

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS on behalf of STUDENT,

v.

LOS ANGELES UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. 2009060016

DECISION

Administrative Law Judge Robert F. Helfand, Office of Administrative Hearings, Special Education Division (OAH), State of California, heard this matter in Los Angeles, California on September 14-17 and 23-24, 2009. The parties submitted closing briefs on October 14, 2009, and rebuttal briefs on October 20, 2009, at which time the matter was submitted.

Mandy S.L. Favalaro represented Student. Student's father (Father) attended most of the hearing, and Student's mother (Mother) attended the hearing on September 14-17, 2009. Attorney N. Jane DuBovy attended on September 14 and 16, 2009. Also present throughout the hearing was Cassidy English, paralegal to Ms. Favalaro.

Donald Erwin, Assistant General Counsel for the District represented Los Angeles Unified School District (District). Sandi Naba, Due Process Specialist, attended throughout most of the hearing. Sharon Snyder, a Due Process Specialist, attended on September 15, 2009, and Lisa Kendrick, Administrative Coordinator, also attended the hearing.

Student filed his request for due process hearing (complaint) on June 1, 2009. On June 30, 2009, the parties requested a continuance of the due process hearing, which was granted for good cause on July 2, 2009. On July 31, 2009, Student filed an amended complaint, which was withdrawn on August 11, 2009. On August 18, 2009, the parties filed a joint stipulation to continue the matter, which was granted on August 18, 2009.

The following witnesses testified during the hearing: Alessia de Paola Gottlieb, M.D.; Nicole Peterson; Erin Kayem; Wendi Sims; Rosalind Myers; Karna Blugrind; Father; Mother; Lauren Walsh; Meika Cooper; Tobi McKay; Eunjo Stephanie Koh; Estrelita Banks-Bordenave; Neger Zivari, Marcia Makarenco; and Carolyn Paige Gelfand.

ISSUES¹

(I) Did the District deny Student a free appropriate public education (FAPE) by committing the following procedural violations of the Individuals with Disabilities Education Act (IDEA) by:

(A) Failing to consider whether Student required assistive technology (AT) devices at the September 10 – October 6, 2008 and January 28, 2009 Individualized Education Program (IEP) team meetings;

(B) Predetermining its offer of FAPE prior to the January 28, 2009 IEP team meeting;

(C) Failing to consider the independent assessments from Dr. Gottlieb and Ms. Fields-Poster provided by Parents at the January 28, 2009 IEP team meeting;

(D) Failing to have a person who had knowledge about the program being offered present at the January 28, 2009 IEP team meeting;

(E) Failing to include a clear statement of the frequency and duration of behavioral intervention development services (BID) being offered within the January 28, 2009 IEP; and

(F) Failing to include the duration of Student's language and speech services (LAS) and a clear statement of frequency and length of LAS services within the January 28, 2009 IEP?

(II) Did the District deny Student a FAPE by failing to assess in all areas of suspected disabilities, to ensure that assessment tools and strategies were utilized and to conduct sufficiently comprehensive assessments by:

(A) Failing to conduct an appropriate initial assessment of Student's cognitive functions, including school-readiness skills;

(B) Failing to conduct an appropriate LAS assessment, including failing to obtain a true measure of Student's abilities or to identify his apraxia; and

(C) Failing to conduct a recreational therapy assessment of Student despite information that he had delays in peer interactions and recreation and leisure skills?²

¹ The issues have been re-framed for the purposes of this decision.

² Student withdrew this issue following the close of testimony on September 24, 2009.

(III) Did the District deny Student a FAPE by failing to implement the consented portions of the September 10 - October 6, 2008 IEP, specifically behavior services and LAS?

(IV) Did the District deny Student a FAPE by failing to make a substantively appropriate offer of FAPE at the September 10 - October 6, 2008 IEP meetings by:

(A) Failing to offer an education placement in the least restrictive environment (LRE) that allowed Student access to typically developing peers on a continuing basis;

(B) Failing to provide for a sufficient amount of behavioral intervention implementation (BII) and BID services with a provider who could meet Student's unique needs in a general education program; and

(C) Failing to provide a sufficient amount of LAS services that would meet Student's unique needs?

(V) Did the District deny Student a FAPE by failing to make a substantively appropriate offer of FAPE at the January 28, 2009 IEP meeting by:

(A) Failing to offer an education placement in the LRE that allowed Student access to typically developing peers on a continuing basis;

(B) Failing to provide a sufficient amount of LAS services to meet his unique needs;

(C) Failing to provide a sufficient amount of occupational therapy (OT) clinic services to meet his unique needs; and

(D) Failing to provide for a sufficient amount of BII and BID services with a provider who could meet Student's unique needs in a general education program?

PROPOSED RESOLUTION

Student requests that (1) Parents be reimbursed for all expenses incurred in identifying and providing Student with an appropriate educational placement and services; (2) Student be placed in a preschool with access to typically developing peers in a small classroom with minimal visual and verbal distractions; (3) Student receive services of three hours per week of LAS, two hours per week of clinic-based OT, 30 minutes per week of school-based OT, and 14 hours (or an amount equal to time spent within a general education setting) of BII services; and (4) the District provide an AT assessment.

FACTUAL FINDINGS

Jurisdictional Facts and General Background

1. Student and his twin sister were born on September 22, 2005. During all times material, Student and his family have resided within the District. On September 10, 2008, the District found Student eligible for special education under the eligibility category of autistic-like behaviors.

2. In July 2007, at approximately two years of age, Student became a client of the Westside Regional Center (WRC) which provided two and a half hours per week of speech therapy and one hour weekly of OT. Therapy West provided Student's OT, and Progressus Therapy provided his speech therapy. Student also attended the Therapy West Infant Specialized Play Program (TWISPP).

3. TWISPP is comprised of a class of two teachers and six to eight children with developmental delays, ranging from two to three years of age, who are clients of the WRC. The class involves free play opportunities and center based activities.

4. At two and a half years, Student did not have any oral vocabulary nor did he display babbling or word approximation. Student would grunt and vocalize to communicate needs or point to show things. He would also take a person's hand to guide them. Parents bought videos teaching American Sign Language (ASL) which Student started to learn. Parents continued to encourage Student to learn ASL so he could communicate his needs and wants. As of April 2008, Student was able to sign about 25 words. In July 2008, Student was able to sign more than 50 words.

5. WRC referred Student to the District for a comprehensive assessment as part of Student's transition to the District at age three.

Initial Developmental Evaluation by Dr. Gottlieb

6. Parents retained Dr. Alessia de Paola Gottlieb (Gottlieb), a psychiatrist in private practice in Santa Monica specializing in developmental pediatric psychiatry. Gottlieb received a B.S. in Biology from Columbia University in 1985, and her M.D. from the College of Physicians and Surgeons at Columbia in 1993. She completed residencies in pediatrics at Cedars Sinai Medical Center in Los Angeles and adult psychiatry at U.C.L.A., plus a fellowship at U.C.L.A. in child and adolescent psychiatry. She holds board certification from the American Board of Psychiatry and Neurology in both adult psychiatry and child and adolescent psychiatry. In her practice, Gottlieb specializes in assessing and treating children from birth to the age of six years.

7. Gottlieb conducted her assessment on April 15, 29, and 30, 2009, and May 7, 2009. She administered the assessment in her office, which is a neutral setting and is designed to minimize distractions for the child. She conducted the examinations without

Student's parents present to keep him on task. Gottlieb utilized the following evaluation methods: clinical history and examination, child medical screen, the Ornitz Developmental Inventory (Ornitz), Child Behavior Checklist, school observation (at TWISPP), Mullen Scales of Early Learning: AGS Edition (Mullen), Adaptive Behavior Assessment System II (ABAS II), and Autism Diagnostic Observation Schedule-Module I (ADOS-I).

8. Gottlieb observed Student at TWISPP and interviewed his teachers. Student was seen during free play where he referenced people as they entered the room and greeted them with a vocalizing "eeee." He followed instructions to clean up, but he had trouble initially attending and participating in circle time. He also appeared to transition appropriately. Student's teachers stated that Student has diminished eye contact with them and his peers; plays on his own and does not observe other children playing; and often walks carrying toys. They reported that he has made significant progress since joining the program.

9. The Mullen assessed Student in the areas of gross motor, visual reception, fine motor, receptive language, and expressive language. In gross motor, Student scored Average in the 31st percentile with skills at the 28-month level. In visual reception, Student scored at the 26-month level in the 14th percentile, which is in the Below Average range for his age. He also scored in the Below Average range in fine motor with a percentile rank of the fourth percentile and at a 24-month level. In receptive language, Student scored in the 12th percentile at a 25-month level, which is Below Average. He scored Very Low in expressive language at a six-month level in the first percentile. Gottlieb noted that the scores on the Mullen might not reflect Student's full capacity for learning, as his performance was impacted in a negative way by hoarding of toys and his inability to organize himself around the activities in a functional manner.

10. The ABAS II is a parental survey which assesses the child's independent functioning on a daily basis. The areas measured are communications, community use, functional pre-academics, home living, health and safety, leisure, self-care, self-direction, social and motor. Student's age equivalent scores ranged between one year and one year, 11 months in all areas.

11. The ADOS-I is a semi-structured, standardized assessment of communication, social interaction, and play to provide diagnostic information as to autism spectrum disorders. Gottlieb selected Level I due to Student's lack of single words. In the area of language and communication, Student directed vocal attempts to maintain the examiner's interest. Although he did not use words or phrases, he communicated by pointing and conventional gestures. In reciprocal social interaction, Student's use of eye contact to regulate, initiate, and terminate social interaction was non-consistent. He displayed direction of facial expressions but made limited spontaneous initiation of joint attention, and limited use of gaze and pointing to engage a response. In the area of play, Student displayed functional play but not imaginative play. Based on the observation schedule, Student met the criteria for an autistic spectrum disorder.

12. Gottlieb made a diagnosis of autistic spectrum disorder with problems in social environment, educational environment, and primary support. She recommended intensive intervention with strategies to address Student's deficits in language, social communication, and play. As to the early intervention, Gottlieb recommended (a) a full-time preschool program with typically-developing peers to support all areas of development including cognitive, language, motor, and social communication skills; (b) one on one speech therapy three to four times weekly; (c) OT twice per week to address stereotypical behaviors, development of motor planning and praxis, and appropriate and productive play; (d) home behavior therapy for 10 to 15 hours per week; (e) an assessment by a pediatric neurologist; and (f) parental consultation with a pediatric nutritionist and gastroenterologist to address Student's nutritional sensitivities as well as evaluate for lead, zinc, and heavy metals which may cause developmental delays.

The District's initial assessment of Student

13. On July 21, 2008, the District conducted a comprehensive assessment of Student as part of his transition from WRC to the District. A pre-school assessment team from the Infant and Preschool Support Services of the District's Special Education Division conducted the assessments. The team's offices are located at Short Avenue School and are situated in a classroom which is set up much like a preschool classroom with a play area and an area with tables. There are a large number of persons, both adults and children present, as other assessments and IEP meetings may be also occurring at the same time. Student's assessment team included Negar Zivari, a school psychologist, Claire Douglas, an OT therapist, and Estrelita Banks-Bordenave (Bordenave), a speech and language pathologist (SLP). All team members attended each of the assessments as the team works collaboratively. The team also assessed Student's twin sister at the same time. The team conducted its testing on one child and then the other. Student's parents were also present. Parents did not share any information regarding previous diagnoses and prior assessments or permit the District team to interview anyone at TWISPP, as they desired to have the District team be "a fresh set of eyes."

14. During the assessment, Student would not engage with any of the examiners. He was given time to explore and play within the toy area, where he wandered around or became fixated on objects on the wall, such as the alphabet. He did not interact with his sister and mainly was involved in self-directed tasks. Student did not respond when his name was called out. The examiners only obtained Student's participation in a few of the tests with the assistance of Father. The team observed Student during his assessment and that of his sister for a total of two to three hours.

The OT assessment

15. Douglas conducted the OT assessment. Student was non-cooperative with many of the assessment activities which made it difficult to establish all of his motor and sensory needs. Douglas found that Student's areas of strength were reflex integration, muscle tone/postural stability/mobility, range of motion, visual-perception, and emerging

self-help skills. His areas of need were upper extremity strength/hand strength, emerging fine motor/visual motor skills, sensory processing/modulation, and motor planning. Douglas concluded that Student's areas of need may impact his ability to participate in the classroom curriculum and in social situations. Douglas recommended that Student wear a weighted-down vest when outside to provide grounding and use an inflatable cushion while seated. She further recommended that Student be allowed to take a one to two minute "motor break" from classroom situations; be provided a two to three step obstacle course to assist in building upper extremity strength, sensory input, and motor planning skills; be allowed to retreat to a quieter place in the classroom if overwhelmed; and be permitted to take a "sensory break" when needed. Douglas also suggested that Student be provided pencil grips, triangular pencils and devices to assist him in maintaining a tripod grasp, and a "sensory diet"³ to ensure Student's sensory needs were met. Douglas also recommended that Student be provided with a slant board and easels and fidget toys.

The language and speech assessment

16. Bordenave conducted the language and speech evaluation. Bordenave received a B.S. in speech pathology from Tennessee State University in 1974, and her M.A. in speech pathology from Vanderbilt University in 1976. In 1977, she obtained her clinical rehabilitative credential from California and begun working as a SLP with the District. Bordenave attempted to administer the Goldman Friste Test of Articulation, Oral Peripheral Examination, Rosetti Infant Toddler Scale, and Preschool Team Assessment I to obtain a language sample. Because of Student's noncompliant behavior, Bordenave was unable to administer the Goldman Friste, give the Oral Peripheral Examination, conduct an oral motor evaluation, and to obtain a language sample. Results were obtained for the Preschool Assessment I from information obtained from Mother. Student scored within the 18 and 24 month age level in both receptive and expressive language areas. The Rosetti is a parent rating scale. Student demonstrated significant delays in the areas of receptive, expressive, and pragmatic fluency. Student scored within the 12 and 15 month age range for receptive language skills and the 6 to 9 month age range with some emerging skills in the 12 to 15 month age range for expressive language skills. The examiner concluded that "delays in the areas of receptive, expressive and pragmatic language skills, will impact his ability to successfully access his regular school program without some type of special education intervention." Bordenave recommended Student be provided auditory cues combined with visual supports; reinforcements for attempting to produce correct sounds and/or utterances; expansion and modeling of Student's verbal expressions; encouragement to vocalize rather than utilize facial expressions; and modeling and facilitating peer interactions. She also recommended that Student be assessed "by the Augmentation and Alternative Communication program" to determine whether "an AAC system(s) and/or strategies would increase [Student's] ability to communicate more effectively" including within the classroom.

³ A 'sensory diet' is a designed plan that provides a child with stabilizing activities to permit them to focus.

The psycho-educational assessment

17. Zivari conducted the psycho-educational assessment. Zivari received her B.A. in psychology in 1988 from U.C.L.A., and her M.A. in school psychology from California State University at Northridge in 2001. She is credentialed as a school psychologist, and has been with the District since 2001 doing assessments. Since August 2002, Zivari has been a preschool assessor. She has conducted over 800 assessments. Zivari attempted to assess Student in the areas of cognition, school readiness, social emotional development, and adaptive development. Zivari utilized parental reports and observations during the assessment, and attempted to administer the Developmental Activities Screening Inventory-2nd Edition (DASI-II), Preschool Team Assessment III (PTA-III), Vineland Adaptive Behavior Rating Scale (VABS), and the Childhood Autism Rating Scale (CARS).

18. In the area of cognition, Zivari was unable to administer the DASI-II. Student threw a tantrum when asked to transition from the play area to the table area. With assistance from Father, Student completed a few of the assessment tasks before throwing a second tantrum and exiting from the table area.

19. As for school readiness, Student failed to cooperate with the structured assessment tasks. Zivari relied on information obtained through an interview with Parents. Zivari found Student's "school readiness skills at or above the level expectation in areas that require rote memorization and do not require language output" (i.e., Student could recognize by pointing to many of the letters of the alphabet, numbers through fifty, and colors). In other areas, Student was deficient (i.e., he did not understand the concept of big and little, could not say the numbers, recognized his name but could not say it, and was unable to say whether he was a boy or girl).

20. In the area of social development, Zivari assessed Student through observations at the test site, parental interview, and the administration of the CARS. Student did not respond to his name nor make eye contact, and he would often walk around the room while holding a toy and making noises without communicative intent. He often stared at letters which were posted on the room's wall. He was observed to hit his father, flap his arms and cover his ears when asked to transition. Parents related that Student has difficulty socializing with others, and he inconsistently responds while others are trying to engage him. Student does not show any interest in other children although he sometimes responds to his sister. He likes to hold toys but does not play with them. Student becomes upset when his activities were interrupted, and often throws tantrums. Though receiving speech therapy for one year, Student does not have any oral vocabulary and communicates by pointing, taking his parents by the hand, or signing. Student is able to sign about 15 words. CARS was completed by examiner observation and parental interview. Student scored in the significant range for autism with a score of 48.5, which is well above the 30 score for being within the autistic range.

21. In the area of adaptive development, Zivari administered the VABS, which is a parental rating scale. Student's adaptive behaviors fell in the moderately low range, which is "borderline," in the areas of communication and daily living skills, and in the low or below average range for socialization. Parents reported that Student loved books and could listen to a story for up to 30 minutes. He also understood multi-step directions and could identify five body parts. Student ate solid foods using a fork and spoon and could feed himself. He was able to take off clothes but could not put them on. He did not have an awareness of dangers like hot objects and requires adult supervision. He was not potty trained and used diapers. In the area of socialization, Student demonstrated affection towards familiar adults by giving hugs. He liked to explore his environment but did not like playing with peers, though he might play next to them.

22. Zivari determined that Student was eligible for special education services under the "category of autism" as he exhibited the following autistic like characteristics: (1) inability to use oral language; (2) history of withdrawal or relating to others inappropriately; (3) resistance to controls; (4) inappropriate use of objects; and (5) display of peculiar motoric behaviors. She concluded that Student would benefit from a small structured preschool classroom that incorporated a predictable routine with daily visual schedule, consistent limit setting, positive reinforcement, access to desired toys/activities contingent upon participation in teacher directed tasks, prompts and cues to transition, modeling, reinforcement of a variety of play themes with toys, and the facilitation of interaction and play with peers. Additionally, the curriculum should incorporate adaptive skills which were modeled and reinforced daily.

The Progressus Therapy speech and language discharge report

23. On September 8, 2008, Catherine Lumma, a SLP with Progressus Therapy, completed a written discharge report as Student reached three years old. Lumma administered the Rosetti with Student scoring in the 30-33 month age range in receptive language skills, and in the 12 to 15 month age range in expressive language skills. Lumma noted that Student "previously displayed receptive language skills most consistent with the 18-21 month age range, with expressive language skills most consistent with the 12-15 month age range."⁴ Lumma reported that Student could follow two-step related and unrelated directions with no visual cues. Student demonstrated an understanding of location words and responded correctly to questions involving gender and size. He correctly responded to yes/no and what/who/where questions utilizing hand signs and word approximations. In the area of expressive language, Lumma reported that Student had made "remarkable progress over the past 6 months in his use of eye contact and gaze to initiate, maintain and regulate interactions with others." Student had a sign vocabulary of about 50 words with a core of 20 word signs. Lumma also stated that though Student's oral vocabulary was very limited, he was understood by those who work with him. Most of these word sounds did lack most of the consonant sounds so that they are difficult to understand as

⁴ Lumma fails to mention when the previous testing was completed.

words. Lumma indicated a marked increase in the frequency of vocalizations and use of word approximations. Student refused to use objects such as horns and whistles, and he continued to have a difficult time blowing bubbles and coordinating his exhale while blowing in a wand or on an already blown bubble. When Student did vocalize during play, it was with a relaxed and easy vocal quality and his sounds were varied in pitch and loudness. Lumma recommended that Student receive continued early intervention services in speech therapy. Also, she specifically recommended:

As [Student] continues to present as having severely disordered speech indicative of developmental dyspraxia of speech, it is strongly urged that he receive both individualized services (1:1) 4-5x/week for 15-20 mins/ session in combination with speech therapy in a group setting. What is vital with the 1:1 therapy setting is the high frequency (4-5x/week) of practice, as well as a short duration of therapy sessions (15-20 mins.) to allow for optimal speech practice.⁵

The September 10, 2008 and October 6, 2008 IEP Team Meetings

September 10, 2008 IEP Team Meeting

24. The initial IEP team meeting was held on September 10, 2008. The IEP team consisted of Parents; Barbara Austin, Administrative representative; Bordenave; Diane Carpenter, a general education teacher; Marcia Makarenco, school psychologist;⁶ Elaine Marot, an occupational therapist; Ramon Trinidad, a representative of WRC; and Gottlieb, who attended at the request of Parents. The IEP team discussed the results of the District assessments. Gottlieb orally presented her evaluation findings and answered questions posed by the District team members.⁷ The team then discussed and agreed upon Student's present levels of performance in the areas of speech/receptive language, speech/expressive language, speech/pragmatics, speech articulation and intelligibility, school readiness, social emotional, adaptive, and motor-OT. The team noted that Student's cognitive level could not be determined and that a re-assessment "should re-address this area." The team reached agreement that Student was eligible and needed special education services under the eligibility category of autistic-like behaviors. The team determined that Student's disability impacts his ability to meet District grade level standards because of autistic-like characteristics in his inability to use oral language for appropriate communication, a history of withdrawal or relating inappropriately to others, resistance to controls, inappropriate use of objects, and his displaying peculiar motoric behaviors.

⁵ Emphasis is contained in original.

⁶ Makarenco attended in place of Zivari, who was on maternity leave at that time.

⁷ Gottlieb testified that she orally presented the results of her assessment and recommendations to the IEP team. Gottlieb also testified that she responded to numerous questions regarding her assessment from the IEP team members, although Gottlieb did not ask the District assessors any questions about their assessments or recommendations.

25. The team then discussed and adopted goals in the areas of speech/receptive language, speech/expressive language, speech/pragmatics, school readiness (two goals), safety, social emotion, motor-OT (three goals), and behavior support. The team adopted only a single goal involving Student's expressive language deficiency. This goal was "to maximize total communication" by having Student "independently demonstrate the ability to communicate through one or more of the following: gestures, words, signs or pictures to express his wants, needs or ideas at the 80% accuracy level in four out of five trials."

The team also determined that Student required related services in the areas of LAS, behavior intervention implementation (BII), behavior intervention development (BID), OT, and OT-clinic. The team also discussed and adopted a behavior support plan and the need for Student to attend extended school year (ESY) in order to prevent regression of skills. The team discussed placement options which included the Intensive Language Enrichment Afterschool Program (ILEAP), the Phonological Program, the Preschool Collaborative Classroom at an Early Education Center (PCC/EEC) and on a regular elementary school (PCC/SRLDP)⁸, Preschool Mixed class (PSM)⁹ and a Preschool Intensive class (PSI).¹⁰ The team failed to discuss the OT report recommendation for various devices or Bordenave's recommendation for Student to be assessed for whether an augmentation and alternative communication system might be needed by Student to assist in his communication. Parents inquired about the availability of a general education preschool class at their neighborhood school. The team determined that Student would benefit from a small structured preschool class where adaptive skills are incorporated into the curriculum and are modeled and reinforced daily. The team also determined that Student also required a predictable routine with a visual schedule, consistent limit setting, positive reinforcement, access to desired toys or activities contingent upon Student participating in teacher directed tasks, prompts and cues prior to transitions, modeling and reinforcement of a variety of play themes, and facilitation of interactions with peers.

26. The District then presented its FAPE offer which placed Student at the PCC/EEC at the Westminster Early Education Center including ESY. The Westminster PCC/EEC is a class comprising about 14 general education pupils with 10 special education students taught by a special education teacher. The teacher is assisted by general education aide and special education aides. An OT is present weekly to work on the children's gross motor skills. Several of the special education pupils have behavior aides (BII). The curriculum utilized is the regular District pre-kindergarten curriculum, although it may be modified. The class also incorporates many sensory tools which are needed for children with autism, including picture schedules, behavior charts, visual aids and prompts. The goal is to prepare the special education children to enter kindergarten. Parents indicated that Student would be attending a licensed preschool at Temple Isaiah at their expense. The

⁸ The PCC is a class containing general education and special education children.

⁹ The PSM is a special day class containing special education children with a mixture of disabilities.

¹⁰ The PSI is a special day class containing severely handicapped children.

District then offered the services of a Preschool Kindergarten Itinerant Teacher (PKIT) for one to five times monthly, for a monthly total of 120 minutes. A PKIT is an early education special education teacher who visits the private preschool one to three times per month and provides consultation with the private preschool on strategies and modifications of curriculum to meet the child's unique needs. Additionally, the District offered to provide related services in OT (one to five times per month, for a monthly total of 120 minutes) and OT clinic (once per month for 60 minutes), plus designated instruction in LAS (one to five times monthly, for a monthly total of 60 minutes) and a nonpublic agency (NPA) for behavioral intervention implementation for one to five times weekly, for 720 minutes, and behavioral intervention development (BID) for one to five times monthly, for a total of 180 minutes per month. The meeting then recessed so that assessments could be completed in the areas of vision, health and hearing.

October 6, 2008 IEP Team Meeting

27. On October 6, 2008, the IEP team reconvened. Parents, along with Austin, Makarenko, Gottlieb, and Tova Goldberg, a District SLP, attended the IEP meeting. The team discussed the assessments in vision, health and hearing. The team also reviewed Lumma's Progressus Therapy discharge report. A summary of the report, prepared by Goldberg, was made part of the IEP documentation. Parents disagreed with the level of LAS services because the services were not directed towards Student's apraxia. Parents requested that the LAS services include one-to-one speech therapy four times per week for 30 minutes each session. Parents consented to the remaining portions of the IEP and to the commencement of the LAS, BII, BID, and PKIT services pending the conclusion of the District's informal dispute resolution.

Independent speech and language evaluation by Roberta Field- Poster

28. On October 22, 2008, Roberta Fields-Poster, a SLP retained by Parents, assessed Student. Poster observed Student at play, assessed his oral motor movements, and administered the Preschool Language Scale-4 (PLS-4). Father attended the entire assessment. Student demonstrated appropriate play with toys. He communicated by using signs and shaking his head for "yes" and "no." Student also made vowel sounds spontaneously which appeared consistent for specific objects such as "uh" for ball. He also spontaneously made nasal sounds for /m/ and /n/.

29. As to oral movements, Student could imitate tongue protrusion and tongue clicks but he was unable to imitate elevation or lateralized tongue movements and smacking or popping sounds. Student was able to imitate six of 13 vowel sounds and a /h/ sound. He was unable to imitate nasal sounds that he had previously made spontaneously. On the PLS-4, Student scored in the average range in the 34th percentile in auditory comprehension which is on the two year, seven month of age level. In expressive communication, Student was below average in the first percentile at the nine months of age level.

30. Poster determined that Student “demonstrates severe oral motor and verbal apraxia” as “[h]e has profound difficulty imitating and sequencing movements and sounds necessary for speech.” She concluded that “it is quite remarkable that his auditory comprehension skills appear to be relatively intact because he does not get the same feedback that other children are able to receive through verbal interactions.” Poster recommended that treatment goals include increasing Student’s ability to imitate consonant and vowel sounds and consonant and vowel combinations; increasing Student’s signs; increasing his ability to spontaneously name objects and pictures; continuing to develop his auditory comprehension skills for pronouns, concepts, classification skills and negatives; and continuing to develop his play and attention skills.

31. Poster recommended intensive speech and language intervention. Based on “a significant amount of research on treating severe apraxia by the American Speech and Hearing Association,” she recommended that Student should receive either three 50 minute individual sessions per week by an NPA speech pathologist or five 30 minute individual sessions per week by a school SLP.

Fall 2008

32. After the October 6, 2008 IEP meeting, the District failed to provide BII and BID services because of unavailability. During this time, Student enrolled in the Temple Isaiah preschool program. After two days, Student was asked to leave because of his behavior problems. Shortly thereafter, Student enrolled at another preschool which also asked him to leave. Both preschools indicated that Student required the services of a one-to-one aide. Mother spoke with Rosalind Myers, the designated PKIT for Student, who suggested that the Garden School (Garden), a private Jewish school, might be able to accommodate Student. On November 17, 2009, Parents enrolled Student at Garden, with the condition that Student have a BII. Student began at Garden on November 18, 2009, and attended four days per week, for three hours a day. Garden, unlike most community preschools and the District, does not allow its staff to change diapers.

33. On November 13, 2008, the District notified Parents that a NPA, Focus on All Child Therapies (FACT), was designated to provide BII and BID services. Mother contacted FACT, which refused to provide the services because Student was not toilet trained and their personnel would not change diapers. FACT told Parents that its contract with the District does not include diaper changing. Parents then retained the services of another nonpublic agency, Support and Treatment for Autism and Related Disorders (STAR), to provide BII/BID services. STAR already provided Student’s home behavioral intervention services through WRC. STAR commenced providing BII and BID services daily starting with Student’s attendance at Garden. STAR personnel will change diapers if the child is not toilet trained.

34. Student and his sister attended the same class at Garden, which is a general education community preschool. The class contains approximately 12 students and is taught by three teachers. The program commenced at nine o'clock and ended at 12:30 p.m.¹¹

35. The District failed to commence providing Student the offered one hour weekly individual speech therapy because there was no SLP available.

36. On November 17, 2009, Parents, through their attorney, Mandy Favaloro, forwarded a letter to Anita Ames of the District's Infant and Preschool Services Division. In that letter, Parents requested that the District reimburse them for the cost of Student attending the Garden School, as the District's offer of placement was inappropriate for Student's unique needs; notified the District that FACT was an inappropriate BII/BID provider due to their refusal to change diapers; and requested that three hours per week of additional LAS be provided to deal with Student's severe verbal apraxia. Favaloro also informed the District that Parents had not been contacted by a speech and language therapist to commence the one hour weekly individual speech therapy sessions. Favaloro informed the District that Parents had obtained BII/BID services from STAR and speech and language therapy services from Milestone Therapeutic Services and would seek reimbursement in the future. On November 24, 2008, Favaloro forwarded another letter to Nancy Festa of the District's Nonpublic School Department, notifying her that FACT was unable to provide BII/BID services because of their unwillingness to change diapers. Favaloro again informed the District that Parents had obtained BII/BID services and would seek reimbursement in the future. Favaloro also requested that the District schedule another IEP team meeting to discuss Student's program and review independent educational evaluations. The parties later agreed that the new IEP meeting would take place on January 28, 2009.

Parent provided speech therapy

37. Beginning on November 3, 2008, Erin Kayem, a licensed SLP with Milestones Therapeutic Services, began providing services to Student three times per week. Kayem received a B.A. in psychology and linguistics from the University of Manitoba in 1993, a B.A. in communication disorders in 1995 from the University of North Dakota, and an M.S. in speech pathology from Fort Hayes State University. She has been a SLP since 1997, and in private practice since 2004. Throughout her career she has worked with children with apraxia. Kayem testified that it was obvious by observing Student that he suffered from apraxia, as he demonstrated oral motor discoordination, inability to blow, pocketing while eating, and limited motion of tongue and lips. Her main goal was to treat Student for his apraxia by working on his oral motor movements and motor planning. She set treatment goals in sequencing, oral planning, saliva management, and sucking. In a typical session, she works one-to-one with Student on oral motor exercises, auditory processing training, oral

¹¹ In his closing brief, Student asserts that the District changed its offer of a BII for Student to a shared aide with his sister. This is incorrect. During this time, Sister's IEP did not provide a BII for her. Because Garden would not accept Student and Sister without behavior aide support, the District, through Rosalind Myers, Student's and Sister's case manager, offered to allow Student's BII to also provide services to Sister until the dispute was resolved.

movement and sounds, and by using pictures to have Student respond with words. She also incorporates pragmatics by having Student maintain eye contact and engage in turn taking and greetings. When Kayem started treating Student, he could only make three to five word sounds and was locked in his own world. Presently, he is able to utter short functional phrases, possesses a vocabulary of 100 words, and uses word approximations which strangers can understand about 60 percent of the time. As time has passed, Student has relied more on oral communication in lieu of signing. On January 15, 2009, Kayem recommended that Student also receive additional OT in the area of sensorimotor integration to assist his speech therapy. Kayem recommended that this increased OT focus on gross motor planning, sequencing, and attention training. Parents accepted this recommendation and retained the services of Nicole Peterson, a licensed OT, to provide these services once per week for 60 minutes per session.

Student's performance at the Garden School

38. Myers has been a PKIT since 2002. A PKIT acts as a liaison with the private school and the PKIT collaborates and consults with the classroom teacher on strategies to implement a pupil's IEP goals. Myers received a B.A. in general studies from San Diego State University in 1977, and a M.Ed. from Pepperdine University in 1987. From 1978 to 1984, she taught general classes from kindergarten to fourth grade in various District elementary schools. Since 1984, she has experience as a special day class teacher, resource teacher and as an administrator. As part of being Student's assigned PKIT, she observes him in class and consults with the Garden staff about three times a month.

39. When Student first started at Garden, he would constantly run away and cry. As he got used to the class routine, his behavior improved. Student's BII implemented his IEP, rather than his teacher. The teacher appeared unable to communicate with Student as she does not sign. Thus, Student had little, if any, contact with the classroom teacher as all communication was through the BII. Student received no real academic instruction from the classroom teacher. Student's only self-initiated interactions were with the BII and his sister. The BII initiated Student's interactions with peers. Student required prompting and maximum support to sustain interactions with his peers. He did not imitate peers independently. Student's attention to instruction would be about three minutes on average, and then he would require maximum prompting to keep from walking away from an activity. The teacher often allowed Student to engage in a preferred activity, such as looking at a book, rather than attempt to have him participate in instruction. Garden's Director, Alexandra Kayman, told Myers that Garden might not be appropriate for Student, who should be in a special day class because of his lack of participation in the class. Based on her observations and information available, Myers believed that Garden was not an appropriate placement for Student, as he was not integrated into the class nor did he have much social contact with his peers.

40. Gottlieb conducted an observation at Garden on December 30, 2008. She observed Student playing alone in an area alongside his sister. Gottlieb's observations were consistent with those of Myers. The teacher instructed the class to clean up and Student only

responded when he noted his sister walking away. He put his toy away after being prompted by his BII. Student was instructed by his BII to get a book and did so after being distracted for a short time staring at numbers on the wall. When the rest of the class joined in circle time, Student went to the door but was redirected by his BII to the circle with his book. During instruction, Student looked at his book while sitting in the BII's lap. At one point, he then started to crawl away but the BII physically brought him back and placed him on her lap. Shortly thereafter, Student walked to the board and looked at numbers while making a verbalization. The BII once again retrieved him and brought him back to the circle. When his name was called by the teacher, he responded by signing the first letter of his name and followed the routine by taking a card from the teacher. He watched while other children's names were called and they received their cards. Student seemed more interested in his peers than the instruction. The BII and teacher informed Gottlieb that Student was becoming more aware of his peers and was more social and would initiate and tolerate parallel play significantly more than he did when he started at Garden. Gottlieb noted that "participation requires facilitation by [Student's] behaviorist," and that if left on his own, Student "may repetitively play and explore numbers and letters, or he may go to the bathroom and flush toilet paper down the toilet." Gottlieb concluded that Student has shown great progress since her observation at TWISPP in the spring of 2008. Such progress appeared mostly due to Student's progress with his BII, his being older, and his improved ability to communicate gained from his increased ability to sign, and the effectiveness of the speech therapy he received from Kayem.

The Preschool Mixed Class

41. Prior to the IEP meeting, Myers contacted Father to inform him of a potentially more appropriate placement for Student. Based on her observations, consultation with Garden staff and BII, and Student's limited progress, Myers suggested that the PSM may be a more appropriate placement for Student. She suggested that Parents visit the PSM class prior to the IEP meeting.

42. The PSM, where Student would be assigned, is taught by Tobi McKay, who has been teaching this class for 12 years. She received her B.A. in sociology in 1990 from U.C.L.A. and her M.S. in clinical psychology in 1992 from the California School of Professional Psychology (CSPP). She is currently working on her thesis in the Ph.D. program at CSPP. McKay has California credentials in early childhood and special education- moderate to severe. There are a total of 22 students in her PSM with 12 children in the morning class and 10 in the afternoon. Of these 22, 18 children are autistic and several have language impairment. Several of the children use signs to communicate. McKay uses a picture schedule and positive behavior reinforcement. The cognitive ability of the children ranges from above average to delayed. In addition, McKay is assisted by one or two basic assistants who have extensive special education training. Two to three of the children in each class have their own BII. McKay utilizes the District's general education curriculum with modifications which focus on getting the children prepared for general education placement. The academic curriculum includes school readiness skills, numbers, alphabet, colors, shapes, and basic concepts of categorizations. The class also incorporates social,

play, language, self-help, gross motor, sensory, fine motor and behavior skills. There are opportunities to be with typically developing peers at lunch, school wide activities, and a portion of the day, in which at least 30 minutes is spent with a general education class. The class meets four days per week.

STAR Report to IEP Team

43. On January 23, 2009, STAR submitted a written progress report signed by STAR's clinical director, Faye Carter, but authored by Wendi Sims, who is, and was, Student's BID. The report showed that Student had met two of his four functional communication benchmarks and his safety goal, but he had not met any of his two benchmarks in school readiness, two benchmarks in behavior or his social emotional benchmark. She concluded that "[a]lthough [Student] has made improvements in his communication and play skills, he still continues to exhibit needs in toileting, social skills, and behavior." The report recommended that Student continue to receive 14 hours weekly of BII support and two hours per week of BID support.

The January 28, 2009 IEP team meeting

44. Prior to the January 28, 2009 IEP team meeting, Myers consulted with Carolyn Gelfand, a District specialist in the District's Division of Special Education, Least Restrictive Environment Department, about a new program, Kid Intensive Therapy (KIT). Gelfand described KIT as being designed to supplement preschool with the goal of preparing autistic children for general education. Gelfand, who has long experience working with autism and helped develop the program, gave Myers printed material describing KIT.

45. On January 28, 2009, the IEP team reconvened. The team consisted of Father; Myers, the assigned PKIT, who also was in the role of general education teacher; Susan Greenberg, special education teacher; Maralyn Soifer, administrator; Lauren Walsh, OT; Sylvia Youbi, SLP; and Favaloro, Parents' attorney. The team reviewed and discussed Gottlieb's December 30, 2008 observation report, a behavior report by STAR, and the Poster speech and language report. The team reviewed Student's progress on the goals adopted in the preceding IEP. Student met the first benchmark in his receptive speech, expressive speech, and safety goals. He met his full goal in one of the two school readiness goals (using real objects in pretend play). He failed to meet his benchmark or made no progress in his goals for school readiness (independently complete a task and put away materials before starting another activity); pragmatic speech; social emotional (play next to another child engaging in a similar activity with adult assistance for three to five minutes); OT motor; and behavior (transitioning). The team then reviewed Student's present levels of performance which were basically unchanged from the previous IEP, except Student was communicating his wants and needs through signing, pointing, some verbalizations, and following class safety rules with decreasing prompts. The team then adopted goals and benchmarks, including a new goal in speech intelligibility for Student to produce age appropriate phonemes in initial position of words in four out of five trials with 60 percent accuracy.

46. The team again felt that Student required a small structured preschool classroom where adaptive skills are incorporated into the curriculum along with a predictable routine with a daily visual schedule, consistent limit setting, positive reinforcement, preferred activities and toys contingent on participation in teacher directed tasks, prompts and cues prior to transitions, modeling and reinforcement of appropriate play themes with toys, and facilitation of interaction and play with peers. The team discussed placement options and then recommended placement in the PSM class at Westminster School taught by McKay in the morning. BII support would be provided during the PSM class with BID support of six hours per month with four of the six hours to be done at the preschool site. Additionally, the team recommended that Student attend a new program, Kid Intensive Therapy (KIT) at Richland School, which meets in the afternoon five days per week for two and a half hours per day. Myers explained the KIT program which provides an intensive targeting of skills in order to get its pupils to be ready and to succeed in general education classes. The IEP team told Father that because speech therapy is integrated into the KIT curriculum, Student's individual speech therapy services would be eliminated in the offer. Myers attempted to respond to numerous questions from Father. Myers offered to arrange an opportunity for Parents to observe the KIT class and confer with the KIT teacher. The District also offered transportation to the PSM and KIT. The offered program included 70 percent of the time in a special education setting. In the section entitled "IEP Service Summary," which is a graph showing a summary of offered services including frequency and total minutes, BII, BID, and LAS are listed in ranges but the total minutes per time segment were listed except for LAS.¹² Parents did not consent to the IEP as they wanted an opportunity to observe the KIT class and review the District offer. Myers and Father visited the KIT class and conferred with Kuo, the KIT teacher, shortly thereafter. Additionally, Gottlieb observed the PSM and KIT classes at a later date.

The Kid Intensive Therapy program

47. KIT is a supplemental therapeutic program designed for preschoolers with autism. Stephanie Eunjo Koh is the teacher. Koh received a B.A. in psychology in 1995 from U.C.L.A., and an M.A. in special education from San Francisco State University. In May 2005, she received an early childhood special education specialist credential from California. She has worked with autistic children since 2001, and was a senior behavioral therapist with the Lovaas Institute for Early Intervention from December 1999 through March 2004. Koh is assisted by a special education assistant with extensive behavior modification training, a speech language pathology assistant and two behaviorists. KIT is designed to concentrate on behavior issues, sensory regulation, social skills, communication and language, and school readiness skills. The program is highly structured and utilizes strategies such as visual schedules and visual icons. The staff plans daily lessons based upon the needs of each pupil. Speech therapy is targeted by working on individual communication

¹² The document lists BID services with a monthly frequency of 1-5 for total monthly minutes of 300. BII is listed at 1-5 times per week for a total of 600 minutes weekly; and LAS is also listed at 1-5 times per week. The graph fails to list the total weekly minutes. The graph notes that PSM would be 400 minutes weekly but does not list the frequency.

goals each day. Presently, one pupil suffers from apraxia and that pupil does articulation exercises daily. The curriculum also includes school based OT activities including gross motor skills and sensory integration.

Appropriateness of the District's assessment

48. The District assessors were unable to conduct any standardized tests on Student because of his behavior during testing. In lieu of recording test results, District assessors relied on parental rating scales. Although the assessments were attempted in an environment which may be distracting to a child such as Student, there was no further attempt to evaluate Student. Zivari and Bordenave testified that, based on their observations during the approximate two hour assessment time, and Parents noting that Student's behavior was typical, tests results were unobtainable. Thus, they contend that the District assessments were appropriate under the circumstances.

49. The District assessment team assessed Student in a room with multiple distractions including a large number of persons, other assessments in progress, Student's parents and sister present, plus Student's assessments were done with a three person team. The testing space included numerous toys in a play area and the walls were covered with pictures, letters and numbers which may also act as a distraction. Gottlieb testified that the best practice in conducting evaluations for a young child is in an environment which minimizes distractions and is done on a one-to-one basis. With young children, such as Student, it sometimes requires more than one attempt to complete cognitive ability testing, as such children are easily distracted. Gottlieb was able to complete a developmental evaluation of Student approximately two to three months earlier by assessing Student in a quiet environment on a one-to-one basis. Gottlieb opined that the District assessors should have made at least three attempts to complete the cognitive testing using a quiet environment and minimizing all distractions.

50. Kayem, Student's current SLP, agreed with Gottlieb that where a child has attention and focus issues, the best practice is to assess the child in an environment with minimized distractions. In Kayem's experience, children react differently with parents present, so that she believes assessments are better conducted on a one-to-one basis. Since the District SLP was unable to assess Student in an environment with many distractions, Kayem believed that another attempt should have been made to administer standardized tests in a quiet environment. Kayem also testified that to do a thorough evaluation, it is necessary to interview the teacher and observe the child in the classroom. Apraxia can be assessed utilizing standardized testing and/or observations. Since it is not often possible to have a young child sit long enough to administer standardized tests for apraxia, it is acceptable to conduct an informal assessment which requires the child to make an adequate repertoire of sounds to determine whether he has apraxia. Kayem said in just a short observation of Student, it is quite obvious that he suffers from apraxia noted by his uncoordinated oral motor movements.

Appropriateness of the District's January 28, 2009 FAPE offer

Gottlieb's Observations and Opinion regarding placement

51. Gottlieb, at the request of Parents, observed the PSM and KIT classes on February 17, 2009. Gottlieb noted that the PSM "provides a small class size with an excellent teacher child ratio." Gottlieb opined that the PSM was not an appropriate placement for Student as "he is a very academic young boy who enjoys preacademic learning" and that he learns significantly from his environment and his peers. Gottlieb felt that the PSM was not academically oriented to Student's level; and because there is little contact with typically developing peers, Student would lack good role models which would prevent him from advancing developmentally. As to the KIT class, Gottlieb also felt that it was inappropriate for Student, as there was very little peer interaction and little direct focus on preacademic skill building. She believed that the children participating in KIT required more instruction on behavior modification and adaptive skills than on development of joint attention, peer interaction, and preacademic skills which she stated are Student's areas of need.

Testimony of Wendi Sims, Student's BID

52. Wendi Sims works for STAR and is currently Student's BID. She received her A.A. in Liberal Studies in 1999 from L.A. Pierce College, a B.A. in child development from California State University, Los Angeles (CSULA) in 2003 and an M.S. in applied behavior analysis in 2009 also from CSULA. She has worked with autistic children for 10 years. As part of her job as Student's BID, she supervises his BII, observes him at least weekly, develops strategies for the BII to follow, and collects data to author progress reports. Paul, Student's current BII, is a college graduate who is trained in Applied Behavior Analysis (ABA), and formerly worked at the Lovaas Institute. Paul has learned ASL and is able to understand and communicate with Student. Student's goals emanate from his IEP. These include following directions, toileting, socialization with peers, attentiveness, and self-advocacy. In her January 2009 report, Sims reported that Student had met two of his four benchmarks in functional communications, and his safety goal. He had not met any of his two behavior benchmarks and his single social emotional benchmark. Sims felt that Student had a lack of motivation to meet his goals and benchmarks, but she did not attribute his failure to meet his benchmarks to Garden. Since January 2009, Sims indicated that Student has met his January benchmarks plus eight of the goals adopted in the January 28, 2009 IEP. Student still requires support in the areas of toileting, social skills, and behavior. Today, Student is able to sit for a 20 minute circle time. Sims believes that it is essential that Student have access to typically developing peers to continue his progress. She observed the PSM class and felt that Student would have only limited opportunities for contact with typically developing peers in art and lunch. It is her professional opinion that Student should not be placed in an environment as restrictive as the PSM, because he may regress in his still developing social skills.

Opinion of Gelfand, District's expert witness

53. Carolyn "Cara" Gelfand is an autism expert who is presently assigned to the District's Special Education Division in the Least Restrictive Environment Department since 2007. Gelfand received a B.A. from the George Washington University in 1988 and a M.Ed. in 1990, from the University of Washington. Currently, she is a Ph.D. candidate in the School of Education at Claremont Graduate University in Urban Leadership. She holds credentials from New York and Washington in special education as well as an instructional specialist moderate/severe credential from California. She has taught classes for students with autism and severe behavioral disabilities and was an autism program specialist in Seattle. She has additional experience as a principal of a special education center, and as an early childhood autism specialist for the New York Board of Education. In 2002, she was a preschool intensive teacher at the District's Castle Heights Elementary School in 2002, and from 2002-2007 she served as a specialist in the Nonpublic Schools Department of the District's Special Education Division. Gelfand has never assessed, or even met, Student. To prepare for her testimony, she reviewed District assessments, the Gottlieb reports (including the Initial Developmental Evaluation), the IEPs (which includes summaries of the reports of Poster and STAR), and Lumma's report. Based on her review, Gelfand agrees that Student is eligible for special education under autism.

54. Gelfand opined that a community preschool program (CPP) like Garden is not appropriate for Student as a CPP is designed to teach children through the use of play, which happens naturally to typically developing children. Since autistic children do not play in a natural manner, as they get lost in play and do not relate socially, this method is not effective. Also, autistic children are unable to communicate or interact with peers, so they require specialized instruction to learn appropriate play skills; social relatedness including such things as turn taking, and playing with peers; and communication skills. Because of their problems relating socially with peers, autistic children do not learn much from their peers. Autistic children require an environment where they can learn and work on attending to task, imitating peers, and social behavior as well having language intensified instruction. Gelfand explained that an appropriate preschool class for such children is one which utilizes various methods to permit a child to communicate including sign language, pictures and other methods. Since autistic children are visual learners, the class should include visual prompts.

55. Gelfand opined that the PSM class is appropriate for Student as it is designed for children with communication deficits who are in the initial phase of verbal development. PSM staff is trained in teaching strategies of direct instruction, facilitated play, early literacy skills, and applied behavior analysis (ABA). Since Student is deficient in these areas, Gelfand is of the opinion that the PSM class is the most appropriate placement to meet Student's unique needs at the time of the January 28 IEP team meeting.

56. Gelfand helped develop the KIT program, which is designed to complement the preschool program. KIT is an intensified program which works on skills necessary for an autistic child to eventually succeed in general education: attention, initiating social interaction and appropriate social behavior. KIT also works on communication and language

skills by incorporating speech therapy in the program. Because Student is deficient in these areas, Gelfand is of the opinion that Student would benefit from KIT and that the offered placement in KIT with the PSM class is an appropriate placement to meet Student's unique needs.

Remedies

57. Student proposes as an appropriate remedy that Parents be reimbursed for (1) all costs incurred in sending Student to Garden, (2) the speech therapy services provided by Kayem, (3) the OT services provided by Peterson, (4) costs incurred to STAR for BII and Bid services, (5) cost of the Poster evaluation, and (6) costs of Gottlieb's evaluations and observations. Additionally, Student requests that the ALJ determine that Student be prospectively placed at Garden and receive continued services from STAR (BII and BID), three hours of speech therapy from Kayem, and two hours OT from Peterson.

Claim for reimbursement

58. Student has attended Garden since November 17, 2008. Parents have incurred a total of \$10,144.50 in costs. Monthly fees to attend preschool during the school year equal \$1,339, summer session costs \$1,100, and registration fee is \$187.50.¹³

59. Student has received individual OT from Peterson starting on January 21, 2009. Each session costs \$140. Student produced invoices showing total costs incurred through August 2009 for Peterson's services as \$4,340. Father testified that Student was still receiving weekly OT from Peterson which would total an additional \$1,680. Thus, the total amount incurred for OT services equals \$6,020.

60. Father testified that the total costs incurred from Gottlieb totaled \$5,450 of which half (\$2,725) was attributed to Student and the other half to Sister. A review of the documentary evidence produced indicates that total charges attributable to Student are \$1,950.

61. Student has produced invoices from STAR for services rendered commencing November 18, 2008 when Student started at Garden through August 28, 2008. The amount incurred for that time period was \$27,795. Student also claims that he has incurred additional charges for September through November 2009. Since no invoices or other evidence was introduced as to these amounts, the ALJ estimates the amount incurred at \$10,500 based on monthly charges of \$3,500. Student incurred expenses of \$200 for the Poster evaluation.

¹³ Registration fees are \$375 for a family's first child and \$187.50 for the second child. Student's twin sister also attends Garden.

62. Student has been receiving speech and language therapy from Kayem three times weekly since November 3, 2008. Student has produced invoices from Milestones Therapeutic Services showing charges incurred from November 3, 2008 through August 27, 2009 in the amount of \$15,660. Student continued to receive services from Kayem through September, October and November of 2009. The ALJ estimates that Student would have received 14 therapy sessions during the three month period at an additional cost of \$4,130.

Appropriateness of Garden School and services provided by Parents

63. Student contends that the placement at Garden along with the services provided by STAR, Kayem and Peterson are appropriate as Student has made progress on his goals, and based on his scores in the Mullen Scales of Early Learning given in May 2009 as compared to May 2008.

Appropriateness of Garden School

64. Karna Blugrind is a preschool teacher at Garden and has been Student's teacher since June 2009. She received a B.A. in special education from a university in her native Denmark. She has worked in a Brooklyn, New York preschool, as an elementary school substitute for the District, and as a BII in California. Currently, she is the head teacher for the pre-kindergarten class at Garden. She claims that she teaches Student and focuses on his communication skills. She admits that she does not know ASL, which Student uses 60 to 70 percent of the time to communicate, and that she needs the BII to translate for her so that they can communicate. Since June 2009, Student has shown great improvement in his attentiveness so that he is now able to sit through a 20 minute circle time. He still requires BII assistance to direct play and for toileting, as well as assistance to communicate. Blugrind characterizes her class as small (18 students) and structured as she utilizes a predictable routine. She admits that she does not use a visual schedule, and that Student does not require one. She also claims that she has read his IEP and works on the goals included there.

65. Blugrind testified that the class day includes a 20 minute period of religious instruction where the children recite Bible passages in Hebrew. Blugrind proudly stated that not only does Student fully participate, but that he is able to recite the Hebrew passages in a clear and understandable manner that any Hebrew speaker would find understandable. Myers testified that she had never heard Student utter an understandable word during any of her observations. Myers further testified that she never observed Student participate in the religious instruction. Also, Kayem testified that Student has apraxia, which prevents him from making word pronunciations because he is physically unable to do so, and that at best he can attempt word approximations. She also testified that Student is able to make only some word approximations. Because of his apraxia, Kayem suggested on January 15, 2009, and continues to opine that Student still requires OT to continue to work on his gross motor

planning “such as the movements required for the production of speech.”¹⁴ Thus, the ALJ gave little weight to Blugrind’s testimony.

66. Gottlieb gave Student the Mullen during her assessment in May 2008, and the Mullen was again given during testing to determine eligibility to for an Infant Siblings research study by the Semel Institute of UCLA Center for Autism Research and Treatment in June and July of 2009.¹⁵ Although Student showed great improvement in the areas of visual reception, fine motor, and receptive language, Student’s scores in expressive language, clearly his greatest need along with his autism, do not. Gottlieb reported that Student scored in the first percentile and at an age equivalent of six months. Over 12 months later, Student’s scores on expressive language in the Semel testing showed him still at the first percentile with an age equivalent score of 15 months, which is much less than a year’s progress. Gottlieb noted in her written report that Student’s Mullen scores “may not reflect [Student’s] full capacity for learning as his performance was negatively impacted by his hoarding of toys and his ability to organize himself around activities in a functional way.” Gottlieb also repeated this during her testimony. Thus, comparing the two administrations of the Mullen would not be proper.

Appropriateness of Kayem’s speech therapy

67. Three speech pathologists, Lumma, Poster, and Kayem, have assessed Student and determined he suffers from verbal apraxia. The District’s speech pathologist, Bordenave, was unable to assess Student, but she had information from the Lumma and Poster reports as well as the opportunity to confer with Lumma telephonically. Bordenave’s disagreement with the apraxia diagnosis appears limited, contending that neither Lumma nor Poster utilized a standardized test in their assessment. Kayem testified that it is the professional standard where standardized testing can not be given due to factors such as the child’s age or behavior, an informal assessment is acceptable for oral apraxia, which she said is readily apparent in Student. The District did not attempt to refute her opinion. Bordenave testified that should Student have apraxia, then Poster’s recommendation for high frequency and high intensity of service, which is endorsed by the American Speech and Hearing Association, is appropriate. Kayem’s testimony clearly showed that Student has made great progress with her treatment, and that Student is communicating frequently his wants and desires using ASL and attempting verbalizations including word approximations. As Student’s ability to communicate with others has increased, his attention and behavior problems have improved.

Appropriateness of Peterson’s OT services

68. Parents retained Peterson to provide OT services to supplement Kayem’s speech therapy for apraxia. Kayem made a written recommendation for Student to receive

¹⁴ Exhibit S27-Kayem progress Report dated January 15, 2009.

¹⁵ See Paragraph 9 for the Gottlieb administered Mullen results.

OT to supplement her therapy on January 15, 2009, prior to the IEP team meeting of January 28, 2009. Parents elected to not share this report with the IEP team. Peterson never conducted an OT assessment of Student, and she testified that she utilizes the IEP goals in working with Student. Student has offered no testimony to demonstrate that the Kayem recommended OT was any different than that which was already being provided by the District OT. Thus, Student has failed to produce evidence demonstrating Student's need for such services.

Claim for Reimbursement for the assessments of Gottlieb and Poster

69. Student never requested that the District fund or reimburse an independent educational evaluation of Student.

LEGAL CONCLUSIONS

Burden of Proof

1. As the petitioning party, Student has the burden of proof on all issues. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 534-537, 163 L.Ed.2d 387].)

Elements of a Free Appropriate Education (FAPE)

2. A child with a disability has the right to a free appropriate public education (FAPE) under the Individuals with Disabilities Education Act (IDEA) and California law. (20 U.S.C. § 1412(a)(1)(A); Ed. Code, § 56000.)¹⁶ FAPE means special education and related services that are available to the student at no charge to the parents, that meet the state educational standards, and that conform to the student's Individualized Education Program (IEP). (20 U.S.C. § 1401(9).) An IEP is an educational package that must target all of a student's unique educational needs, whether academic or non-academic. (*Lenn v. Portland School Committee* (1st Cir. 1993) 998 F.2d 1083, 1089.) The term "unique educational needs" is to be broadly construed and includes the student's academic, social, emotional, communicative, physical, and vocational needs. (*Seattle Sch. Dist. No. 1 v. B.S.*, 82 F.3d 1493, 1500 (9th Cir. 1996) [citing J.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106].)

3. 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 School District v. B. Smith* (9th Cir. 1994) 15 F.3d 1519, 1527 (*Union*).) DIS services shall be provided "when the instruction and services are necessary for the pupil to benefit educationally. (Ed. Code, § 56363, subd. (a).)

¹⁶ All statutory citations to the Education Code are to California law, unless otherwise noted.

4. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034] (*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. (*Rowley, Id.* at pp. 198-200.) The Court stated that school districts are required to provide only 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. (*Rowley, 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. 2008) 541 F.3d 1202, 1212-1213 (*Hellgate*); *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (*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.)

Procedural Violations

5. 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 Sch. Dist. No. 23*, (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.) Mere technical violations will not render an IEP invalid. (*Amanda J. v. Clark County School District* (9th Cir. 2001) 267 F.2d 877, 892 (*Amanda J.*).) A procedural violation constitutes a denial of FAPE only if the procedural inadequacies (1) impeded the child's right to a FAPE; (2) significantly impeded the parents' opportunity to participate in the decision-making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2); *W.G. v. Board of Trustees of Target Range School District No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484. (*Target Range*).)

6. Parents are required and vital members of the IEP team. (20 U.S.C. § 1414(d)(B)(i); 34 C.F.R. §§ 300.321(a)(1), 300.322; Ed. Code, § 56341, subd. (b)(1).) The IEP team must consider the concerns of the parents for enhancing the education of their

child. (20 U.S.C. § 1414(d)(3)((ii); Ed. Code, § 56341.1.) The requirement that parents participate in the IEP process ensures that the best interest of the child will be protected, and acknowledges that parents have a unique perspective on their child's needs, since they generally observe their child in a variety of situations. (*Amanda J.*, *supra*, 267 F.3d at p. 891.) Procedural violations that interfere with parental participation in the development of the IEP "undermine the very essence of the IDEA." (*Ibid* at p. 892.) In order to fulfill the goal of parental participation in the IEP process, the school district is required to conduct, not just an IEP meeting, but a meaningful IEP meeting. (*Deal v. Hamilton County Board of Education* (6th Cir. 2004) 392 F.3d 840, 857, citing *Target Range*, *supra*, 960 F.2d at p. 1485.)

Issue (I)(A) Did the District deny Student a FAPE by committing a procedural violation of the IDEA by failing to consider whether Student required Assistive Technology (AT) devices at the September 10 - October 6, 2008 IEP team meetings?

7. Pursuant to Factual Findings 15, 16, and 24 through 27 and Legal Conclusions 2 through 6, the District denied Student a FAPE by failing to consider whether Student required an AT assessment. The evidence is clear that two District assessors, Douglas who recommended that Student may need various devices (i.e., pencil grips) to assist him, and Bordenave, who recommended that Student be assessed to determine whether an augmentation and alternative communication system would increase Student's ability to communicate, made recommendations that require an AT assessment. Since the IEP team failed to discuss these recommendations, Student suffered a deprivation of educational benefits and his right to a FAPE has been impeded by the failure to conduct these assessments or discuss whether AT may assist in meeting Student's unique needs.

Predetermination of FAPE offer

8. Predetermination occurs when an educational agency has decided on its offer prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives. (*H.B. v. Las Virgenes Unified School Dist.* (9th Cir. 2007) 239 Fed.Appx. 342, 344-345 [nonpub. opn.].) A district may not arrive at an IEP meeting with a "take it or leave it" offer. (*JG v. Douglas County School Dist.*, *supra*, 552 F.3d 786, 801, fn. 10.) However, school officials do not predetermine an IEP simply by meeting to discuss a child's programming in advance of an IEP meeting. (*N.L. v. Knox County Schs.*, *supra*, 315 F.3d at p. 693, fn. 3.) Although school district personnel may bring a draft of the IEP to the meeting, the parents are entitled to a full discussion of their questions, concerns, and recommendations before the IEP is finalized. (Assistance to States for the Education of Children with Disabilities and the Early Intervention Program for Infants and Toddlers with Disabilities, 64 Fed.Reg. 12406, 12478 (Mar. 12, 1999).)

Issue (I)(B) Did the District deny Student a FAPE by committing a procedural violation of the IDEA by predetermining its offer of FAPE prior to the January 28, 2009 IEP team meeting?

9. Pursuant to Factual Findings 41, 44, and 45 and Legal Conclusions 2 through 6 and 8, Student has failed to meet his burden in demonstrating that the District predetermined its FAPE offer at the January 28, 2009 IEP team meeting. Student contends that the District predetermined its FAPE offer as evidenced by Myer's telephone call where she told Father that a PSM class may be a more appropriate placement for Student. The IEP team reviewed Student's performance at Garden and discussed placement options at the meeting in which Father actively participated. Thus, the District did not violate Student's procedural rights to a FAPE.

Issue (I)(C) Did the District deny Student a FAPE by committing a procedural violation of the IDEA by failing to consider the independent assessments from Dr. Gottlieb and Ms. Fields-Poster provided by Parents at the January 28, 2009 IEP team meeting?

10. Student contends that Parents' right to meaningfully participate in the IEP decision making process was inhibited when the IEP team did not consider independent assessments from Gottlieb and Poster. Pursuant to Factual Findings 6 and 45 and Legal Conclusions 5 and 6, the District did not commit a procedural violation of the IDEA because the IEP team did consider the Gottlieb and Poster independent assessments. The IEP team did consider Gottlieb's independent evaluation as the team received from Gottlieb an oral presentation of her assessment and recommendations and the team asked Gottlieb questions about her evaluation and recommendations at the September 10, 2008 IEP team meeting. The IEP team reviewed and discussed Gottlieb's December 30, 2008 report on her December 30, 2008 observation of Student at Garden.¹⁷ The IEP team also reviewed and discussed the Poster report as well as considered it at the January 28, 2009 IEP team meeting.

Mandatory members of the IEP team

11. An IEP team consists of (1) parents, (2) one regular education teacher, (3) one special education teacher, (4) a representative of the school district, (5) an individual who can interpret the instructional implications of assessment results, and (6) at the discretion of parents or the district, other individuals who have knowledge or special expertise regarding the student, including related service providers, as appropriate. Participants are expected to be knowledgeable about the student's disability and educational history. (*Shapiro v. Paradise Valley Unified School District No. 69* (9th Cir. 2003) 317 F.3d 1072, 1076, 1078.)

Issue (I)(D) Did the District deny Student a FAPE by committing a procedural violation of the IDEA by failing to have present at the January 28, 2009 IEP team meeting a person who had knowledge about the program being offered?

12. Pursuant to Factual Findings 44 through 46 and Legal Conclusions 5, 6, and 11, Myers, an experienced special education specialist, had consulted with one of the persons

¹⁷ The December 30, 2008 observation report by Gottlieb is not an independent assessment but is actually a report of what she saw and her opinion as to the appropriateness of the Garden School for Student based on this observation.

responsible for establishing KIT, and brought with her literature explaining the program, which was new. Although Myers could not respond to all questions raised by Father at the IEP meeting, Myers did arrange for Father to visit and observe the KIT class and confer with the teacher, Kuo. By permitting Father to observe the KIT class and confer with the KIT teacher, Parents' right to meaningfully participate in the IEP process was not inhibited.

Issue (I)(E) Did the District deny Student a FAPE by committing a procedural violation of the IDEA by failing to include a clear statement of the frequency and duration of behavioral intervention development services (BID) being offered within the January 28, 2009 IEP?

13. Pursuant to Factual Findings 45 and 46 and Legal Conclusions 5, 6, and 14, the District did not commit a violation of FAPE by listing a range of frequency for behavioral services on the "IEP Service Summary" graph as Parents' right to meaningfully participate in the IEP decision making process was not inhibited. Father actively participated in the IEP meeting and was informed orally that Student would receive behavior services to cover the entire time that he was in the PSM class, although he would not receive the BII during the KIT program since behavior services were part of that program.

Issue (I)(F) Did the District deny Student a FAPE by committing a procedural violation of the IDEA by failing to include the duration of Student's Language and Speech services (LAS) and a clear statement of frequency and length of LAS services within the January 28, 2009 IEP?

14. An IEP offer must be sufficiently clear that a parent can understand it and make intelligent decisions based on it. (*Union, supra*, 15 F.3d at p. 1519.)

15. Pursuant to Factual Findings 44, 45 and 46 And Legal Conclusions 5, 6, and 14, the District did not inhibit Parents' right to participate in the IEP decision making process by listing a range of LAS in the "IEP Service Summary" graph. Father actively participated in the IEP meeting and was informed orally that Student's individual LAS would be eliminated as speech therapy was part of the KIT program. The offered program was also described in the IEP document itself. Thus, Student is unable to demonstrate that Parents were not able to participate effectively in the IEP process.

Assessments

16. A school district is required to conduct "a full and individual initial evaluation" before the initial provision of special education and related services to a child with a disability. (20 U.S.C. § 1414 (1)(a); 34 C.F.R. § 300.301(a); *P.P. v. West Chester Area School District* (E.D. Pa. 2008) 557 F.Supp.2d 648, 666.) In evaluating a child for special education eligibility, a district must assess the child in all areas related to a suspected disability. (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) The assessors must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child that may assist in determining whether the child is eligible for special education. (34 C.F.R. § 300.304(b)(1).) A reassessment may be

performed if warranted by the child's educational or related services needs, or if requested by a parent or teacher. (34 C.F.R. § 300.303(a)(2006); Ed. Code, § 56381, subd. (a)(1).) No single measure, such as a single general intelligence quotient, shall be used to determine eligibility or educational programming. (Ed. Code, § 56320, subds. (c), (e).)

17. An assessment must be conducted "by persons competent to perform the assessment, as determined by the local educational agency." (Ed. Code, § 56322.) An assessor must also be knowledgeable of the student's suspected disability. (Ed. Code, § 56320, subd. (g).) An assessment must be administered by trained and knowledgeable personnel in accordance with any instructions provided by the producer of the assessments. (Ed. Code, § 56320, subd. (b)(3).) Only a school psychologist may administer tests of intellectual or emotional functioning. (*Ibid.*) 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; and used for purposes for which the assessments or measures are valid and reliable. (Ed. Code, § 56320, subd. (b)(1).) 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).) The determination of what tests are required is made based on information known at the time. (See, *Vasherresse v. Laguna Salada Union School Dist.* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1158.)

18. The assessor must prepare a written report that includes,: 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) the need for specialized services, materials, and equipment. (Ed. Code, § 56327.) The report must be provided to the parent at the IEP team meeting required after the assessment. (Ed. Code, § 56329, subd. (a)(3).)

19. A school district's failure to conduct appropriate assessments or to assess in all areas of suspected disability may constitute a procedural denial of FAPE. (*Park v. Anaheim Union High School District, et al.* (9th Cir. 2006) 464 F.3d 1025, 1031-1033.) A school district fails to fulfill its obligations to evaluate a child in all areas of suspected disability, thus depriving the child of a FAPE, when it does not evaluate a child in an area of suspected disability when it is put on notice of a potential disability. (*Hellgate, supra*, at pp. 1209-1210; see also, *JG v. Douglas County School District* (9th Cir. 2008) 552 F.3d 786, 800.)

Issue (II) Did the District deny Student a FAPE by failing to assess in all areas of suspected disabilities, to ensure that assessment tools and strategies were utilized and to conduct sufficiently comprehensive assessments by (A) failing to conduct an appropriate initial assessment of Student's cognitive functions, including school-readiness skills; and (B)

failing to conduct an appropriate LAS assessment, including failing to obtain a true measure of Student's abilities or to identify his apraxia?

20. Pursuant to Factual Findings 6 through 22, 28 through 31, and 48 through 50 and Legal Conclusions 2 through 4 and 16 through 19, the District failed to conduct a full and individual assessment of Student using a variety of assessment tools and strategies to gather relevant information about Student in the psycho-educational and language and speech assessments. The District assessors attempted only once to assess the child, who was uncooperative and inattentive, which may well have been because of the environment where the assessments were attempted and the manner that they were attempted. Student had been able to be assessed by Gottlieb and Poster while in an environment designed to reduce distractions and on a one-to-one basis. Additionally, Bordenave possessed information that Student's former SLP had previously suspected he suffered from apraxia, and then learned that Student was able to be assessed, at least informally, by an assessor retained by Parents, Poster, with apraxia. Neither, Zivari nor Bordenave attempted to assess Student utilizing a different strategy, including a quiet environment, on a one-to-one basis or doing the assessment in a familiar place for Student. By failing to attempt to assess Student, the District assessors prevented the IEP team from having a complete picture of Student's strengths and weaknesses as to cognitive ability and language and speech.

21. As previously stated, a mere technical procedural violation of the IDEA does not amount to a denial of FAPE. Student must demonstrate that the procedural violation impeded Student's right to a FAPE, significantly inhibited parents' right to participate in the IEP decision making process, or caused the student to suffer a deprivation of educational benefit.

(a) As to the failure of Zivari to conduct a full and individual assessment, Student has failed to meet his burden that he suffered a denial of FAPE since the IEP team reviewed and discussed the results of the evaluation conducted by Gottlieb and adopted her recommendations in offering placement and services. (Factual Findings 12 and 24 through 26 and Legal Conclusions 16 through 19.)

(b) Pursuant to Factual Findings 16, 23 through 31 and 48 through 50 and Legal Conclusions 16 through 19, Student has more than demonstrated that he has suffered a deprivation of educational benefit and that his right to a FAPE has been impeded as to the Bordenave assessment. Bordenave was on notice that apraxia was a suspected disability since Gottlieb included it in her report, Lumma orally informed Bordenave as well as stating it in her discharge report, and Poster diagnosed Student with this condition. Thus, Bordenave was on notice that she should have conducted an evaluation for apraxia. Bordenave's failure to attempt to complete the language and speech assessment, specifically as to apraxia, prevented Student from receiving services designed to deal with Student's apraxia. As Kayem testified, it is proper to attempt to assess a young child utilizing standardized testing; but when that is impossible, an assessor can conduct an informal assessment. Because apraxia can be easily diagnosed informally, such should have been attempted.

Implementation of IEP services

22. Minor failures by a school district in implementing an IEP should not automatically be treated as violations of the IDEA. (*Van Duyn v. Baker School District* (9th Cir. 2007) 502 F.3d 811, 821.) Rather, a material failure to implement an IEP violates the IDEA. (*Id.* at p. 822.) “A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child’s IEP.” (*Id.* at p. 822.) This standard does not require that the child suffer demonstrable educational harm for there to be a finding of a material failure. (*Ibid.*)

Issue (III) Did the District deny Student a FAPE by failing to implement the consented portions of the September 10 - October 6, 2008 IEP, specifically Behavior Services and LAS?

23. The District denied Student a FAPE with respect to the IEP’s offer of one hour weekly language and speech therapy services as the District was unable to provide these services because no SLP was available to provide the service. Parents notified the District of the absence of services and that they had retained the services of a SLP and would seek reimbursement of those costs. (Factual Findings 25 through 27 and 32 through 36 and Legal Conclusions 2, 3, and 22.)

24. Pursuant to Factual Findings 26, 27, 33 and 36 and Legal Conclusions 2, 3, and 22, the District denied Student a FAPE with respect to the IEP offer of behavior services as the District did offer to provide such services when Parents rejected the placement offer by the IEP team. The District offered to provide services, including BII, to permit Student to attend a community preschool. Although the choice of provider is at the option of the District, the provider must be able to provide services which meet the child’s unique needs. Here, one of Student’s unique needs was toileting. Since FACT, the designated provider of behavioral services, would not change diapers, Student’s toileting needs were not met. When Parents, through their attorney, notified the District in writing of their problem that the BII must take care of Student’s toileting needs at Garden, the District failed to respond. Parents then retained STAR, which was already providing services to Student, which would change diapers and work on potty training.

Elements of a FAPE

25. As stated in Legal Conclusion 4, a child’s IEP must be reasonably calculated to provide the child with some educational benefit, but the IDEA does not require the school district to provide the child with the best education available or to provide instruction or services to maximize the child’s abilities. (*Rowley, supra*, 458 U.S. at 201.) In *J.L. v. Mercer Island School District* (9th Cir. 2009) 575 F.3d 1028, (*Mercer Island*), the Ninth Circuit found that the *Rowley* FAPE standard still applies and that the proper standard to determine whether a disabled child has received FAPE is the “educational benefit” standard. (*Ibid.* at p.1037-1038.) In resolving the question of whether a District has offered a FAPE,

the focus is on the adequacy of the district's proposed program. (See *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) A 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 constitute a FAPE under the IDEA, the district's offer of educational placement and/or services must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the student 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 Board of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.)

26. A school district has the right to select a program and/or service providers for a special education student, as long as the program and/or providers are able to meet the student's unique needs; IDEA does not empower parents to make unilateral decisions about a program funded by the public. (See *N.R. v. San Ramon Unified School District* (N.D. Cal, 2007) 2007 U.S. Dist. Lexis 9135; *Slama ex rel. Slama v. Independent School District No. 2580* (D. Minn. 2003) 259 F.Supp.2d 880, 885.) Nor must an IEP conform to a parent's wishes in order to be sufficient or appropriate. (*Shaw v. District of Columbia* (D.D.C. 2002) 238 F.Supp.2d 127, 139 [IDEA does not provide for an "education...designed according to the parents' desires."], citing *Rowley, supra*, 458 U.S. at p. 207.)

27. Federal and state law require a school district to provide special education in the least restrictive environment (LRE). A special education student must be educated with nondisabled peers "to the maximum extent appropriate." and may be removed from the general education environment only when the nature or severities of the student's disabilities are such education in general classes with the use of supplementary aids and services "cannot be achieved satisfactorily." (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)9II.) In light of this preference, the Ninth Circuit has adopted a balancing test that requires consideration of four factors: (1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect the student would have on the teacher and children in the regular class, and (4) the costs of mainstreaming the student. (*Sacramento City Unified School District v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1403.)

28. School districts are not required to provide or fund general preschool classes (Ed. Code, § 8972.), and districts are not mandated to establish preschool programs for nondisabled children in order to provide peer interaction for disabled children. (*Letter to Neveldine* OSEP (May 28, 1993) 20 IDELR 181, citing note 34, 34 C.F.R. § 300.552.)

Issue (IV)(A) Did the District deny Student a FAPE by failing to make a substantively appropriate offer of FAPE at the September 10 - October 6, 2008 IEP meetings by failing to offer an education placement in the LRE that allowed Student access to typically developing peers on a continuing basis?

29. Student, in his closing brief, argues that the District offered placement in the PCC permits Student to access typically developing peers on a limited basis and not on a continued basis. Student also contends that the PCC is not appropriate because a number of the regular education students are English learners. The District counters that the PCC is the LRE as it is a general education placement and Student would have contact with typically developing peers as well as the special instruction he requires because of his disability.

30. Pursuant to Factual Findings 6 through 22, 24 through 27, and 38 through 40 and Legal Conclusions 2, 3, 4 and 25 through 28, the District did not deny Student a FAPE at the September 10-October 6, 2008 IEP, as the offer of placement at the PCC was appropriate to meet Student's unique needs in the LRE and provide him with educational benefit. Student is a child with autism who also has speech delays as a result of apraxia. Gottlieb diagnosed Student with autism and associated problems including socializing. Gottlieb recommended in her May 9, 2008 report that Student requires intensive intervention with strategies to address his deficits in language, social communication, and play. In this regard Gottlieb recommended that Student attend a full-time preschool program with typically developing peers; one-on-one speech therapy three to four times per week; OT twice per week to address stereotypical behaviors, and development of motor planning and praxis. During the District assessment, Student refused to follow directions and exhibited severe autistic-like behaviors, which Parents confirmed occurred regularly. Based on parental rating scales and observations, the school psychologist found Student's school readiness and adaptive behavior at the low level. Student requires special instruction to access the pre-kindergarten curriculum. Zivari and the IEP team recommended and the IEP team offered that Student be placed in a small structured preschool classroom that incorporates a predictable routine with a visible schedule, consistent limit setting, positive reinforcement, access to desired toys and activities contingent upon participating in teacher directed tasks, and prompts and cues to teach Student how to transition, reinforcement of a variety of play themes, and facilitation with social interaction with peers. The PCC is a class taught by a general education teacher and a special education teacher that contains approximately 14 typical children with 10 special education children. The teachers are assisted by both general education and trained special education aides. The class utilizes the regular pre-kindergarten curriculum. Because several of the children are on the autism spectrum, the curriculum incorporates strategies such as picture schedules, behavior charts, visual aids, and prompts. The placement that the District offered, the PCC, would permit Student to be in constant contact with typically developing peers. The use of the strategies designed for autistic children would benefit Student and improve his school readiness skills. The placement at the PCC was appropriate based on the information possessed by the IEP team including the Gottlieb evaluation and recommendations, the District incomplete assessment, and the information provided by Parents. Additionally, the PCC placement was in the LRE and still would permit Student to receive instruction from certified special education specialists.

Issue (IV)(B) Did the District deny Student a FAPE by failing to make a substantively appropriate offer of FAPE at the September 10 - October 6, 2008 IEP meetings by failing to provide for a sufficient amount of BII and BID services with a provider who could meet Student's unique needs in a general education program?

31. Student contends that the District's offer of BII and BID services were insufficient since the District knew that Student was going to attend a community preschool. Student contends that the amount of BII services offered was two hours weekly short of providing the BII through attendance at Garden.¹⁸ The District contends that the amount of BII and BID services offered were appropriate, as the frequency was based upon the time per week that Student would be in attendance at the PCC, the offered placement.

32. Based on Factual Findings 6 through 22 and 24 through 27 and Legal Conclusions 2, 3, 4, and 25 through 28, and 30, the District did not deny Student a FAPE based on the frequency of behavioral services offered at the September 10-October 6, 2008 IEP as the amount of the offered behavior services was appropriate as it was based on the proffered placement, which was appropriate. Based on Factual Findings 26, 27, 32, 33, and 36, and Legal Conclusions 2, 3, 4, 24, 25 through 28, the District did deny Student a FAPE as the behavior service provider designated by the District, FACT, could not meet Student's unique needs in toileting.

Issue (IV)(C) Did the District deny Student a FAPE by failing to make a substantively appropriate offer of FAPE at the September 10 - October 6, 2008 IEP meetings by failing to provide a sufficient amount of LAS services that would meet Student's unique needs?

33. Pursuant to Factual Findings 12 through 31, 36, 37, and 67 and Legal Conclusions 2, 3, 4, and 25 through 28, the District denied Student a FAPE since the amount of LAS is inappropriate to meet his unique needs in language and speech. Student suffers from apraxia. The proper level of speech therapy to treat this disability is that recommended by the American Speech and Hearing Association which is three to five times per week for a weekly total of 150 minutes. The District offer of one hour per week of LAS is an insufficient amount of services to meet Student's unique needs.

Issue (V)(A) Did the District deny Student a FAPE at the January 28, 2009 IEP meeting by failing to offer an appropriate placement in the least restrictive environment that allowed Student access to typically developing peers on a continued basis?

34. Student contends that the District's offered placement in the PSM class is not appropriate as it is not the LRE as Student would not have contact with typically developing peers on a continued basis. The District avers that the PSM class was the appropriate placement based on Student's needs as evidenced by his failure to integrate into the Garden preschool class and his behavior which prohibited Student from accessing the curriculum.

¹⁸ At the time of the IEP meetings, Parents stated that they planned to enroll Student at a different preschool. Because of behavioral problems encountered when Student started the other preschool without a behavioral aide, he was asked to leave. (Factual Finding 32.)

35. Pursuant to Factual Findings 6 through 31, 34, 38 through 47, 51 through 56, and 64 through 67, and Legal Conclusions 2, 3, 4, and 25 through 30, the District did deny Student a FAPE by its offer of placement at the PSM class as it was not in the LRE. Because of his autism, Student requires an intensive intervention which can be accomplished in a small structured classroom incorporating a predictable routine. The class should also incorporate strategies which assist autistic children, who are visual learners, such as a visible schedule, positive reinforcement, socialization, access to desired toys and activities contingent upon participating in teacher directed activities, prompts and cues to assist in teaching the child transitioning, learning proper play techniques, behavior charts. It is also important for autistic children to have contact with typically developing peers to the greatest extent possible to learn socialization skills and modeling behavior. The placement at the PSM and KIT classes would restrict Student to only minimal contact with typically developing peers as over 70 percent of the class time would be in a special education environment. Student did not have an opportunity to be in the PCC where he would have had access to specialized instruction, strategies designed to assist autistic children, be instructed by teachers who can communicate with him, and access the pre-kindergarten curriculum of the District. At Garden, Student did not receive instruction from his teacher who was unable to communicate with him and his actual instruction came from his BII. This led to Student being isolated and not part of his Garden class. This isolation came from the circumstances and not Student himself, who appears to be starting to open up more to his environment as he is more able to communicate through ASL and the success of his speech therapy with Kayem. Thus, the PSM and KIT classes are not the LRE for Student. The appropriate placement in the LRE for Student is the PCC/EEC at the Westminster Early Education Center.

Issue (V)(B) Did the District deny Student a FAPE at the January 28, 2009 IEP meeting by failing to provide sufficient amount of LAS services to meet his unique needs?

36. Pursuant to Factual Findings 6 through 31, 36, 37, 50 and 67, and Legal Conclusions 2, 3, 4, 25 through 28, and 32, the District denied Student a FAPE in that the District's offer failed to include an appropriate amount of LAS to meet Student's unique needs.

Issue (V)(C) Did the District deny Student a FAPE at the January 28, 2009 IEP meeting by failing to provide a sufficient amount of OT clinic services to meet his unique needs?

37. Pursuant to Factual Findings 15, 44, 45, 46 and 68 and Legal Conclusions 2, 3, 4, and 25 through 28, Student failed to meet his burden that the District denied Student a FAPE by providing an insufficient amount of OT clinic services in the January 28, 2008 IEP. Student's privately retained OT provider, Peterson, worked on the goals from his IEP as did the District OT. Student offered no evidence that the amount and the OT services provided were inadequate to meet Student's needs.

Issue (V)(D) Did the District deny Student a FAPE at the January 28, 2009 IEP meeting by failing to provide for sufficient amount of BII and BID services with a provider who could meet Student's unique needs?

38. Pursuant to Factual Findings 6 through 22, 24 through 27, 33, and 36, and Legal Conclusions 2, 3, 4, 24 through 28, and 32, the District did deny Student a FAPE as the designated BII/BID provider would not change diapers.

Remedies

Compensatory education

39. When an LEA fails to provide a FAPE to a student with a disability, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (*School Committee of Burlington v. Department of Education* (1996) 471 U.S. 359, 369-371 (*Burlington*); 20 U.S.C. § 1415(i)(2)(C)(3).) Based on the principle set forth in *Burlington*, federal courts have held that compensatory education is a form of equitable relief that may be granted for the denial of appropriate special education services to help overcome lost educational opportunity. (*Student W. v. Puyallup School District* (9th Cir. 1994) 31 F.3d 1489, 1496.) The purpose of compensatory education is to "ensure that the student is appropriately educated within the meaning of IDEA." (*Ibid.*) An award of compensatory education need not provide a "day-for-day compensation." (*Id.* at p. 1497.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (*Ibid.*)

Reimbursement

40. Parents may be entitled to reimbursement for the costs of placement or services they have procured for their child when the school district has failed to provide a FAPE, and the private placement or services were appropriate under the IDEA and replaced services that the district failed to provide. (20 U.S.C. § 1412(a)(10)(C); *Burlington, supra*, 471 U.S. at 369-71; *Forest Grove School District v. T.A.* (2009) ___ U.S. ___, 129 S.Ct. 2484, 2493-2494 [174 L.Ed. 2d 168] (*Forest Grove*).) A pupil need not have already received special education in the public school district in order to be awarded reimbursement for a private placement. (*Forest Grove School District v. T.A., supra*, 129 S.Ct. at 2496.)

41. 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. (*School Committee of the Town of Burlington v. Department of Education* (1985) 471 U.S. 359; *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.*)

Independent Education Evaluation

42. "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 student. (34 C.F.R. § 300.502(a)(3)(I) (2006).) A parent has the right to an IEP at public expense if the parent disagrees with an evaluation obtained by a school district. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502(b)(1); Ed. Code, § 56329, subd. (b).) Federal law states that a parent has the right to an IEE at public expense "[i]f a parent *requests* an independent education evaluation at public expense." (34 C.F.R. § 300.502(b)(2)(1) (2006) (emphasis added).) When such a request is made, the school district must either file a due process complaint requesting a hearing to show that its evaluation is appropriate, or ensure that an IEE is provided at public expense. (34 C.F.R. § 300.502(b)(2)(i) and (ii) (2006).) Thus, a parent is required to make a request to the school district for an IEE.

Findings

43. Student proposes as an appropriate remedy that Parents be reimbursed for (1) all costs incurred in sending Student to Garden; (2) speech therapy services provided by Kayem; (3) OT services provided by Peterson; (4) costs incurred in providing behavior services from STAR; (5) cost for the Poster evaluation; and (6) the cost for Gottlieb's assessment and observation reports. Student also seeks a determination that Garden is the appropriate placement for Student prospectively, and that he continue to receive prospective services from STAR, Kayem for three hours weekly, and Peterson for two hours weekly.

44. Pursuant to Factual Findings 6 through 22, 24 through 26, 38 through 40, 43, 45, 46, 52, and 63 through 66 and Legal Conclusions 2, 3, 4, 25 through 30, 34 and 35, Student is not entitled to reimbursement for costs to attend Garden as Garden is not an appropriate placement. As a student with autism, Student requires specialized instruction in a structured classroom where strategies designed for such students are incorporated. Garden does not provide such an environment which resulted in Student not being integrated into the class, receiving no instruction from his teacher who permitted Student to indulge in preferred activities rather than participating in class activities.

45. Pursuant to Factual Findings 15, 44 through 46 and 68 and Legal Conclusions 2, 3, 4, 25 through 28, and 37, Student is not entitled to reimbursement for Peterson's services as Student has failed to produce evidence that the District provided OT services were insufficient.

46. Pursuant to Factual Findings 6 through 22, 24 through 27, 33, and 36, and Legal Conclusions 2, 3, 4, 25 through 28, and 38, Student is entitled to be reimbursed for the cost of services provided by STAR in an amount equal to the hourly rate which District would have paid FACT for behavior services for Student.

47. Pursuant to Factual Findings 6 through 22, 24 through 27, 33, 36, and 67, and Legal Conclusions 2, 3, 4, 25 through 28, and 33, Student is entitled to be reimbursed for the language and speech services provided by Kayem in the amount of \$19,790, which includes reimbursement for LAS services provided through the date of hearing.

48. Pursuant to Factual Findings 6 through 12 and 69, and Legal Conclusion 42 and 43, Student is not entitled to reimbursement for Gottlieb's assessments or observation reports. Student retained Gottlieb to assess Student in April 2008, prior to the District conducting its assessment. Further, Student did not request that Gottlieb undertake an additional assessment of Student.

49. Pursuant to Factual Finding 69 and Legal Conclusions 42 and 43, Student is not entitled to reimbursement for the Poster assessment as Student never requested a language and speech independent educational evaluation.

ORDER

1. Student's claims under Issues I(B), I(C), I(D), I(E), I(F), II(A), and V(C) are denied. Student's claim under Issue IV(B) is partially denied.

2. Student's claims under Issues I(A), II(B), III(A), III(B), IV(C), V(A), V(B), and V(D) are hereby granted. Student's claim under Issue IV(B) is partially granted.

3. The District shall implement the September 10-October 6, 2008 IEP as to placement at the PCC/EEC at the Westminster Early Education Center with the following services: BII services while Student is attending the PCC for a total of 720 minutes weekly; BID for 180 minutes per month; OT one to five times monthly for a total of 120 minutes; and OT clinic once weekly for 60 minutes per week. Additionally, the District shall provide Student with Language and Speech services at a frequency of three to five times per week for a total of 150 minutes per week as per the recommendation for the treatment of apraxia by the American Speech and Hearing Association. The District is ordered to implement this placement by January 5, 2010.

4. The District shall have an AT evaluation administered to Student within 45 days as to what AT devices may assist him in accessing the curriculum including, but not limited, to augmentative and alternative communications.

5. The District shall cause to have Student evaluated by a speech and language pathologist and a school psychologist within the next 60 days.

