoon activity rotations. The children also are given sensory breaks or sensory objects to occupy them during their activities, based upon their individual needs. Ms. Gansko would work with occupational therapist Stephanie Cowell to develop and implement a sensory diet for Student and to incorporate it into his daily classroom activities, as they have done for other children in her class.

128. Ms. Gansko was well-versed in the principles of ABA. She explained that it was a principle of learning and motivation to teach positive behaviors and to decrease negative behaviors. She explained that for every behavior there is an antecedent, or precursor to the behavior, and that for every behavior there is a consequences. Ms. Gansko believes that using a token economy system with Student, in much the same way CARD has been using a reward system, would work with him. She would individualize the system to what worked best for him and based upon his attention span, as she does for every child in her classroom. Her system is consistent with the principles of ABA: the children earn positive consequences for positive behaviors.

129. The PECS system is also used in Ms. Gansko's classroom with the children who require it, as a precursor to verbal communication or in lieu of communication for non-verbal children. Where needed, the children also use augmentative communication devices, such as the one on which Student is now receiving training. At the time of the hearing, Ms.

Gansko was scheduled to receive training on the type of device that Student's IEP team had suggested for him.

130. At the time of the hearing, there were nine students in Ms. Gansko's class, from kindergarten age to second grade. To support the students in the class, Ms. Gansko also has three full-time and several part-time classroom aides. There are generally six adults in the classroom to support the nine children. All of the aides have received a minimum of three-days of training, including, ABA training, from the District, and are familiar with ABA, DTT, and TEACCH. They all have experience implementing DTT with students, all are familiar with the concept and execution of a token economy system, and all are familiar with and trained to use visual schedules. The aides work one-on-one, two-on-one, and three-on-one with the children, depending on their individual needs.

131. Ms. Gansko and her aides are also trained to address the maladaptive behaviors often found in autistic children such as tantrums and eloping. They are also trained in a crisis intervention program called PROACT which addresses self-injurious or assaultive behaviors. However, as Ms. Gansko pointed out, when Student is frustrated or upset, he sometimes has tantrums in which he falls on the floor, or he tries to elope. Student does not have a history of being self-injurious or assaultive.

132. The STEPSS classroom aides are also trained to take data on progress toward IEP goals where such data is required, and would be able to do so for Student. Also, due to the high ratio of adults to children in Ms. Gansko's classroom, they would be able to provide him with one-on-one support where needed. All the aides would work with Student to generalize what he was learning across environments and to help increase his compliance across people. Also, given the high amount of adult support in the classroom, Ms. Gansko would be able to individualize her instruction to Student, shortening or changing the rotation of activities if necessary to maintain his attention.

133. Ms. Gansko recognized that there might be more noise in her classroom than what Student is presently used to, but believes that getting used to noise distractions would prepare Student for life both inside and outside a classroom.

134. Additionally, Ms. Gansko's classroom provides opportunities for the children in the class to interact with typical peers in the class itself, and not just during lunch and recess, through reverse-mainstreaming. Nine children from a typical second grade general education class come to Ms. Gansko's classroom once a week: each typically-developing child is matched with one of the children in her classroom during music or game activities.

135. Ms. Cowell provides consultative OT services to Ms. Gansko's classroom to address sensory issues and other OT issues of the students, in much the same way Ms. Vandenberg provides consultative SL services. Additionally, autism coordinator Joseph Trance spends time observing the classroom to ensure that the program is being run correctly. Mr. Trance, who has a Master of Science degree in special education, began his career as a special education teacher teaching students with autism and later became the

Principal at a New York State public school dedicated to special education students. He was hired as an autism coordinator for the District in 2007. He has been working with autistic students and applying ABA principles to their education for about 30 years. He supervises the autism program, including the STEPSS classroom, at various District schools, as well as supervises in-home ABA programs the District provides to Students either through District staff or through contract with NPAS such as CARD. He is generally in Ms. Gansko's classroom five times a month. Altogether, there are three degreed professionals in addition to Ms. Gansko ensuring that the program and services in her classroom are meeting the needs of the students.

136. Several experts testified on behalf of the parties in this case to address both the suitability of the STEPSS classroom for Student and his readiness to transition from his in-home ABA program to school, both as of the time of the March IEP, and as of the time of the hearing. While all experts, including Dr. Laura Schreibman, the District's witness, found things to criticize about Ms. Gansko's classroom, the criticisms were few and all generally found the class to be well-run, the children well-behaved, and learning. The basic dispute between the District's experts and Student's experts is *if* and *when* Student should be transitioned to school.

137. Dr. Laura Schreibman is presently a Distinguished Professor at the Department of Psychology for the University of California, San Diego (UCSD). She obtained her Doctorate in developmental psychology from the University of California, Los Angeles (UCLA) in 1972. She is also a licensed psychologist in California. Her career has been spent conducting research in behavioral psychology as it relates to behavior, autism, behavior modification, and psychological disorders in children. As an undergraduate student at UCLA, Dr. Schreibman collaborated on the seminal research study of autistic children led by Dr. O. Ivar Lovaas, who reported on his findings in 1987 (Lovaas study). Dr. Lovaas was also Dr. Schreibman's graduate advisor at UCLA, and she did all of her graduate work under his tutelage. She also worked with him subsequent to receiving her degrees.

138. Dr. Schreibman's doctoral dissertation looked at the different kinds of prompting that could be used to teach students with autism. From 1974 to 1983, she was the Director of Research for the Children's Treatment Services at Camarillo State Hospital. From 1975 to 1983, Dr. Schreibman was the Research Director for the Claremont Autism Research Project, which was a federally funded research program for the experimental analysis and treatment of childhood autism. Since 1984, Dr. Schreibman has been the Research and Clinical Director at the UCSD Autism Research Project, a federally funded research program similar to the Claremont project.

139. In the last 35 years, Dr. Schreibman has been involved in some 15 research projects concerning the treatment of autistic children. She was the principal investigator on almost all of the projects. She has given nearly 100 presentations on the subject over her career and has been a consultant to school districts, hospitals, movie studios, and developmental centers. Dr. Schreibman has been an associate editor, an editorial consultant, or on the editorial board of numerous publications, and is a member of several professional

organizations, including the Society for the Experimental Analysis of Behavior, where she has both been on the board of directors and was President and Chair of the Board, and the Autism Society of America.

140. Dr. Schreibman is the author of well over 100 papers and articles concerning autism and behavioral issues, either on her own or in collaboration with other experts in the field. She is also the author of three books, the most recent of which is *The Science and Fiction of Autism* (Harvard University Press 2005) which addressed controversies and issues relating to autism.

141. Over the last five years or so, Dr. Schreibman has testified in due process hearings five or six times. Of those, three have been as an expert on behalf of school districts; the other times she testified on behalf of the student.

142. Dr. Schreibman observed Ms. Gansko's classroom on June 3, 2009, for about two hours, and then again on September 17, 2009, for an hour. At the time of her observations, the classroom was staffed with seven adults: Ms. Gansko and six aides. She found the classroom to be highly structured and well-designed, with specific areas designated for each activity, which permitted the students to have a predictable, yet varied educational experience. She noted that the classroom included activity schedules to guide them through the day, which enhanced the structure and predictability of the class. Dr. Schreibman observed that that the students were presented with developmentally appropriate educational activities and were treated in a positive and encouraging manner by all staff.

143. Important to Dr. Schreibman was the fact that the types of instructional protocols reflected best practices of autism classroom education. She observed the aides and Ms. Gansko engaging in DTT with some students, using PECS with others, using time-delayed responses to encourage spontaneity in students, and using naturalistic behavior teaching strategies and planned reinforcement. Dr. Schreibman was impressed that the staff took advantage of opportunities to facilitate spontaneous or imitated language. She observed multiple methodologies being used, such as ABA and TEACCH, but they were all behaviorally based methodologies. She was also pleased to learn from Ms. Gansko that the classroom had a reverse mainstreaming program with typical children to facilitate social behavior.

144. Dr. Schreibman observed that Ms. Gansko was an excellent teacher and had created a language rich environment for her students where all staff was using appropriate levels of language. She also asked to see how staff collected data and reviewed their data collection protocols. There was data on each child and progress noted on each one's goals. The data being kept in Ms. Gansko's class was consistent with best practices in that there was different data for different protocols which was individualized to each student and graphed appropriately.

145. Dr. Schreibman was impressed both with Ms. Gansko's teaching abilities as well as with the capabilities of the classroom aides. She stated that it was apparent they had

been well-trained in ABA and in working with autistic children. The only criticism she had of the classroom was that she did not see all components of TEACCH being implemented, and that she would advocate for the use of more naturalistic reinforcement, where the student has more choice and control over the stimuli being used as reinforcers.

146. Dr. Schreibman's most fundamental tests were met in Ms. Gansko's classroom: the class was structured and quiet, the students were happy and engaged in their activities, they were smiling, cooperative, and involved. She felt that the classroom offered an appropriate ABA-based educational experience for a young autistic student.

147. Student offered the testimony of three experts who addressed the issue of what constituted an appropriate placement for him. Dr. Robin Morris is a clinical psychologist and marriage and family counselor, whose practice focuses on children. She has been in practice for almost 15 years. She has worked for many years directly with autistic children doing assessments and providing psychological services to them. She has been hired by school districts to set up reinforcement schedules for children in the classroom. In addition to assessing autistic children, she makes recommendations regarding what type of programs they should have at home and in school. Although Dr. Morris has participated in six research projects, none of them included issues dealing with autism or behavioral analysis, and, since she is a clinical rather than research psychologist, she does not publish or present research papers on autism or other issues in psychology. She has never worked in any type of educational setting and has never worked in a home ABA program. However, she has completed all the necessary training to become a board certified behavior analyst, and just needs to take and pass the test.

148. Dr. Morris has observed Ms. Gansko's classroom twice. The first time was in September of 2008, the second was on September 18, 2009.¹⁵ During the first observation, Dr. Morris noted that there were generally five aides in the classroom in addition to Ms. Gansko to serve the students. She noted that the room was color-coded, and that picture schedules were used in classroom as well. She observed that aides were using token boards to reinforce the children every five minutes or so during activities for purposes of task completion. Dr. Morris noted that reading activities appeared to be individualized for each student, and that some students had sensory objects that they could manipulate for sensory input. She also noted that the aides were competently prompting and redirecting the children who were off-task. She further noted that the aides spoke in quiet tones and were calm in nature. Dr. Morris acknowledged that the classroom offered many positives, such as children who were socially engaged, a behavior system that was carried out consistently, and aides who appeared to display continuity of training and skill. However, Dr. Morris did not believe that Student would benefit at the time from anything but a full-time ABA program that did not use other methodologies. Additionally, she believed he was not ready for school

¹⁵ Ms. Gansko's class was one of several Dr. Morris observed as part of a previous IEP process for Student.

because he was not a group learner, was non-verbal, was not toilet trained at the time, had a slow acquisition rate, and at the time, was not responding to his name being called.

149. Dr. Morris's most recent observation of Ms. Gansko's classroom occurred during a group activities period. At one point, all nine of the students were engaged in a group speech and language session. She felt that all nine of the students were functioning at a higher level than student. For example, while a couple of them had access to PECS communication books, they were verbalizing and did not need to use the books. As another example, the children could trace independently; Student would still need hand-over-hand assistance.

150. Dr. Morris had some very positive things to say about Ms. Gansko's class. She observed that there was a low amount of behavioral difficulties so that there was more time for instructions. The children did socialize and interact with each other. Although she noted that the use of visual schedules was not as structured as she would have wished, the schedules were there and available to the Students. Some students used them; others did not seem to need them. The class was structured, had language models, and had consistency. She noted that some of the children were able to transition independently between activities, other needed support to do so that was readily available. In all, Dr. Morris liked the classroom; she just does not believe Student is presently ready for it.

151. Dr. Morris's views were seconded by Dr. Melanie Lenington, another of Student's experts. Dr. Lenington is both an occupational therapist and a clinical psychologist. She has been licensed as a psychologist in private practice in California since 1994. She has done numerous assessments of children with autism and attended hundreds of IEPs although she does not have a teaching credential and is not a school psychologist. Her practice presently consists primarily of those suffering from autism or who care for autistic family members. Although she has been hired by school districts to assess children, she is primarily hired by parents. She has also reviewed classrooms to determine if it is appropriate for a child, and has consulted with school districts with regard to their programs. Dr. Lenington has also made professional presentations to various groups on a variety of topics, including autism and behavior.

152. Dr. Lenington observed Ms. Gansko's classroom on September 9, 2009. She found many things in the classroom she liked. The room was bright and large and the staff appeared to like the children. The staff took many opportunities to reinforce language and there were many materials for autistic children in the room. The classroom was uncluttered and well-organized. The only criticism she had of the classroom was that the children should have been praised more often for having appropriately completed a task. Dr. Lenington just did not believe Student is ready for a classroom program.

153. Dr. Robert Patterson also testified on behalf of Student. He has an impressive and varied professional background with corresponding credentials. Dr. Patterson is a licensed psychologist and a licensed educational psychologist, and has worked in the field for over 20 years. He has credentials in teaching and in school psychology. Dr. Patterson has

various Master's degrees, including developmental psychology, education, zoology, and animal behavior. His doctorate is in psychology and family therapy. He has published many articles, although none in the field of autism. Dr. Patterson's work history is impressive; he has taught in the public schools and at the college level, he has worked as a school psychologist, as a school administrator, and as coordinator of special education for a school district. He has assessed many preschool age children, including children on the autism spectrum. He has taken numerous educational courses and presented numerous trainings in a variety of areas. Dr. Patterson presently is certified as an NPA with the California Department of Education to provide therapy, counseling, and behavioral interventions and assessments. He has testified in the past equally on behalf of school districts and students in due process hearings.

154. Dr. Patterson also observed Ms. Gansko's classroom on September 9, 2009. He first observed the motor room program, noting that there was a ratio of five adults to six children in the room. There was a visual schedule used and a rotation system for activities in the room. Dr. Patterson also observed the classroom itself. He saw the token economy system implemented, but felt that it was not implemented with enough consistency. However, he also felt that it was a nice, quiet classroom with a high degree of compliance among the students. He noted that Ms. Gansko clearly was capable and all her staff appeared to know what they were doing. Dr. Patterson also observed the group speech and language session during which he felt there was not enough concentration on getting the students to socialize amongst themselves. Another criticism Dr. Patterson had was that he did not observe any data collection during the time he was in the classroom. He also noted that TEACCH was part of the classroom structure in addition to ABA components, and felt that Student would benefit most from a strict ABA program.

155. At the hearing, Dr. Patterson indicated that he thought the classroom had many positive aspects but that Student was not ready either for group ABA or for full-time placement in a classroom. What he recommended was a gradual transition for Student over a six or seven month period, beginning with related services such as occupational therapy, and gradually adding time throughout the school day.

156. Therefore, the dichotomy between the parties centers on when Student will be ready for school. Although the parties spent considerable time at hearing presenting evidence as to whether, in Student's case, Student's CARD program was best for Student, or in the District's case whether CARD is inappropriately providing services, the efficacy of the CARD program is not at issue when deciding whether the District's proposed program is appropriate. Based upon all the evidence, including the observations of Dr. Schreibman, the testimony of Ms. Gansko, and the affirmations of Drs. Lenington, Morris, and Patterson, the weight of the evidence is that Ms. Gansko's STEPSS classroom provides an appropriate educational environment for autistic children and would be appropriate at some point for Student. The question is whether he had reached that point in March 2009, or, if not, is he now ready to be transitioned into that classroom. As discussed below, the weight of the evidence supports a conclusion that Student could have been transitioned in March 2009 and received meaningful benefit from his education.

157. As stated above, Dr. Morris believes that Student was not, and is not ready for school. She bases her opinion on what she described as a lack of pre-academic skills on Student's part: that he is too inattentive, too unfocused, has severe communication deficits, and is unable to follow directives. Dr. Morris acknowledged that Student had made significant gains in the year between her two observations of him. During the second observation of him in April 2009, Dr. Morris saw Student playing meaningfully, where he had not done so during the first observation in May 2008. During the second observation, he actually wanted objects and showed some interest in his environment. He had improved communication and was toilet trained. He had also made a small amount of progress in socialization. But Student did not communicate with her or engage with her in any meaningful way, and still grabbed at things he wanted. Although he turned when Mother called his name, he did not do so for Dr. Morris. Additionally, Student was still eloping and was still engaging in verbal stimulation of repeating sounds.

158. Dr. Lenington does not believe Student is ready for the classroom either. She felt that the pace of the classroom and the fact that the students appeared to be functioning on a higher level than Student made him unprepared for the class at this time. She felt that Student was not ready to follow instructions, would not be able to participate in saying the pledge of allegiance, and would have to be motored through every activity in the classroom. In all, she feels that the demands of the class would overwhelm him.

159. Both Ms. Scott and Ms. Manual, Student's CARD supervisors agree that Student was not ready for transition to a classroom in March 2009, and is not ready now. They state that although he has made significant progress in the CARD program, his attention level and lack of communication and responsiveness make a classroom unsuitable for him at this time.

160. Both Dr. Lenington and Dr. Morris feel that the research on children with autism indicates that full-time in-home ABA programs are the only way to educate autistic students like Student. Dr. Lenington points to research studies which demonstrate the efficacy of intensive ABA-only programs based upon DTT for children with autism.

161. Dr. Patterson agreed with Dr. Lenington that the research supports the effectiveness of ABA programs, and acknowledged he stated in his assessment report of Student that he was only ready to transition to school presently on a minimal basis. However, under cross-examination by the District, he agreed that a review of the data from CARD indicates that Student's behaviors had reached somewhat of a baseline as of March 2009, particularly in the area of eloping and non-compliance. That is, Student's behaviors had reached a plateau in those areas. His eloping attempts had reached a rate of much less than once an hour, and his incidents of non-compliance had decreased as well. Dr. Patterson therefore agreed that based upon the CARD data, Student would have been ready to start a transition to school in March 2009.

162. All of the District's assessors and Dr. Schreiberman disagreed with position of Student's experts. They all testified that Student would be able to obtain meaningful benefit from his education in the classroom based upon the high ratio of adults to students and their observations of him. Ms. Gasko, Ms. Cowell, and Ms. Vandenberg all voiced the opinion that the behaviors they observed during observations in Student's home and/or during their assessment of him would not prevent him from being educated by them. Ms. Gasko, who has taught autistic children both as a provider of ABA/DTT in-home services and as a special education teacher, was most persuasive in her testimony. It is to her classroom that Student would be assigned, and it would ultimately be her responsibility to instruct him and ensure that he was progressing on his goals. She showed no hesitation when she stated that Student had enough pre-academic skills to be able to access his education in her classroom. Since so many aides are present throughout the day, Ms. Gasko is certain that one-on-one assistance will always be available should Student require it. Her classroom is individualized to each Student so that all their needs can be addressed.

163. The opinion of Dr. Schreiberman with regard to Student's readiness for school is also highly persuasive. In addition to observing the STEPSS classroom and observing Student in his home CARD program, Dr. Schreiberman reviewed his assessments, his IEPs, and his history. This provided her with enough information to determine that Student was ready to transition to the District. She was not pressured by the District to come to any particular conclusion and feels that she is a neutral observer who is an advocate for the child and bases her impressions on what she thinks is best for him or her.

164. Dr. Schreiberman agrees that there are a limited number of circumstances when a child should not be in school, such as when he is severely cognitively impaired, where there is a major concern with aggression, or if there is simply no adequate school program for the child. None of these situations, however, apply to Student. She was concerned as well with keeping Student in a segregated home program where Student could not generalize his skills to other environments. The home program basically constituted one of the most, if not the most, restrictive environment in which Student could be placed and Dr. Schreiberman believed that the benefits of going to school for Student, even if he did not learn incidentally from other children, outweighed any benefits he received from continuing exclusively in a home program.

165. Dr. Schreiberman was a convincing witness. Her credentials, education, experience, and research in the area of autism were unmatched by any other witness. She was neutral and balanced in her testimony and stated those aspects of the District's classroom with which she did not agree. She has dealt with thousands of children on the autism scale and had no reason to be biased against or in favor of any specific program. Her statement that her objective was the best interest of the child was sincere and believable.

166. Although both Drs. Lenington and Morris have many years' experience working with autistic children, ultimately the ALJ did not find persuasive their testimony that Student was not ready as of the hearing for transition to a school. First, neither are educators, neither have worked in a classroom, and neither have spent the amount of time researching

autism as has Dr. Schreibman. Additionally, their opinion conflicts with that of Student's expert Dr. Patterson, who has decades of experience in psychology and in education, including transitioning students from home programs to school programs, and who admitted that Student was ready to transition to school in March 2009.

167. Additionally, the ALJ finds the testimony of Drs. Lenington and Morris less persuasive because their interpretation of the research regarding ABA programs for autistic children is misplaced. As will be discussed below in the Legal Conclusions, the research studies cited by Student and referenced by his experts do not address or support maintaining a child full-time in an in-home ABA program after he had already received more than two years of that intensive type of therapy. Additionally, neither Dr. Lenington nor Dr. Morris adequately responded to the ALJ's query regarding at what point an autistic child would be ready for school if, hypothetically, he did not progress passed Student's present profile.

168. Finally, the testimony of the CARD supervisors was undermined by several issues that affected their credibility. At the IEP meetings in March and June 2009, the CARD supervisors discussed Student's use of a PECS communication book during his CARD sessions and at home. The IEP team discussed the use of PECS in relation to goals for Student and developed several communication goals for Student based upon the use of PECS. At the March 12, 2009 IEP meeting, one of the CARD therapists discussed the current phase of PECS that Student was in and the fact that Student was able to use PECS spontaneously. The District team members then stated that their proposed goals addressed opportunities for Student to use PECS to communicate spontaneously. Likewise, at the June 12 meeting, Ms. Manucal, the only CARD therapist present at the meeting, discussed Student's then current use of PECS.

169. The problem is that Student was not using PECS to communicate at all. Dr. Schreibman took issue in her report and at hearing with the way PECS was being used with Student by CARD, stating that the program was not being properly employed. At hearing, Ms. Manucal admitted that she had unilaterally decided to cease using the formal PECS program with Student when he transferred to CARD in Temecula. Instead, she began using an informal communication book with picture icons, coupled with requiring Student to verbalize his responses. While making a determination as to a specific communication method to use with Student certainly was within CARD's prerogative, there is no apparent reason why Ms. Manucal, or CARD, hid this information from the District and, essentially, misrepresented a significant aspect of CARD's instruction to the IEP team. This misrepresentation impacts the credibility of the CARD witnesses.

170. The credibility of the CARD supervisors was further diminished by their constantly changing recommendations regarding when they felt Student would be ready to transition to a school-based program. At the March IEP they stated Student would probably be ready to transition during the summer. At the June IEP they modified their recommendation and opined that Student perhaps would be ready in the coming autumn. At hearing Ms. Manucal and Ms. Scott testified that Student should remain in his home ABA program through the remainder of the 2009-2010 school year. Yet CARD asserts that

Student is making progress in the program, a contention which is, in fact, supported by their data. If Student was making continued progress in the program from March to the present, why did they continually change their recommendation as to when he could begin to transition to? Since the evidence demonstrates that Student continued to make progress in the CARD program, as testified to by Ms. Manual, Ms. Scott, Mother, Dr. Patterson, Dr. Lenington, and Dr. Morris, there was no reason to delay transition, other than CARD's vested interest in maintaining Student in its program.

171. Ultimately, the opinion of the District's staff and Dr. Schreibman, as buttressed by the opinion of Dr. Patterson, was more persuasive. The weight of the evidence therefore supports the District's contention that Student was ready to transition from his ABA program in March 2009, and that the District's STEPSS program would provide him with meaningful educational benefit.

Was the District's Transition Plan Appropriate? (Issues 2 and 3(h))

172. At the March 12, IEP meeting, the District IEP team members formulated a transition plan for Student. The plan called for Student to transition over a two-week period, spending three hours at school the first week, accompanied by a CARD aide, and increasing the hours to first four hours a day and then to a full six hours a day the following week. The plan included a corresponding decrease in Student's CARD home ABA program. The District IEP members testified that they developed the transition plan based upon their observations of Student and the results of his assessments. Dr. Schreibman agreed that the plan was sufficient for Student as she felt her observations of him indicated that he had no difficulty with transitions.

173. While the District IEP members and Dr. Schreibman were persuasive with regard to their testimony concerning Student's readiness for transition, ultimately, the ALJ is not persuaded that a two-week transition from Student's full-time ABA program to a six-hour school day is sufficient to prevent him from, as Dr. Patterson so expressively put it, "imploding." When the District developed the plan, it was based only on its observations of Student, and not on the progress, or lack of it, in his CARD program. While Parents did revoke consent without any apparent reason after the March 11 IEP meeting, the District did not take any previous opportunities to discuss or review Student's progress in the CARD program. Neither the assessors nor the autism coordinators who observed Student spoke to the CARD therapists during their assessments or observations, or contacted them at any other time. It appears that no one reviewed the CARD log books at the time that consent to do so was still in force. The transition plan was therefore based upon the small snapshot in time that the District had of Student, and not on a greater understanding of Student's deficits or needs. As Student's experts pointed out, a two-week transition period is overly simplistic for a child with the deficits demonstrated by Student. The District has the burden of proof in demonstrating that its IEP offer constituted a FAPE. It has not met that burden with regard to its proposed transition plan.

174. In the context of this hearing, only three options for a transition plan were presented to the ALJ. First was the District's proposed plan, which the ALJ has found was not adequate to meet Student's needs. Second, during her testimony, Ms. Manucal offered that she believed if Student were to transition, it would have to be at the rate of no more than one hour of school added every three to six months. The school day in the STEPSS classroom is six hours long. In concrete terms, under Ms. Manucal's proposal, it would take Student a minimum of 18 months (a year and a half) to a maximum of 36 months (three years) for him to transition to school full time. Under her plan, Student could conceivably (and incredibly) be nine years old before he was attending school full time. Ms. Manucal, whose testimony the ALJ has already found suspect, offered no rational basis for a transition plan that protracted.

175. Finally, when pressed by the ALJ at hearing as to what he thought would be an appropriate transition plan given his testimony that Student could have been ready to start transition to a school program in March 2009, Dr. Patterson proposed that Student be transitioned over approximately six months, starting with his related services. A transition based upon Dr. Patterson's suggestion would involve increasing Student's class participation by one hour a month, and simultaneously decreasing his CARD hours. He felt that Student would basically decompensate if interjected too quickly into a full-time school program. However, Dr. Patterson did not give any explanation of the basis for his recommendation that six to seven months were necessary to transition Student. He did not reference the CARD data collected on Student, his observations or his assessments of Student, or the observations and assessments of other assessors. It is thus unclear why Student would need such a protracted transition.

176. There is quite a bit of evidence, however, that Student does not require the prolonged transition urged by either Ms. Manucal or Dr. Patterson. A review of the CARD data books, and the graphs subsequently prepared by Ms. Manucal from the graphs already in the books, as well as the testimony of Ms. Manucal and Ms. Scott, indicates that although Student had some difficulty in transitioning from his home in the San Jose area to his home in Temecula, along with transitioning from one set of CARD providers to another set, he did not show long term regression or long-term spikes in maladaptive behaviors. In other words, although the change in location was unsettling at first, Student soon adapted to his new environment, his maladaptive behaviors again decreased, and his progress in the CARD program resumed.

177. Student presented additional evidence in support of his position that the CARD program benefited him. In response to the District's position that CARD's own progress reports between March and July 2009 showed regression in non-compliance, eloping, and visual and verbal stereotypies, Ms. Manucal prepared graphs, admitted as Student's Exhibit 70, that demonstrate that the purported regression was merely spikes in Student's maladaptive behaviors which were occasioned either by the introduction of new and more difficult tasks or a change in location in his home where CARD provided him with services. The increase in maladaptive behaviors, however, did not last long according to the graphs and according to the testimony of Ms. Manucal and Ms. Scott. Once Student became

familiar with the new tasks or familiar with the new location of services his maladaptive behaviors decreased. Additionally, CARD has been exposing Student to new locations by taking him to places in the community such as the grocery store and the park, which is increasing his tolerance to new locations. The evidence supports a finding, therefore, that although Student can be expected to initially show an increase on maladaptive behaviors when he transitions to the classroom, he will most likely become accustomed to the new location and his behaviors should thereafter decrease.

178. The evidence also demonstrates that Student does not have a significant difficulty transitioning between service providers. As evidence presented by the District at hearing demonstrated, during the four to five month period from March 2009 to July 2009, Student was served by 17 different CARD therapists, based upon personnel who left and had to be replaced, and on daily absences because of illness, etc. Yet, overall, Student's progress in the program was fairly steady. The evidence therefore supports a conclusion that Student should not have a significant amount of difficulty transitioning to receiving instruction and services from the District staff.

179. Based upon the foregoing, a transition plan of more than two weeks, but less than six months, would be appropriate for Student. Given the evidence from CARD that demonstrates Student's maladaptive behaviors should not continue over a long period of time after a change of location, and given the evidence that Student's behavior decreased once he became used to a location, the ALJ finds that a transition period of six weeks would have appropriately addressed Student's needs in March 2009, and will address his transition needs at the present time. The District's IEP shall therefore be amended to consist of the following: first week of attending school, Student shall attend school one hour a day/five days a week, to encompass related services, plus any additional school activity time necessary to cover the one hour a day/five days a week for the first week. For the second week, Student will add one hour per day/five days a week of ABA/DTT to his school day and will add the final hour of ABA/DTT to his school day for the third week. For the following fourth through six weeks, another hour per day/five days per week will be added Student's school day, until, after six weeks, Student will be attending school full-time. The hours shall be added consecutively, so that Parents do not have to transport Student back and forth to school various times during the day, unless the parties mutually agree otherwise.

180. Should Student choose to begin transitioning to the STEPSS classroom, the District will be responsible for funding the CARD therapists for 17 and a half hours per week during the six-week transition period, with funding covering the presence of a CARD therapist at school with Student for five hours the first week, ten hours the second week, fifteen hours the third week, and 17.5 hours the fourth week. The District shall also fund 10 hours of CARD supervision and six hours of CARD participation at clinic meetings during the six-week transition period. If Parents wish to have CARD present during the transition hours at school, it will be Parents' responsibility to arrange and fund CARD's participation. If they do decide to do so, the District shall agree to permit the CARD staff to be present at school.

Lack of a Behavior Support Plan (Issues 2 and 3)

181. Student alluded at hearing and alludes in his closing brief that the District's IEP offer is not a FAPE because it does not include a behavior support plan (BSP). The evidence does not support Student's position that the District was required to include one in its IEP offers.

182. Ms. Gansko and Mr. Trance testified that while they acknowledged that Student has maladaptive behaviors, it was not appropriate to develop a BSP until after he began school since they could not be certain of what type of behaviors would carry over to the school setting and what the antecedents of the behaviors would be in that setting. Rather, they proposed observing Student after he began school and then developing a plan based upon observations of him. Ms. Gansko believed that the high number of adults in her classroom, and her competence as well as the competence of her aides, could address any initial issues that arose with Student in class.

183. The only Student witness who addressed the issue of a BSP in any depth was Ms. Manual, who criticized the District's IEP offer because it did not include one. However, in addition to the problems with Ms. Manual's credibility as discussed above, her position with regard to developing a BSP was totally contradictory. In describing Student's transfer from CARD in the San Jose area, to CARD in Temecula, Ms. Manual testified that he had had a BSP when being served by CARD in San Jose. However, when he transferred to Temecula in January 2008 and came under her supervision, she felt it was inappropriate to apply the San Jose BSP to Student's program in Temecula since he was in a new home and working with new therapists. Rather, she determined it was more appropriate to observe Student's behaviors during approximately the first month of his work with CARD in Temecula and then developed a BSP based upon those observations. Inconsistently, she asserted that the District should have developed a BSP without having had any opportunity to observe Student in school and determine what his behavior needs were in that new environment. This inconsistency undermines Ms. Manual's opinion that the District should have developed a BSP for Student without having a basis for its content.

184. The weight of the evidence therefore supports the District's position that a BSP would be more properly developed after Student began attending school.

Adequacy of Related Services (Issues 2 and 3(i))

185. Student also alleges that the District's IEP offer did not constitute a FAPE because it failed to include APE services and did not include adequate speech and language services or adequate occupational therapy services.

186. It is unclear why Student does not believe that the OT services offered by the District are inadequate. Student's attorney did not make an opening statement and his closing brief does not address OT services. The District's offer included two, 30-minute sessions of individual OT services per week, along with one, 30-minute per week session of

collaboration between the occupational therapist and Ms. Gansko. The District also offered, as supplementary services, development of a sensory diet for Student and sensory breaks on an as-needed basis. Ms. Gansko's classroom also includes in its normal schedule two, 20-minute group sessions a day for the entire class in the motor lab, which is dedicated to addressing each student's sensory needs.

187. Anne Fleck, a private occupational therapist, assessed Student in December 2008. In her report, she recommends that Student receive two, 45-minute OT sessions a week in addition to one, 30-minute classroom consultation a month. However, as stated above, Parents did not inform the District that Ms. Fleck had assessed Student, did not provide them with copies of her report, and did not discuss the report, at any time during the March or June 2009 IEPs. Nonetheless, even if the District had been privy to her recommendations, their IEP offer with regard to OT corresponds to hers. Although Ms. Fleck recommends a half hour more a week of OT than contained in the District's offer, overall, the District was providing that, and more, to Student, because he would have access to the school's motor lab about 40 minutes a day. In effect, the District's provision of OT services, including all the sensory services built into the offer, provided more OT to Student than that recommended by Ms. Fleck.

188. The weight of the evidence therefore supports a finding that the District's offer of OT services was sufficient to meet his needs.

189. Student also contends that the District's offer of speech and language services did not offer him a FAPE. To some extent, the evidence supports Student's contention.

190. The District's offer of SL consisted of four, 20-minute group sessions of SL each week, for a total of 80 minutes a week of group therapy, and two, 30-minute sessions a week of individual therapy, for a total of 60 minutes per week. At hearing, Ms. Vandenberg stated that there are two group models of providing SL services in Ms. Gansko's classroom: there is one group of three students, and one group of six students. She stated that the District proposed providing Student with his group SL sessions in the smaller of the two groups. During their observation of the classroom, the group observed by Drs. Patterson and Lenington consisted of all nine students in the classroom. It is unclear from the testimony whether there are other SL group sessions as described by Ms. Vandenberg. However, the size of the group is not relevant as the evidence indicates that it is not presently appropriate to deliver SL services to Student in a group.

191. The description of the SL group session observed by Drs. Patterson and Lenington demonstrate that the students do not react or socialize with one another during the sessions. Rather, Ms. Vandenberg directs herself to each child in turn regarding the particular lesson she is working on that day. The other children are required to wait quietly during the session for Ms. Vandenberg to direct her attention to him or her.

192. Ms. Abrassart, who assessed Student and was present for the first day of the March IEP meeting, opined that Student required two, 45-minute individual SL sessions a

week. She has been providing SL therapy to Student since January 2009. Ms. Abrassart is a licensed SLP who has a Master's degree in communicative disorders. In addition to her certificate of clinical competency as an SLP, she also is a credentialed special education teacher. Ms. Abrassart's professional accomplishments are significant. She has practiced as an SLP for some 35 years, many of which were with other school districts. She maintained a private practice while working at her last school district, and now exclusively devotes herself to the private practice. She has been an independent evaluator for the Riverside County Office of Education and has been an accreditation team member for the Commission for Teacher Credentialing. Additionally, she has taught speech and language at the college level for 21 years. She had a commanding presence in the hearing room, and gave very assured, but not arrogant testimony.

193. Ms. Abrassart's experience as a school-based SLP and her many months of providing services to Student, made her testimony more persuasive than that of Ms. Vandenberg, whose only contact with Student has been during her assessment of him. In order to deliver services to Student, Ms. Abrassart testified that she sits on the floor with her feet around his chair and his hands on him to prevent him from attempting to elope and to keep him focused. She is constantly prompting and redirecting him. She attempted a group format with Student by bringing his sister into a session but it was unsuccessful.

194. There is no evidence that Student can participate in a group SL session. The District had the burden of proof that the related services they offered constituted a FAPE. It has failed to meet that burden with regard to the offer of group SL services. Pursuant to Ms. Abrassart's recommendation, Student requires 90 minutes per week of individual SL services, rather than the 60 minutes a week of individual services and 80 minutes per week of group services proposed by the District.

195. Student also contends that the District improperly denied him APE services. District APE instructor Katie Hairabedian assessed Student on May 14, 2009. She was not able to be present at the June 12 IEP meeting and therefore turned her notes and test results over to her colleague, Ronnie Plotner, who presented the assessment report, including Ms. Hairabedian's recommendation, at the meeting.

196. Ms. Hairabedian administered a standardized APE test to Student called the Test of Gross Motor Development-2 (TGMD-2). She also conducted an informal APE test which consisted of looking at Student's skills with ball playing, on a balance beam during a wheelbarrow walk, and for sit-ups, all skills not tested on the TCMD-2. Ms. Hairabedian has been an APE instructor for a total of 21 years. During that time, she has assessed approximately 200 autistic children and made recommendations with regard to their need for APE services. She has a Bachelor of Science degree in physical education and a certificate as an APE instructor. Student does not contest the results of her assessment. Rather, he contends that the results indicate that he required APE services. Student's position is well-taken.

197. The TGMD-2 consists of two sections. The first section tests locomotor skills such as hopping, running, jumping, and galloping. Student was able to walk forward on a balance beam independently, and to accomplish the other locomotor skills tested. He required assistance to perform bent-knee sit-ups and was not able to jump a long turned rope. Student's locomotor skills were overall very much above average. He scored in the 95th percentile, at an age-equivalency of 10 years old.

198. The second section of the TGMD-2 tests object control with regard to balls. While Student was able to successfully strike and kick a stationary ball, he needed much improvement in dribbling, catching, overhand throwing and underhand rolling. On the overall object control section of the test, Student scored in the second percentile, at an age equivalency of less than three years old, although he was over five-and-a-half years old at the time.

199. Student's aggregate score on the TGMD-2, averaging his score from the locomotor section and his score from the object control section was in the 42nd percentile, overall an average score. Because Student's aggregate score was in the average range, the District found that Student did not qualify for APE. The District's position is that a student must score in the seventh percentile or less overall to qualify for services.

200. The District's argument is not persuasive. The TGMD-2 test two totally unique areas: locomotor and object control. The fact that Student excelled in one area cannot discount the fact that he scored significantly below average in the other. A comparison would be to an assessment testing a student's academic achievement. That a student has above average scores on the math portion of the test does not signify that a school district can ignore his very low achievement scores in reading. The district would be remiss in averaging the two scores and then asserting that the student did not require reading intervention because, when his reading and math scores were combined, the student's overall score was in the average range. Because Student scored well below the seventh percentile in object control, the District here needs to address his deficits in that area.

201. The District asserts that even if Student has deficits in physical education, they will be addressed in the specialized physical education sessions Ms. Gansko provides to all her students. The flaw in the District's argument is that it presented no evidence regarding what Ms. Gansko's specialized physical education class covers or how Student's deficits would be met in it. There was no testimony at all addressing that issue. The District had the burden of proving that its offer of placement, including physical education, offered a FAPE to Student. It has not met that burden with regard to the provision of APE.

202. Student also contends that the District's offer of extended school year (ESY) services is insufficient because he requires continuous or almost continuous services throughout the calendar year. ESY services are not designed to resemble school year services. They are designed to prevent a student from so seriously regressing during the time between school sessions that the student will not be able to progress the following year. The District presented evidence that there was no more than a three-week break between its school year and its ESY session. Student did not present persuasive evidence that he would

so regress during the three weeks between those sessions that he would fail to make any progress the following year. The District's offer of ESY was sufficient to provide Student with a FAPE.

Reimbursement (Issues 4 and 5)

203. Parents may be entitled to reimbursement for the costs of services they have procured for their child when: (1) the school district has failed to provide a FAPE and (2) the private placement or services are determined to be proper under the IDEA. Student requests reimbursement for the costs of his IEES. However, since the District has proven that its assessments of Student were all appropriate, Student is not entitled to reimbursement for the costs of any of his IEES.

204. However, the weight of the evidence supports Student's contention that he was denied a FAPE by the District's failure to provide him with an appropriate transition plan. While the District's offer of placement in the STEPSS classroom was a FAPE, it should have prepared a plan calling for a slower transition of Student from his ABA program to school. Since the ALJ has found that Student could have transitioned to school over a six-week period, she will order reimbursement to Parents for six-weeks of payments they made to CARD. The evidence shows that Parents have been self-funding 17.5 hours per week of Student's ABA program as of March 2009. For six weeks, the total amount of hours would have been 105 hours. At \$60 per hour, the total amount of reimbursement for CARD therapy services is \$6300. The documentary evidence submitted by Parents also indicates that on an average, Parents paid for four hours per month of attendance by a CARD therapist at clinic sessions to discuss Student's progress. Over a six week period, CARD would have attended approximately six clinic hours, for which they charged Parents \$60 an hour. The total amount of reimbursement for clinic hours is thus \$360. Additionally, the documentary evidence indicates that, on an average, Parents paid for eight hours a month of CARD supervision at \$150 per hour. The total amount of CARD supervision for six weeks would therefore have been 12 hours at \$150 per hour, for a total reimbursement of CARD supervision hours of \$1800.

205. Therefore, equities in this case warrant a total amount of reimbursement to Parents from the District, based upon the lack of an appropriate transition plan, in the amount of \$8460 (eight thousand four hundred sixty dollars).

206. The District presented a significant amount of evidence at hearing attempting to show that CARD did not provide appropriate services to Student. The basis for its assertion was the observation conducted by Dr. Schreibman, who believed that the CARD provider was not following good ABA principles in delivering her services. It is not necessary to resolve whether the services that day were poorly delivered. The evidence indicates that CARD is an experienced NPA provider of ABA services. The District contracts with it to provide those types of services to other children. The evidence also demonstrates that Student made progress during the entire time he received CARD intervention. Mr. Trance acknowledged that during his testimony and the CARD data logs

support such a finding. For purposes of reimbursement, a student does not need to demonstrate that his private program met the legal criteria for a FAPE that a district must show when defending its own program. The student must only show that his private program was appropriate. Student has met that burden in the instant case.

207. Student has also met his burden of proof that the District's offer of group SL services for him, in addition to the 60 minutes a week of offered individual services, did not offer him a FAPE. Student has demonstrated that all his SL services should be delivered individually to him. Ms. Abrassart's recommendation was for 90 total minutes a month of individual SL. The District offered 60 minutes, which Student chose not to accept. The equities therefore support a reimbursement award to Student of 30 minutes a week of Ms. Abrassart's services, or one third of what he is requesting. The total amount of reimbursement requested for Ms. Abrassart's services is based only on her provision of SL services after the March 12, IEP meeting, and does not include attendance at meetings. Ms. Abrassart billed Parents a total of \$3968.75. One third of that is \$1322.92, which is the amount of reimbursement that the District shall be ordered to pay.

208. Should Student have begun transitioning in March, he would have completed the transition by the beginning of fall 2009. Reimbursement is an equitable remedy. It would be inequitable to order the District to reimburse Student for two transition periods. Therefore, should Parents decide to accept the District's IEP offer and enroll Student in the District's STEPSS classroom, it will be their decision as to whether they wish to continue funding their portion of Student's ABA program and to what extent. It will also be their burden to fund CARD's participation in the transition of Student to school if they believe that to be necessary.

209. All of Student's other requests for reimbursement are denied.

LEGAL CONCLUSIONS

1. The petitioning party has the burden of persuasion in a due process case. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) Therefore, the District has the burden of persuasion for the issues raised in OAH case numbers 2009031335 and 2009050048 (Issues 1 and 2) and Student has the burden of persuasion for the issues raised in OAH case number 200904514 (Issues 3(a) – 3(i), 4, and 5).

The District's Assessments Were Appropriate and Accurately Reflected Student's Abilities and Needs. The District Therefore Had no Duty to Fund Student's IEES. (Issues 1, 3(a), and 4)

2. The District contends that it does not have to publically fund IEES for Student because it appropriately assessed Student in all areas of suspected disability. The District contends that its multidisciplinary assessment dated March 7, 2009, which consisted of an educational assessment, a psychological assessment, a speech and language assessment, and an occupational therapy assessment, were all appropriately conducted. It also contends that

its health assessment was appropriate, and that it had no reason prior to June 12, 2009, to refer Student for an audiology or vision assessment. Student disagrees. He contends that the District's multidisciplinary assessment was improper because sections of the assessment did not utilize standardized tests, or inappropriately modified standardized tests. He also contends that the District should have referred him for an audiology assessment and a vision assessment earlier than the June 12, 2009 IEP meeting. As discussed below, the District has met its burden of proof as to Student's contentions.

Independent Educational Evaluations

3. The procedural safeguards of the IDEA provide that under certain conditions a student is entitled to obtain an IEE at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1)(2006)¹⁶; Ed. Code, § 56329, subd. (b) [incorporating 34 C.F.R. § 300.502 by reference]; Ed. Code, § 56506, subd. (c) [parent has the right to an IEE as set forth in Ed. Code, § 56329; see also 20 U.S.C. § 1415(d)(2) [requiring procedural safeguards notice to parents to include information about obtaining an IEE].) “Independent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question.” (34 C.F.R. § 300.502(a)(3)(i).) To obtain an IEE, the student must disagree with an evaluation obtained by the public agency and request an IEE at public expense. (34 C.F.R. § 300.502(b)(1) & (b)(2).)

4. The provision of an IEE is not automatic. Code of Federal Regulations, title 34, part 300.502(b)(2), provides, in relevant part, that following the student's request for an IEE, the public agency must, without unnecessary delay, either:

- (i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or
- (ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§ 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria.

(See also Ed. Code, § 56329, subd. (c) [providing that a public agency may initiate a due process hearing to show that its assessment was appropriate].)

Assessments

5. “The assessment shall be conducted by persons competent to perform the assessment, as determined by the local educational agency.” (Ed. Code, § 56322.) Assessors must be knowledgeable about the student's suspected disability and must pay attention to the

¹⁶ All subsequent references to the Code of Federal Regulations are to the 2006 version, unless otherwise indicated.

student's unique educational needs such as the need for specialized services, materials and equipment. (Ed. Code, § 56320, subd. (g).)

6. For purposes of evaluating a child for special education eligibility, the District must ensure that "the child is assessed in all areas of suspected disability." (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) After a child has been deemed eligible for special education, reassessments may be performed if warranted by the child's educational needs or related services needs. (34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).) The determination of what tests are required is made based on information known at the time. (See *Vasherese v. Laguna Salada Union School District* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158 [assessment adequate despite not including speech/language testing where concern prompting assessment was deficit in reading skills].)

7. Assessment materials and procedures must be selected and administered so as not to be racially, culturally or sexually discriminatory, and must be given in the student's native language or mode of communication unless it is not feasible to do so. (Ed. Code, § 56320, subd. (a).) Assessments must also meet the following requirements: 1) are provided and administered in the language and form most likely to yield accurate information on what the pupil knows and can do academically, developmentally, and functionally, unless it is not feasible; 2) are used for purposes for which the assessments or measures are valid and reliable; and 3) are administered by trained and knowledgeable personnel in accordance with any instructions provided by the producer of the assessments. (Ed. Code, § 56320, subd. (b).) Assessments must also be selected and administered to best ensure that the test results accurately reflect the pupil's aptitude, achievement level, or any other factors the test purports to measure and not the pupil's impaired sensory, manual, or speaking skills unless those skills are the factors the test purports to measure. (Ed. Code, § 56320, subd. (d).) No single measure, such as a single intelligence quotient, shall be used to determine eligibility or services. (Ed. Code, § 56320, subs. (c) & (e).)

8. The personnel who assess the student shall prepare a written report that shall include, without limitation, the following: 1) whether the student may need special education and related services; 2) the basis for making that determination; 3) the relevant behavior noted during observation of the student in an appropriate setting; 4) the relationship of that behavior to the student's academic and social functioning; 5) the educationally relevant health, development and medical findings, if any; 6) if appropriate, a determination of the effects of environmental, cultural, or economic disadvantage; and 7) consistent with superintendent guidelines for low incidence disabilities (those effecting less than one percent of the total statewide enrollment in grades K through 12), the need for specialized services, materials, and equipment. (Ed. Code, § 56327.) The report must be provided to the parent at the IEP team meeting regarding the assessment. (Ed. Code, § 56329, subd. (a)(3).)

9. Here, there is no contention that the District's assessors were not qualified to assess Student. Ms. Gansko, Ms. Childers, Ms. Vandenberg, and Ms. Cowell are all trained in their respective fields, all are trained to administer the assessments they chose, and all have assessed students previously. They all used a variety of assessment instruments,

including standardized tests where they were able to do so and modified testing where they could not, informal testing, review of records, interviews with parents and/or CARD staff, and observation, in order to determine Student's unique needs in each area. The assessments were consistent with Student's history of autism and his deficits in communication and behavior. The assessments were not racially, sexually, or culturally biased, were given in Student's primary language of English, and the assessments, to the extent they could be administered in their standardized forms, were valid for the purpose for which they were used. Student's eligibility for special education was not at issue at the time of the assessments. Parents were provided with a comprehensive report that explained all of the assessments, the results, and the assessors' recommendations. There is no contention that the District's filing for due process in case 2009050048 was not a timely response to Student's assertion that the District's assessments were inappropriate.

10. Student basically contends that Ms. Gansko's modification of the Brigance, Ms. Vandenberg's modification of the PLS-4, and Ms. Cowell's finding that she could not administer the WRAVMA, all due to Student's inability to follow the test directions, invalidated the tests. Student contends that all three assessments should have been administered in standardized form to him or other testing instruments should have been attempted, because his private assessors were able to administer standardized tests to him and obtain valid results. Student's argument, however, ignores the fact that because one assessor on a given day is able to administer a test, it does not mean that another will be able to do so at another time. As Dr. Patterson pointed out, an assessment is just a snapshot in time of a child on that day, at that time, with that test, and with that assessor. Student's argument is belied by the fact that his own assessors also had difficulty assessing him due to his inattention and receptive language deficits, and had to modify tests or cease attempting to administer them. Ms. Abrassart gave Student the Rosetti, a test designed for children of age three and under, based on her professional opinion that Student's cognitive profile warranted using it. She then had to modify it because she was not able to obtain basal (or base) level on most of the test's subtests. Dr. Morris attempted to administer the Bracken to Student in order to assess his academic ability, but was unable to do so because of Student's non-compliance and lack of understanding of the directions. Dr. Morris was therefore unable to include an academic assessment as part of her psychoeducational assessment. Student does not argue that Dr. Morris's or Ms. Abrassart's assessments were improper or should not be considered based upon their inability to administer the tests in standardized form. Ms. Gansko, Ms. Cowell, and Ms. Vandenberg used their professional judgment in determining whether to modify a standardized test or to cease attempting to administer a test that Student could not do. Furthermore, Student has not demonstrated that the multidisciplinary assessment did not accurately reflect his abilities or his needs. The results on each test are comparable to those obtained by Student's private assessors. What Student really disagrees with is not the results of the District's assessments, but rather with their recommendations concerning placement and services. Even if those recommendations were improper and/or did not offer Student a FAPE, that fact would not invalidate the administration of the assessments or the results obtained on them. The District has therefore demonstrated that its multidisciplinary assessment was appropriate, that it reflected Student's abilities, and that

Student is not entitled to publically funded IIEES. (Factual Findings 5 through 60; Legal Conclusions 1 through 10.)

11. Student also contends that the District should have referred him for a vision and hearing screening as a result of Ms. Dillon's health screening. However, the District had no information at the time that would have led it to suspect that Student had either a vision or hearing deficit. Neither Student's Parents nor his CARD supervisors provided any information or gave the District reason to believe that either deficit might exist. While Dr. Ballenger has prescribed some type of prism glasses for Student, the District did not have access to or notice of her assessment. Although Ms. Dillon found that Student was slightly far sighted, as did Dr. Ballenger, both testified that far sightedness is common in children of Student's age and that his being far sighted did not warrant intervention. In any case, there is no evidence that Student's vision affects his ability to access his education. With regard to the hearing assessment, Ms. Dillon properly attempted to screen Student's hearing on two occasions. When she was still unable to conduct a formal screening of his hearing, she recommended that the District refer him to an audiologist. The District adopted her recommendation. However, even if the referral to an audiologist should have occurred earlier, Student has failed to demonstrate any prejudice. He was privately assessed by Dr. Abramson, who found that he did not appear to suffer a hearing loss. The District has therefore met its burden of proof that it did deny Student a FAPE by failing to refer him for a vision or hearing assessment prior to June 12, 2009. (Factual Findings 61 through 69; Legal Conclusions 1 through 9, and 11.)

Does the District's IEP Dated March 12, 2009, as Amended by the June 12, 2009 IEP Make a FAPE Available to Student? (Issues 2, 3(b) – 3(i), and 5)

12. The District originally made an offer of FAPE to Student after a two-day IEP meeting on March 11 and 12, 2009. The offer consisted of placement in the District's STEPSS autism-specific special day class full time with two hours a day of individual ABA/DTT and accompanying team meetings and ABA supervision. The District also offered several related services, which consisted of 60 minutes a week of individual SL services, 80 minutes a week of group SL services, and 60 minutes a week of individual OT services along with 30 minutes a week of collaborative OT. The District also offered several supplementary aids and services to Student, including a sensory diet and sensory breaks. Additionally, the District also developed a plan to transition Student from his full-time, in-home ABA program to the STEPSS classroom over a two-week period, with CARD personnel fading out during those two weeks. At the June 12, 2009 IEP meeting, the District amended its offer to include AT services, but found that Student did not qualify for APE. The District contends that its March 12, 2009 IEP offer, as modified by its June 12 offer, provides Student a FAPE. Student contends that the offer is both procedurally and substantively flawed. Other than accepting the AT services after the June 12 IEP meeting, Student's Parents did not consent to the implementation of the District's offer. As discussed below with regard to each issue raised by Student, the District has shown by a preponderance of the evidence that it did not procedurally deny Student a FAPE, and that its STEPSS classroom was appropriate for him as of March 2009, and that its offer of OT was sufficient.

However, the District has not met its burden of proof that its transition plan was appropriate for Student, or that its offer of SL services was sufficient, or that Student did not qualify for APE services. (Factual Findings 70 through 209; Legal Conclusions 1, 12, and 13 through 46.)

Elements of a Free Appropriate Education (FAPE)

13. Under both the federal Individuals with Disabilities Education Act (IDEA) and state law, students with disabilities have the right to a free appropriate public education (FAPE). (20 U.S.C. § 1400; Ed. Code, § 56000.)¹⁷ A FAPE means special education and related services that are available to the student at no charge to the parent or guardian, that meet the state educational standards, and conform to the student’s IEP. (20 U.S.C. § 1401(9).) A child with a disability has the right to a FAPE under the IDEA and California law. (20 U.S.C. § 1412(a)(1)(A); Ed. Code, § 56000.)

14. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034] (hereafter *Rowley*), the United States Supreme Court addressed the level of instruction and services that must be provided to a student with a disability to satisfy the requirements of the IDEA. The Court determined that a student’s IEP must be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not require school districts to provide the student with the best education available or to provide instruction or services that maximize a student’s abilities. (*Id.* at pp. 198-200.) The Court stated that school districts are required to provide a “basic floor of opportunity” that consists of access to specialized instructional and related services that are individually designed to provide educational benefit to the student. (*Id.* at p. 201.) The Ninth Circuit refers to the “some educational benefit” standard of *Rowley* simply as “educational benefit.” (See, e.g., *M.L. v. Fed. Way School Dist.* (2004) 394 F.3d 634.) It has also referred to the educational benefit standard as “meaningful educational benefit.” (*N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2007) 541 F.3d 1202, 1212-1213; *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149. (hereafter *Adams*).) Other circuits have interpreted the standard to mean more than trivial or “de minimis” benefit, or “at least meaningful” benefit. (See, e.g., *Houston Indep. Sch. Dist. v. Bobby R.* (5th Cir. 2000) 200 F.3d 341; *L.E. v. Ramsey Bd. of Educ.* (3d Cir. 2006) 435 F.3d 384.) A child’s academic progress must be viewed in light of the limitations imposed by his or her disability and must be gauged in relation to the child’s potential. (*Mrs. B. v. Milford Board of Education* (2d Cir. 1997) 103 F.3d 1114, 1121.)

15. The Ninth Circuit recently reaffirmed the validity of the *Rowley* standard in analyzing FAPE in the context of the 1997 version of the IDEA. In *J.L. v. Mercer Island School District* (9th Cir. 2009) 575 F.3d 1025, 1034, 1037-1038 & fn. 10 (hereafter *Mercer Island*), the Ninth Circuit overturned the district court’s finding that *Rowley*’s educational benefit standard had been superseded by Congress when it revised the IDEA in 1997. The court found that for all intents and purposes, Congress had retained the same definition of a

¹⁷ All statutory citations to the Education Code are to California law, unless otherwise noted.

free appropriate public education when it reenacted the IDEA in 1997 and that it had not indicated any disapproval of *Rowley*. The court further found that Congress did not express any clear intent to change the *Rowley* FAPE standard. The court thus found that the proper standard to determine whether a disabled child has received a FAPE is the “educational benefit” standard set forth by the Supreme Court in *Rowley*. (*Id.* at pp. 1037-1038.) A review of the 2004 reauthorization of the IDEA does not indicate any substantive changes in the definition of FAPE or anything in the legislative history that would support a finding that Congress intended to change or modify the educational benefit standard enunciated in *Rowley* when it reauthorized the IDEA in 2004. The Ninth Circuit’s discussion regarding the lack of congressional intent to modify the *Rowley* standard is therefore equally applicable to IDEA 2004.

16. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district’s proposed program. (See *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) For a school district’s offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district’s offer of educational services and/or placement must be designed to meet the student’s unique needs, comport with the student’s IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. (*Ibid.*) Whether a student was denied a FAPE is determined by looking to what was reasonable at the time, not in hindsight. (*Adams, supra*, 195 F.3d at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041 (hereafter *Fuhrmann*).)

17. An IEP must be both procedurally and substantively valid. A procedural violation constitutes a denial of FAPE only if it impeded the child’s right to a FAPE, significantly impeded the parents’ opportunity to participate in the decision making process regarding the provision of a FAPE to their child, or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E); Ed. Code, § 56505, subd. (f); see also, *W.G. v. Board of Trustees of Target Range School Dist.* (9th Cir. 1992) 960 F.2d 1479, 1483-1484 (hereafter *Target Range*).) Recent Ninth Circuit Court of Appeals cases have confirmed that not all procedural violations deny the child a FAPE. (*Park v. Anaheim Union High Sch. Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033, n.3; *Ford v. Long Beach Unified Sch. Dist.* (9th Cir. 2002) 291 F.3d 1086, 1089.)

The District Did Not Commit Procedural Violations of the IDEA by Predetermining Student’s Placement, Failing to Allow Parents to Meaningfully Participate in the IEP Process, Failing to Consider the IEES Obtained by Parents, or Failing to Consider the Opinions of Student’s Experts (Issues 2 and 3(b) through 3(e))

18. Predetermination of a student’s placement is a procedural violation that deprives a student of a FAPE in those instances where placement is determined without parental involvement in developing the IEP. (*Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2004) 392 F.3d 840 (hereafter *Deal*); *Bd. of Educ. of Township High School Dist. No. 211 v.*

Lindsey Ross (7th Cir. 2007) 486 F.3d 267.) However, the fact that District staff wrote draft proposed goals and objectives, or met with each other before an IEP meeting does not constitute predetermination; nor does providing a written offer to a student before her parents have agreed to it. (*Doyle v. Arlington County Sch. Bd.* (E.D. Va. 1992) 806 F.Supp.1253, 1262.) Indeed, a district has an obligation to make a formal written offer in the IEP that clearly identifies the proposed program. (*Union Sch. Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526 (hereafter *Union*.) The Ninth Circuit reiterated this proposition in *Mercer Island, supra*, 575 F.3d at p. 1038. The court quoted from 34 Code of Federal Regulations part 300.501(b)(3) (1999), the version of the Code in effect at the time, which stated that an IEP meeting “does not include preparatory activities that public agency personnel engage in to develop a proposal or response to a parent proposal that will be discussed a later meeting” in finding that a pre-IEP meeting held by district IEP team members did not constitute evidence in and of itself that the district had predetermined its IEP offer.

19. A school district has the right to select a program for a special education student, as long as the program is able to meet the student’s needs; IDEA does not empower parents to make unilateral decisions about programs funded by the public. (See, *N.R. v. San Ramon Valley Unified Sch. Dist.* (N.D.Cal. 2007) 2007 U.S. Dist. Lexis 9135; *Slama ex rel. Slama v. Indep. Sch. Dist. No. 2580* (D. Minn. 2003) 259 F.Supp.2d 880, 885; *O’Dell v. Special Sch. Dist.* (E.D. Mo. 2007) 47 IDELR 216.) Nor must an IEP conform to a parent’s wishes in order to be sufficient or appropriate. (*Shaw v. Dist. of Colombia* (D.D.C. 2002) 238 F.Supp.2d 127, 139 [IDEA does not provide for an “education...designed according to the parent’s desires.”], citing *Rowley, supra*, 458 U.S. at p. 207.)

20. However, the IDEA also imposes upon the school district the duty to conduct a meaningful IEP meeting with the appropriate parties. (*Target Range, supra*, 960 F.3d. at p. 1485.) Those parties who have first hand knowledge of the child’s needs and who are most concerned about the child must be involved in the IEP creation process. (*Shapiro v. Paradise Valley Unified School District No. 69* (9th Cir. 2003) 317 F.3d. 1072, 1079.) Parents play a “significant role” in the development of the IEP and are required and vital members of the IEP team. (*Winkelman v. Parma City School Dist.* (2007) 549 U.S. 1190 [127 S.Ct. 1994, 2000-2001; 167 L.Ed. 2d 904].); 20 U.S.C. § 1414 (d)(1)(B)(i); 35 C.F.R. § 300.322; Ed. Code, § 56341, subd. (b)(1).) In order to fulfill the goal of parental participation in the IEP process, the school district is required to conduct, not just an IEP meeting, but also a meaningful IEP meeting. (*Target Range, supra*, 960 F.2d at p. 1485; *Fuhrmann supra*, 993 F.2d at p. 1036.) A parent has meaningfully participated in the development of an IEP when she is informed of her child’s problems, attends the IEP meeting, expresses her disagreement regarding the IEP team’s conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools.* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann, supra*, 993 F.2d at p. 1036.) The school district is required to consider the opinions of the student’s private assessors, and to review the private assessments, but is not required to adopt their recommendations. (Ed. Code, § 56329, subd. (c).)

21. In the instant case, the weight of the evidence demonstrates that the District did not predetermine its offer of placement and services for Student. Other than brief

meetings between Mr. Trance and Ms. Gansko, there is no evidence in the record that the District met formally to discuss Student's IEP before the IEP meeting. A draft IEP was written by Ms. Gansko, with proposed goals interjected by other District team members, but there is no evidence that any formal meeting occurred with all District team members. Nor did Ms. Hertig, the District's representative at the IEP meetings, meet with any other team member before hand. As discussed above, there is no prohibition against district team members meeting without parents to discuss issues relating to the IEP. However, in this case, there is not even any evidence that such a meeting occurred. There is no evidence that the District's draft proposals were set in stone and no evidence that unwritten District policies were determining the type and amount of services that it would offer Student.

22. Unlike the circumstances in the *Deal* case, Student presented no evidence that the District here had a policy of refusing to offer home-based services to students or of refusing to alter its draft proposals. To the contrary, the District here provides in-home ABA services to other children through CARD, through other NPA providers, and through its own staff. Nor has Student proven that District officials were dictating placement decisions concerning special education students or even concerning Student. Unlike the school district in *Deal*, the District here provided many opportunities for Parents to provide their input, including the significant input of the CARD staff in developing goals. Unlike the situation in the recent case of *H.B. v. Las Virgenes Unified School District, et al.* (N.D.Cal. 2008) 52 IDELR 163, 109 LRP 24785, the District here never stated at any time that it would not consider continuing Student's in-home placement, and there is no evidence that the District believed that the purpose of the March IEP was simply to bring Student into a District program. Nor did the District refuse to discuss the merits of Student's CARD program or the possibility of him remaining in it. The District discussed three potential placements at the meeting: general education, Student's CARD program, and the STEPSS classroom. The fact that it ultimately did not agree that Student needed to remain in his CARD program in order to receive a FAPE, and did not adopt Parents' preferred placement, does not mean that the placement was predetermined. The evidence supports the District's position that it had not predetermined its placement offer to Student. (Factual Findings 70 through 95; Legal Conclusions 1, and 13 through 22.)

23. Additionally, the District did not prohibit Parents from meaningfully participating in the IEP process. Nor did it fail to consider Student's IEES or the opinion of his experts. The record is replete with evidence of the many changes the District made to its draft IEP based upon input from Parents, from CARD, and based upon a review of Student's IEES. The District added additional parent concerns, added vocational information, added a goal based upon information and recommendations in Student's SL IEE, added information to and changed baselines, added goals, changed the person responsible for implementing goals, and added accommodations to address Student's sensory needs. The District extensively reviewed the goals proposed by CARD and Ms. Abrassart, and incorporated many of them in its proposed goals. The District IEP team reviewed all IEES presented at the IEP meetings and discussed whether and how to incorporate recommendations made in them. Parents and CARD were asked if they had any questions, concerns, or input, during the discussion of each topic at the IEP meetings. Parents at time offered information or

suggestions, but generally chose to remain silent. There is no evidence that they were prevented from interjecting comments, concerns, opinions, or suggestions.

24. The evidence thus fails to support Student's position that the District prevented Parents from meaningfully participating in the IEP process or failed to consider the assessments or input of Parent's experts. To the contrary, the evidence supports a conclusion that the District devoted several hours to discussing Student's needs, CARD's opinions, all Student's IIEES, and Parents' concerns. Student has therefore failed to meet his burden of proof that the District procedurally violated his rights or Parents' rights under the IDEA. (Factual Findings 70 through 99; Legal Conclusions 1, 13 through 20, 23, and 24.)

The District Developed Appropriate, Clear, and Measurable Goals for Student, and Properly Addressed Student's Present Levels of Performance (Issues 2 and 3(f))

25. The IEP is the "centerpiece of the [IDEA's] education delivery system for disabled children" and consists of a detailed written statement that must be developed, reviewed, and revised for each child with a disability. (*Honig v. Doe* (1988) 484 U.S. 305, 311 [108 S.Ct. 592, 98 L.Ed.2d 686]; 20 U.S.C. §§ 1401 (14), 1414 (d)(1)(A); Ed. Code, §§ 56032, 56345.) 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)(i),(ii); 34 C.F.R. § 300.320(a)(2), (3); Ed. Code, § 56345, subds. (a)(2), (3).)

26. In developing the IEP, the IEP team is mandated to consider the strengths of the child, the concerns of the parents for enhancing the education of their child, the results of the initial evaluation or most recent evaluation of the child and the academic, functional and developmental needs of the child. (20 U.S.C. § 1414(d)(3)(A).) For each area in which a special education student has an identified need, the IEP team must develop measurable annual goals that are based upon the child's present levels of academic achievement and functional performance, and which the child has a reasonable chance of attaining within a year. (Ed. Code, § 56344.)

27. Student contends that at least 31 of the 33 goals and objectives the District developed are inappropriate, vague, and are not measurable. While Dr. Lenington and Ms. Abrassart both took exception to many of the District's goals, their criticisms were not persuasive. As discussed in Factual Findings 100 through 104, the goals were developed in conjunction with CARD, Student's Parents, and Ms. Abrassart. The majority of CARD's proposed goals were similar or almost identical to the District's goals. Ms. Abrassart's goals were also incorporated into the District's final proposed goals. Parents, CARD, and Ms. Abrassart failed to voice any objections to or concerns about the goals. As CARD supervisor Kari Scott testified, had she felt the goals were not appropriate or measurable,

she would have said so at the IEP meeting. All District team members who testified agreed the goals were measurable and that they would be able to implement them in the STEPSS program and measure Student's progress in them, in much the same way that Ms. Abrassart stated that she would be able to implement her goals, even if not as precise as they could optimally be, because she had written them. The goals here are distinct from those developed in the case of *Escambia County Bd. Of Education v. Benton* (S.D.Ala. 2005) 406 F.Supp.2d 1248, cited by Student in his closing brief. There, the goals did not have levels of mastery that the District included here, and were so fuzzy and ill-defined that they were impossible to measure. Here, the District developed goals designed to meet Student's needs. Even if the goals were not as clear as they could optimally be, Student has failed to demonstrate that they were so inadequate that he would not benefit from his education or that his progress would not be able to be measured.

28. Student also contends that the District failed properly to address his present levels of performance. Student's contentions are not supported by the evidence. As discussed in the Factual Findings, Student's present levels were based primarily on input from CARD, which had been providing services to Student for over a year and a half at the time of the March IEP. The information from CARD came from its progress reports and data it kept on Student and was provided by the CARD supervisors who attended the IEP meetings. The District supplemented CARD's information on Student's present levels with the information from its own assessments and observations, as well as from information in Student's IEES. Neither Parents nor the CARD representatives ever indicated during the IEPS that the present levels were incorrect or needed to be supplemented. Indeed, the present levels and baselines of the goals were modified at the IEPS to add information based upon additional information from CARD and Ms. Abrassart. There is simply no basis for Student's contention that the present levels in the IEP were inappropriate or inadequate.

29. The evidence thus supports a finding that the District developed adequate goals and objectives and adequate present levels of performance for Student. (Factual Findings 100 through 119; Legal Conclusions 1, and 25 through 29.)

The District's Offer of Placement in its STEPSS Classroom Constituted an Offer of FAPE to Student (Issues 2 and 3(g))

30. Student contends that he was not ready for transition to a school program in March 29. He argues that his particular needs required that he continue with a full-time, in-home ABA program that uses DTT as its primary method of instruction. The position of Student and his experts – Drs. Patterson, Lenington and Morris, and CARD supervisors Manucal and Scott – is that an eclectic program such as the one employed in the STEPSS classroom, did not meet Student's needs, and is not supported by the research and literature addressing the appropriate way to instruct autistic children.

31. In *Rowley*, the Supreme Court held that courts must refrain from imposing their views of preferable educational methods upon school districts, because courts lack the specialized knowledge and experience necessary to resolve persistent and difficult questions

of educational policy. (*Rowley, supra*, 458 U.S. at p. 208.) Accordingly, as long as the requirements of IDEA are satisfied, "questions of methodology are for resolution by the State." (*Ibid.*)

32. Federal courts of appeal have consistently interpreted *Rowley* to mean that, as long as a district provides or offers a FAPE, the choice of methodology is up to the district, not the parent. (*T.B. v. Warwick School Comm.* (1st Cir. 2004) 361 F.3d 80, 84; *Gill v. Columbia 93 School Dist.* (8th Cir. 2000) 217 F.3d 1027, 1036-37; *Poolaw v. Bishop* (9th Cir. 1995) 67 F.3d 830, 834; *Barnett v. Fairfax County School Bd.* (4th Cir. 1991) 927 F.2d 146, 152; *Lachman v. Illinois State Bd. of Educ.* (7th Cir. 1988) 852 F.2d 290, 296-97; see also, *M.M. v. School Bd. of Miami-Dade County* (11th Cir. 2006) 437 F.3d 1085, 1102-03; *Adams v. Oregon, supra*, 195 F.3d at 1149-50.)

33. Several federal courts have considered the argument that the intensive DTT employed by ABA is the best or the only way to treat an autistic student, and that without it a school district has denied the student a FAPE. For the most part, they have rejected that argument. The seminal case in the Ninth Circuit is *Adams v. Oregon, supra*.¹⁸ There, the student argued that his school district had denied him a FAPE in his individual family service plan (IFSP) had provided him with only 12.5 hours a week of ABA services at home, rather than the 40 hours a week of intensive ABA (the "Lovaas method") he argued he required. Several well-credentialed experts testified for the student that intensive ABA training was the best method of training for autistic children, and that he would be denied a FAPE without it. The Ninth Circuit observed that:

Neither the parties nor the hearing officer dispute the fact that the Lovaas program which Appellants desired is an excellent program. Indeed, during the course of proceedings before the hearing officer, many well-qualified experts touted the accomplishments of the Lovaas method. Nevertheless, there are many available programs which effectively help develop autistic children. [Citation omitted.] IDEA and case law interpreting the statute do not require potential maximizing services. Instead the law requires only that the IFSP in place be reasonably calculated to confer a meaningful benefit on the child.

(*Adams, supra*, 195 F.3d at pp. 1149-1150.) In *Adams*, the hearing officer had received, but not agreed with, extensive testimony in favor of ABA. The Ninth Circuit supported the hearing officer's weighing of the evidence:

While Appellees' experts may not have been as highly qualified as Appellants' experts, they nevertheless were qualified to give their expert opinions as to the appropriateness of Lucas' IFSP program. Thus, the district court's deference to the hearing officer's credibility findings was not clearly erroneous

¹⁸ Although *Adams* involved an IFSP and not an IEP, the Ninth Circuit applied the analysis in *Adams* to other issues concerning an IEP. District Courts within the Ninth Circuit have adopted its analysis of this issue for an IEP. (*Pitchford v. Salem-Keizer School Dist. No. 24J* (D. Or. 2001) 155 F.Supp.2d 1213, 1236.)

Furthermore, in view of the testimony by [District experts] before the hearing officer and the Dawson & Osterling research findings, we are persuaded that the March 6 IFSP was reasonably calculated to develop Lucas and be responsive to his individual needs.

(*Adams, supra*, 195 F.3d at 1150.)

The court concluded that the child's program was reasonably developed based on information available to the team that wrote it, and therefore provided him a FAPE, even though it did not provide the intensive ABA therapy parents wanted. (*Adams, supra*, 195 F.3d at 1150; see also, *Deal v. Hamilton County Dept. of Educ.* (6th Cir. 2008) 258 Fed.Appx. 863, 865 (unpublished).)

34. Student's experts primarily rely on a series of articles describing research studies of the efficacy of ABA programs for autistic children to support their position that only a full-time ABA program was appropriate for Student. The initial case study cited by Student and relied on as the starting point in the vast majority of cases in which a student urges that an intensive home ABA program is the only way he will receive a FAPE, is the Lovaas study, the report of which Dr. Lovaas published in 1987. In that study, two groups of children were followed. One group received more than 40 hours a week of one-on-one intensive ABA therapy. The other group received 10 hours or less per week of that type of therapy. Both treatment groups received their respective therapies for two or more years. At the end of the study, 47 percent of the children in the group receiving the 40 hour per week ABA program had achieved normal intellectual and educational functioning, with normal-range I.Q. scores and successful first grade performance in the public schools, as compared to only two percent of the other group. Student thus argues that he too can only benefit from something nearing the 40 hours a week of ABA advocated by the Lovaas study.

35. Student's premise is flawed for a number of reasons. First, as stated by Dr. Schreibman, who collaborated on the Lovaas study as a student at UCLA, the study itself is imperfect. However, even without addressing the problems with the study, it is clear that Student does not fall into the 47 percent of children in the study who benefited from the intensive ABA program. Those children, after two years of intensive ABA treatment, were able to be mainstreamed in a general education first grade classroom, and demonstrated I.Q. scores in the normal range. Student in this case had received over two years of intensive ABA therapy by the time of the March IEP. However, no one argues that he was capable of being mainstreamed in a first grade classroom or that his I.Q. had increased to the normal range. Student continued, even after two years of intensive ABA therapy, to have significant characteristics of autism and to demonstrate significant deficits in communication and behavior. His cognitive abilities remained many years below his chronological age.

36. Student's reliance on the research concerning intensive ABA programs is also misplaced because nearly all studies he provided as support for his argument begin with the premise that the children in the studies are preschool age at the inception of the studies. The children in the Lovaas study were all below the age of four. Another study cited by Student

found that of children who received either a full time ABA program or an eclectic program, the children in the former showed significantly more improvement than the children in the latter. (*Change in Autism Core Symptoms with Intervention* (Research in Autism Spectrum Disorders I (2007) (Ditza A. Zachor, Esther Ben-Itzhak, Ana-Lia Rabinovich, Eli Lahat).) However, the children in that study, and in all prior studies cited in it, all began receiving their intervention when they were under four years of age. None of the studies has focused on following the progress of older children who have already completed two years or more of an intensive, full-time ABA program such as has Student, to determine if they would make the same significant gains. It is therefore totally inapposite to compare Student, who, even after more than two and a half years of intensive ABA still is severely impacted by autism, to the children who showed such gains in the studies upon which Student relies. Student actually falls within the other 53 percent of the children in the Lovaas study who did not demonstrate the gains of the children who, after two or more years of intensive ABA, were functioning basically like typical first grade students. In fact, like Student now, 10 percent of the children in the Lovaas study remained profoundly retarded and were assigned to the equivalent of special day classes. There is no suggestion in the Lovaas study, or the studies that follow it, that a severely impacted autistic child should continue to remain in an intensive full time ABA program after having received the two plus years advocated by the studies.

37. Ultimately, the opinion of Dr. Schreibman that Student was ready to attend school was more persuasive than that of Student's experts, who, with the exception of Dr. Patterson, seemed content to have Student remain isolated in a home-based program. Student's position defeats the purpose of the IDEA, which was to address the past practices of "excluding entirely from the public school system and from being educated with their peers" children who had disabilities. (20 U.S.C. § 1400(c)(2)(B).) As described more fully in the Factual Findings, while Student continues to have deficits, the structure of Ms. Gansko's classroom and high ratio of adults to students will address any issues that arise with his behavior or lack of attentiveness. The classroom provides a language rich environment, many visual supports, and the structure of the TEACCH program. It has a dedicated teacher well-trained in all aspects of educating autistic children. The aides who staff it are also well-trained, dedicated professionals who calmly approach their work with the children in the class. The high ratio of adult support in the class supports the capacity of the staff to offer one-on-one instruction at any time during the school day to those students who require it. The class includes SL consultation with the speech therapist and OT consultation with the occupational therapist, both of whom integrate their services into the everyday structure of the class. Sensory breaks and a sensory diet are provided to those children, like Student, who need them. The class includes a motor room where the students are taken twice a day to address other sensory needs they may have. The class has a specific daily schedule that would provide Student the consistency and structure he requires. The testimony of Dr. Schreibman and the District IEP team that Student was ready to transition to a classroom is buttressed by the testimony of Dr. Patterson that, based upon the CARD data indicating Student's progress in the program and the fact that his non-compliant behaviors and eloping had reached a plateau, Student was ready to transition, albeit a bit slower than proposed by the District, to a classroom. Ms. Gansko's classroom would provide Student

with an array of opportunities for learning and would be supplemented by 10 hours a week of ABA therapy to permit Student to continue to work on his pre-academic skills in a one-on-one setting. The totality of the evidence thus weighs in favor of the District. Its offer of placement in its STEPSS classroom in March 2009 constituted a FAPE for Student. (Factual Findings 120 through 171; Legal Conclusions 1, 12 through 17, and 30 through 37.)

The District's Transition Plan Did Not Offer Student a FAPE (Issues 2 and 3(h))

38. If appropriate, an IEP must also include a provision for the transition of a child from a special class or nonpublic, nonsectarian school into a regular class in a public school for any part of the school day, including a description of the activities provided to transition the child into the regular program. (Ed. Code, § 56345, subd. (b)(4); *T.P. and S.P. v. Mamaroneck Union Free Sch. Dist.* (S.D.N.Y. May 10, 2007) 47 IDELR 287, 107 LRP 27096.) Although the ALJ has found that Student was ready to transition to the STEPSS classroom in March 2009, the evidence supports Student's contention that the District's two-week transition plan was inadequate to address Student's needs. The District did not provide any empirical evidence that two weeks was enough to transition Student, who has a history of difficulty with transitions and of regression and spikes in maladaptive behaviors whenever he leaves the comfort of a known location. As stated above, Student's primary transition issues involve difficulties with adapting to changes in location rather than in adapting to changes in the people providing services to him. The District did not provide persuasive evidence that its transition plan took into consideration the totality of Student's needs and strong possibility that he would have difficulty making the transition from the comfort of his home program. It was the District's burden to prove that its plan met Student's individual needs but it has not met that burden in this regard. However, as discussed in the Factual Findings, neither Ms. Manucal nor Dr. Patterson provided a description of a viable alternative transition plan. However, based upon the evidence of Student's rate of adaptability to new locations, as evidenced by the data collected by CARD and the graphs Ms. Manucal created charting the spikes in Student's maladaptive behaviors, the ALJ has determined that the evidence supports a finding that a six-week transition plan would adequately support Student's transition from his home program to the District's STEPSS classroom. The District will therefore be directed to modify its IEP offer to include the transition plan detailed in this Decision, and will be directed to implement it should Student decide to enroll in the STEPSS class. (Factual Findings 172 through 180; Legal Conclusions 1, 12 through 17, and 30 through 38.)

Lack of a Behavioral Support Plan

39. 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); 34 C.F.R. § 300.346(a) (2)(i); Ed. Code, § 56341.1, subd. (b)(1).) If the team determines that it does, it must consider the use of positive behavioral interventions and supports, and other strategies to address the behavior. (*Id.*) An IEP that does not appropriately address behavior that impedes a child's learning denies a student a FAPE. (*Park v. Anaheim Union High Sch. Dist.* (9th Cir. 2005) 464 F.3d 1025; *Neosho R V Sch. Dist., v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028; *San*

Rafael Elem. Sch. Dist. v. Cal. Special Educ. Hearing Office (N.D.Cal. 2007) 482 F.Supp.2d 1152, 1161-1162; *Escambia County Bd. of Educ. V. Benton* (S.D. Ala. 2005) 406 F.Supp.2d 1248.) A school district is not required to address a student's behavior problems that occur outside of school when the student demonstrates educational progress in the classroom. (*San Rafael Elem. Sch. Dist. v. Cal. Special Educ. Hearing Office, supra*, 482 F.Supp. at p. 1160.) A school district is required to address behavioral problems extraneous to the academic setting only to the extent they affect the student's educational progress. (*Id.* at p. 1162.)

40. Student alleges that the District's IEP offer should have included a BSP. However, the District has proven by a preponderance of the evidence that it was not appropriate to develop a BSP for Student until the District had an opportunity to observe him in the STEPSS classroom in order to determine what behaviors would manifest themselves in Student's new environment and what the antecedents to the behaviors were. Ms. Manucal's testimony that the District's IEP offer was flawed because it did not include a BSP was not credible given her own decision to delay developing a BSP when Student transferred to CARD in Temecula until she had time to observe him in his new environment and with his new ABA providers. The failure to develop a BSP as part of the March and June 2009 IEPs did not deny Student a FAPE. (Factual Findings 181 through 184; Legal Conclusions 1, 39, and 40.)

Related Services (Issues 2 and 3(i))

41. In California, related services are called designated instructional services (DIS). (Ed. Code, § 56363.) DIS includes speech-language services and other services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26)(A); Ed. Code, § 56363, subd. (a); *Irving Independent School Dist. v. Tatro* (1984) 468 U.S. 883, 891 [104 S.Ct. 3371; 82 L.Ed.2d. 664]; *Union, supra*, 15 F.3d at p.1527.) DIS services shall be provided "when the instruction and services are necessary for the pupil to benefit educationally from his or her instructional program." (Ed. Code, § 56363, subd. (a).)

42. Student contends that the District's offer of 60 minutes a week of individual SL services and 80 minutes a week of group SL services, did not meet his needs. Student contends that he is not ready to receive group services based upon his non-compliance and lack of attentiveness, and that he requires a full 90 minutes a week of individual SL services. The evidence supports Student's contention. Ms. Abrassart's testimony was persuasive that Student's needs require a one-on-one method of delivering of services so that he can be prompted, redirected, and prevented from eloping during the SL sessions, and that he requires 90 minutes of services a week to address his communication deficits. The evidence presented by the District was not persuasive that Student would be able to benefit from group instruction. The District has not met its burden of proof that its offer of SL provided a FAPE to Student. (Factual Findings 185 and 189 through 194; Legal Conclusions 41 and 42.)

43. Student has also demonstrated that he should have received APE services. The District's APE assessment demonstrated that Student had significant deficits in the area of object control, where he scored in the second percentile, well below the District's stated ceiling of the seventh percentile. The District offered no support for its contention that it was appropriate to average Student's low scores on the object control section of the APE assessment with the section addressing locomotor skills, where Student scored in the 95th percentile. While the District stated that Student's needs would be met by the specialized physical education provided by Ms. Gansko in her classroom, there was no evidence offered at hearing as to what constituted the specialized physical education program or whether Ms. Gansko could meet Student's object control needs. It was the District's burden to demonstrate that Student did not require APE and that his needs could be met without that related services. The District has failed to meet its burden in that regard. (Factual Findings 185 and 195 through 201; Legal Conclusions 1, 41, and 43.)

44. However, the District has met its burden of proof that its offer of OT services was sufficient to provide Student with a FAPE. It has also demonstrated that it properly deferred developing a BSP for Student because it could not know what his behavior issues would be until he began attending a District classroom. Ms. Manucal, the only Student witness to address the issue of a BSP, did not offer credible testimony that the District's IEP offer was inadequate because it did not include a BSP. She herself had delayed developing a BSP for Student after he transferred to CARD in Temecula specifically so that she could determine what behaviors he would engage in and what the antecedents of the behaviors were. (Factual Findings 185 through 188; Legal Conclusions 1, 41, and 44.)

Extended School Year (Issues 2 and 3(i))

45. California Code of Regulations, Title 5, section 3043, provides that extended school year services shall be provided for each individual with unique and exceptional needs who requires special education and related services in excess of the regular academic year. Pupils to whom ESY services must be offered under section 3043 “. . . shall have handicaps which are likely to continue indefinitely or for a prolonged period, and interruption of the pupil's educational programming may cause regression, when coupled with limited recoupment capacity, rendering it impossible or unlikely that the pupil will attain the level of self-sufficiency and independence that would otherwise be expected in view of his or her handicapping condition.” (See also, 34.C.F.R. § 300.106; Ed. Code, § 56345, subd. (b)(3).)

46. Student has failed to demonstrate that he requires extended school year services in excess of the four weeks of placement and related services offered in the District's IEP. Student has not shown that he would regress to such an extent during the three week breaks between the ESY and regular school years that he would be unable to recoup any losses he incurred during that short period. The District's offer of ESY constituted a FAPE. (Factual Findings 185 and 202; Legal Conclusions 41, 45, and 46.)

Reimbursement

47. Parents may be entitled to reimbursement for the costs of services they have procured for their child when: (1) the school district has failed to provide a FAPE and (2) the private placement or services are determined to be proper under the IDEA. Reimbursement is an equitable remedy. (*School Committee of the Town of Burlington v. Department of Education* (471 US 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 385] ; *Student W. v. Puyallup School District* (9th Cir.1994) 31 F.3d 1489, 1496.) However, parents are not required to have procured an exact proper placement under the IDEA in order to be entitled to reimbursement. (*Alamo Heights Independent School District v. State Board of Education* (5th Cir.1986) 79 F.2d 1153, 1161.) The parents may receive reimbursement so long as their placement met the student's unique needs and provided the student with educational benefit. (*Ibid.*)

48. Student has failed to prove that he is entitled to reimbursement for any of the IEEs he obtained because the District's assessments challenged by Student were appropriate. However, since the District has failed to meet their burden of proof that its proposed transition plan offered Student a FAPE, Parents are entitled for reimbursement of some of their expenses for the portion they funded of Student's CARD program beginning in March 2009. Student has also demonstrated that CARD was an appropriate program for purposes of reimbursing Parents for their self-funding of a portion of his program. As stated in Factual Findings 203 through 209, Parents are entitled to reimbursement for six weeks of the payments they have made to CARD, including therapy services, clinic meeting attendance, and supervision, for a total amount of \$8460 (eight thousand four hundred sixty dollars). Student has additionally shown that he should have received 90 minutes a week of individual SL services rather than the 60 minutes per week of SL services offered by the District in its IEP. Parents are therefore entitled to reimbursement of one third of the hours billed by Ms. Abrassart for the SL services Parents self-funded, for a total amount of \$1322.92 (one thousand three hundred twenty-two dollars and ninety-two cents). The total amount of reimbursement due from the District to Parents is \$9782.92 (nine thousand seven hundred eighty-two dollars and ninety-two cents). All other requests of Parents for reimbursement are denied. (Factual Findings 203 through 209; Legal Conclusions 47 and 48.)

ORDER

1. Within 45 days of receipt by the District of copies of cancelled checks, credit card statements, or other bank statements showing that Parents paid CARD for its services in March and April, 2009, and paid Ms. Abrassart for her services in the months of March through September, 2009, the District will pay the sum of \$9782.92 (nine thousand seven hundred eighty-two dollars and ninety-two cents) to Parents.

2. If Student chooses to enroll in the District elementary school, the March 12 and June 12, 2009 IEP shall be modified as follows:

a. The speech and language services listed on pages 34 and 35 of the IEP shall be modified to consist of 90 minutes a week of individualized services, to be provided on a pull-out basis. The reference to any group speech and language services shall be deleted.

b. Adaptive physical education services shall be added to the related services listed on page 35, for the amount of minutes per week Student would have received of specialized physical education services in Ms. Gansko's classroom.

c. The transition plan detailed on page 45 of the IEP shall be modified to indicate that Student will transition to the STEPSS classroom for one week at a time over a six-week period, adding one hour a week to the time he spends in school, in accord with Factual Findings 179 and 180 of this Decision.

3. Provided Student is enrolled in the District elementary school during the 2009-2010 school year, the District shall provide Student with the placement and services in the March and June 2009 IEPS, as modified by this Decision, through ESY 2010.

4. As modified by this order, the March 12 and June 12, 2009 IEPS shall constitute Student's stay put placement.

5. All other requests for relief by the parties are denied.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that the hearing decision indicate the extent to which each party has prevailed on each issue heard and decided. The District prevailed fully on Issues 1, 3(a) through 3(g), inclusive, and 4. The District partially prevailed on Issues 2 and 3(i). Student fully prevailed on 3(h) and 5, and partially prevailed on Issues 2 and 3(i).

RIGHT TO APPEAL

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within ninety days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

Dated: November 23, 2009

/s/

DARRELL LEPKOWSKY
Administrative Law Judge
Office of Administrative Hearings