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JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

G. D., a minor, by and)	Case No. CV 11-2463-JFW (JCx)
through his Guardian Ad)	
Litem Dien Do and Hong)	JUDGMENT
Dang,)	
)	
Plaintiff,)	
)	
v.)	
)	
Torrance Unified School)	
District,)	
)	
Defendant.)	

WHEREAS, on January 24, 2011, the Administrative Law Judge issued a Decision in favor of Defendant Torrance Unified School District and against Plaintiff G.D. on all issues,

WHEREAS, G.D. appealed the Administrative Law Judge's Decision to this Court,

WHEREAS, the Court Trial was conducted on December 20, 2011,

WHEREAS, in his December 6, 2011 Opening Trial Brief, G.D. withdrew from consideration by this Court the issues of whether the April 28, 2010 individualized education program

1 offered placement in the least restrictive environment and
2 whether extended school year should have been offered,

3 WHEREAS, the Court issued its Findings of Facts and
4 Conclusions of Law on March 8, 2012,

5 IT IS NOW, THEREFORE, HEREBY ORDERED, ADJUDGED AND
6 DECREED, that judgment is entered in this action as follows:

7

8 The Court affirms the Administrative Law Judge's January
9 24, 2011 Decision as to all remaining issues.

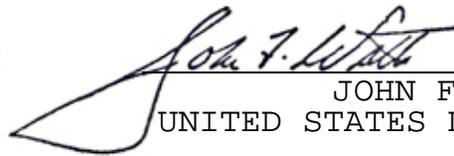
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11 The Clerk is ordered to enter this Judgment.

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13 Dated: March 19, 2012

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JOHN F. WALTER
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

G. D., a minor, by and)	Case No. CV 11-2463-JFW (JCx)
through his Guardian Ad)	
Litem Dien Do and Hong)	FINDINGS OF FACT AND
Dang,)	CONCLUSIONS OF LAW; ORDER
)	
Plaintiff,)	
)	
v.)	
)	
Torrance Unified School)	
District,)	
)	
Defendant.)	
_____)	

This action came on for court trial on December 20, 2011. Bruce Bothwell of the Law Offices of Bruce E. Bothwell appeared for Plaintiff G.D., a minor, by and through his Guardians Ad Litem Dien Do and Hong Dang ("G.D.") and Sharon A. Watt of Filarsky and Watt appeared for Defendant Torrance Unified School District (the "District"). On December 29, 2011, the parties filed their proposed Post-Trial Findings of Facts and Conclusions of Law. On January 10, 2012, the parties filed Post-Trial Briefs and a Joint Statement Regarding the proposed Post-Trial Findings of Fact and Conclusions of Law.

1 After considering the evidence, briefs and argument of
2 counsel, the Court makes the following findings of fact and
3 conclusions of law¹:

4

5 **I. FINDINGS OF FACT**

6 **A. Procedural History**

7 On August 6, 2010, Dien Do and Hong Dang (collectively,
8 "Parents"), on behalf of their son, G.D., filed a request for a
9 due process hearing ("Request") with the California Office of
10 Administrative Hearings. In their Request, they alleged that the
11 April 28, 2010 individualized education program ("IEP") did not
12 meet the requirements of the Individuals with Disability Education
13 Act ("IDEA") because it did not offer an appropriate school-based
14 behavior program, a home-based behavior program, placement in the
15 least restrictive environment ("LRE"), a program and services for
16 the 2010 extended school year ("ESY"), and goals proposed by
17 Behavioral Education for Children with Autism ("BECA"), a
18 nonpublic agency. The Request also alleged that the IEP was
19 deficient because of the inadequacy of the speech and language
20 therapy that was offered in the April 28, 2010 IEP, but the
21 Parents withdrew that issue at the due process hearing.

22 The hearing on the Request was held on November 29 and 30,
23 2010 and December 2 and 3, 2010. The hearing transcript
24 demonstrates that the Administrative Law Judge ("ALJ") was fully

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26 ¹ The Court has elected to issue its findings in
27 narrative form. Any finding of fact that constitutes a
28 conclusion of law is also hereby adopted as a conclusion of
law, and any conclusion of law that constitutes a finding of
fact is also hereby adopted as a finding of fact.

1 engaged in the hearing and questioned the witnesses to ensure that
2 the record contained complete information and to ensure that she
3 fully understood the testimony. On January 24, 2011, ALJ issued
4 her thirty-four page Decision, which found in favor of the
5 District on all issues and denied G.D.'s requested relief. In her
6 Decision, the ALJ extensively reviewed the law pertaining to a
7 school district's duty in offering a free appropriate public
8 education ("FAPE"). For example, in her summary of the law, the
9 ALJ discussed a school district's duty to provide a basic floor of
10 opportunity, the evaluation of a district's offer of FAPE, the
11 duties of the IEP team, the methodology used to evaluate the IEP,
12 and the prerogative of a district to select programs, service
13 providers, and methodology for teaching and evaluating G.D.'s
14 skill level.

15 G.D. appealed the ALJ's Decision to this Court and alleges
16 that the ALJ erred by basing her decision on the appropriateness
17 of the program proposed by the Parents rather than by determining
18 the appropriateness of the District's offer of a FAPE that did not
19 include classroom aide support, appropriate school-based behavior
20 support, or appropriate home-based services; by finding that the
21 measurable annual goals were appropriate; by finding that the
22 program offered by the District was in the LRE; and by finding
23 that G.D. did not require the ESY program. In his December 6,
24 2011 Opening Trial Brief, G.D. withdrew from consideration by this
25 Court the issues of whether the April 28, 2010 IEP offered
26 placement in the LRE and whether ESY should have been offered.

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1 **B. Relevant Background Facts**

2 G.D. was born on May 3, 2004, and resides with his Parents
3 within the District. Parents became concerned about G.D.'s
4 development when G.D. was four years old and attending a general
5 education preschool at the El Camino College Child Development
6 Center ("El Camino"). On March 30, 2009, Parents contacted
7 District personnel and expressed their concern about G.D.'s
8 development and made a written request for services.

9

10 **1. April 29, 2009 IEP**

11 On April 14, 2009, District personnel, which included school
12 psychologist Susan Lee, special education teacher Jennifer Fisher,
13 speech and language pathologist Malia Miyamoto, and ASSISTT²
14 teacher Danielle Colin-Wiertz, conducted an assessment of G.D. in
15 order to determine whether he was an individual with exceptional
16 needs. As part of the District's assessment, Ms. Lee, Ms. Fisher,
17 Ms. Miyamoto, and Ms. Colin-Wiertz observed G.D. at El Camino.
18 Ms. Lee, who has been a credentialed school psychologist since
19 1990, a special education teacher from 1980 to 1990, and has
20 conducted over 600 assessments of students, observed G.D. for
21 approximately one hour. During that time, Ms. Lee observed G.D.
22 sitting comfortably next to other children, interacting with other
23 children, looking around with an awareness that his peers were

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25 ² ASSISTT is an acronym for Autism Spectrum Services &
26 Inclusion Support Torrance Team, which is a team of
27 credentialed special education teachers, behavior analysts,
28 and paraeducators who provide services for children who have
autism spectrum disorders and children with moderate to
significant disabilities who are included in general
education classrooms.

1 present, and observing the social situation. According to Ms.
2 Lee, G.D. did not require any more prompting in following the
3 routine and playing with toys appropriately than other El Camino
4 students, and G.D. was able to follow the rules and satisfactorily
5 transition within the classroom setting from area to area. Ms.
6 Fisher, who has been a special education teacher for approximately
7 10 years, a paraeducator for approximately one year, and has
8 conducted approximately 80 assessments of preschoolers, observed
9 G.D. and completed a written evaluation entitled "Fast Facts for
10 G.D." In her written remarks, Ms. Fisher noted that G.D. was
11 smart, friendly, persistent, curious, knew letters and numbers,
12 was able to write his name, had preacademic skills that were age
13 appropriate or greater, attended to preferred tasks for up to 20
14 minutes, sat on the carpet, attempted to participate during circle
15 time, engaged cooperatively with adults, and verbally communicated
16 his wants and needs. Ms. Fisher also reported that G.D. had
17 delayed play skills, which were at the parallel play stage, and
18 may have needed redirection when he refused to work. Ms. Fisher
19 concluded that G.D. did not have significant delays in social
20 skills with adults, but Ms. Fisher did have concerns about his
21 social skills with his peers. For example, Ms. Fisher observed
22 that G.D. required prompting to come to the rug but she did not
23 remember any instance during which G.D. was noncompliant with an
24 adult directive after such prompting. However, she also observed
25 that G.D. would not do what another child asked him to do.

26 In addition to the El Camino observations and assessments,
27 Ms. Lee, Ms. Fisher, Ms. Miyamoto, and Ms. Colin-Wiertz assessed
28 G.D. at a District school on April 14, 2009. During that

1 assessment, G.D. was very compliant, performed the requested tasks
2 with minimal tangible reinforcement, and his attention was good
3 despite the very involved nature of the assessment.

4 The results of the District's assessments were reported in an
5 April 29, 2009 Transdisciplinary Preschool Assessment Report
6 ("Report"), which concluded that G.D. exhibited autistic-like
7 behavior and demonstrated concept development, pre-academic, fine
8 motor, and self-help skills that were unevenly developed but that
9 were at or above age-appropriate levels. The Report also
10 concluded that G.D. had age-appropriate receptive language skills
11 but was delayed in his expressive language, pragmatic, gross
12 motor, play, and social skills.

13 In addition to the assessments and observations conducted by
14 District personnel in order to determine whether G.D. qualified
15 for services under IDEA, on April 28, 2009, G.D.'s then-current
16 level of educational functioning were assessed by a District
17 general education kindergarten teacher, Diane Konishi, who has
18 taught kindergarten and elementary general education classes for
19 13 years. Ms. Konishi's assessment was performed as part of the
20 District's "LAUNCH Roundup," which takes place every April in
21 order to determine the kindergarten readiness of age-eligible
22 children within the District. During the LAUNCH Roundup, G.D. was
23 able to successfully identify the color of each crayon in a box,
24 identify numbers written in random order, and identify the capital
25 and small letters of the alphabet. Ms. Konishi completed a
26 District Kindergarten Screening/Preppy Referral form for G.D., in
27 which she documented that G.D. had fully mastered five important
28 kindergarten skills, had some difficulty with nine other important

1 kindergarten skills, and had no skill area in which he had a total
2 lack of achievement.

3 On April 29, 2009, an IEP team meeting attended by District
4 staff and G.D.'s mother was convened in order to determine whether
5 G.D. was an individual with exceptional needs and, if so, to
6 develop an IEP that would offer G.D. a FAPE. The IEP team adopted
7 the recommendation made in the Report that G.D. should qualify for
8 special education because of his autistic-like behavior. The IEP
9 team also developed a program which provided for placement in a
10 collaborative District preschool classroom generally comprised of
11 eight children with special needs and seven typically developing
12 children through the end of the 2008-2009 school year. The IEP
13 team also recommended a future IEP team meeting in June 2009 in
14 order to determine whether G.D. should be placed in kindergarten
15 for 2009-2010 school year. In addition, the IEP team offered G.D.
16 behavior intervention services and speech and language therapy
17 through April 29, 2010.

18

19 **2. Settlement of the Disputed April 29, 2009 IEP**

20 G.D.'s Parents refused to accept the April 29, 2009 IEP and,
21 instead, arranged for G.D. to continue attending El Camino until
22 the 2009-2010 school year, at which time they enrolled G.D. at
23 Crossroads Learning Center ("Crossroads"), a private general
24 education preschool. In Spring 2009, Parents retained the
25 services of B. J. Freeman, Ph.D., who assessed G.D. and
26 memorialized the results of her assessment in a Psychological
27 Assessment report dated May 21, 2009. In her report, Dr. Freeman
28 concluded that G.D. was autistic and recommended that G.D. should

1 attend preschool rather than kindergarten during the 2009-2010
2 school year. Dr. Freeman did not observe G.D. at El Camino, did
3 not ask his El Camino teacher to complete any survey or other
4 report, and apparently did not interview G.D.'s El Camino teacher
5 as part of her assessment.

6 In or about August 2009, as G.D. began attending Crossroads,
7 G.D.'s Parents privately retained BECA to assess G.D. and to
8 devise a program to address his alleged behavioral deficits.
9 Gregory Elsky, Psy.D., BECA Associate Director, observed G.D. for
10 one or two hours in G.D.'s home in or about August 2009, and
11 without the presence of any of G.D.'s peers.

12 On August 19, 2009, G.D.'s Parents filed a request for due
13 process because they alleged that G.D.'s April 29, 2009 IEP was
14 deficient. The matter was settled on December 28, 2009, without
15 the need for a hearing. The parties entered into a settlement
16 agreement which provided, among other things, that if the Parents
17 did not consent to G.D.'s Spring 2010 IEP, which would be
18 developed at the annual review, G.D.'s stay put placement for the
19 2010-2011 school year would be in a District general education
20 kindergarten class with behavioral support from BECA at the
21 beginning of the year, with transition from BECA to a District
22 aide commencing after the first four weeks of school, as well as
23 speech and language therapy.

24

25 **3. Investigation Conducted In Preparation for the**
26 **April 28, 2010 IEP**

27 G.D. remained at Crossroads throughout the 2009-2010 school
28 year. According to Dr. Elsky, as of November 14, 2009, BECA had

1 reduced the duties of G.D.'s one-to-one aide to that of a shadow
2 aide and data was no longer collected on G.D.'s progress in
3 achieving goals because of G.D.'s success in the classroom, which
4 included sitting and participating in circle time for an average
5 of twenty-three minutes, participating and answering questions,
6 and singing songs.

7 In Spring 2010, the members of G.D.'s 2010 IEP team, ASSISTT
8 behavior analyst³ Mandy Juarez, District special education teacher
9 Susan Weiner, District program specialist Tami Dowgiewicz, and
10 Jennifer Fisher, began preparing for the annual review of G.D.'s
11 need for special education and related services by, among other
12 things, observing G.D. at Crossroads.

13

14 **(a) Mandy Juarez**

15 Ms. Juarez, who has worked as a District behavior analyst for
16 four years and is a board certified associate behavior analyst,
17 observed G.D. at Crossroads while he was on the yard and in the
18 classroom during circle time and seatwork for approximately one
19 hour in order to determine the appropriate services required for
20 G.D. On the yard, Ms. Juarez was only able to observe G.D. lining
21 up with his classmates at the end of recess, after which he
22 transitioned to the classroom by washing his hands and preparing

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24 ³ An ASSISTT behavior analyst is an individual who
25 designs and supervises the implementation of programs for
26 autistic children and other disabled children who receive
27 inclusion support services. These tasks are carried out by,
28 among other things, collecting, maintaining, and analyzing
data, attending IEP team meetings, developing measurable
annual goals, reporting on progress towards the goals,
consulting with teachers and paraeducators on strategies to
assist pupils in achieving their goals, supervising and
overseeing ASSISTT staff, and training paraeducators.

1 for the next activity. Once inside the classroom, Ms. Juarez
2 observe that the proximity of the BECA aide to G.D. varied
3 depending upon the activity but G.D. was always within sight of
4 the aide. Ms. Juarez reported that, during circle time, G.D. sat
5 near the front of the rug and the BECA aide sat at the back of the
6 rug, and during seat work, the BECA aide was seated away from
7 G.D.'s table but did move to G.D. to provide some prompts. The
8 aide's prompts consisted of gestures and visual cues from across
9 the room, and verbal and physical prompts when she approached
10 G.D.'s area. During play-based activities in the classroom, G.D.
11 interacted with two peers, although the duration of the
12 interactions was relatively brief. G.D. followed his teacher's
13 directions, appropriately asked for assistance when needed,
14 remained focused on task, and transitioned after completing tasks.
15 Ms. Juarez noted that G.D. actively worked on a notebook activity
16 and, when the activity was completed, he independently put his
17 materials away by placing them in a cabinet. In addition, he
18 appropriately transitioned from his choice of free play to
19 rug/circle time.

20

21 **(b) Susan Weiner**

22 In approximately March 2010, Ms. Weiner, who has worked as a
23 special education teacher for 11 years, observed G.D. at
24 Crossroads for approximately one to one and one-half hours during
25 snack/recess, circle/rug time, and center-based time that
26 consisted of art activities, and she found that G.D. was
27 comfortable and familiar with the routine. At recess, G.D. built
28 a tower and a tunnel in the sand with another child and had a

1 discussion with that child for approximately fifteen to twenty
2 minutes with only one prompt from his BECA aide. During center
3 time, the BECA aide did not interact with G.D. and, while G.D.
4 worked on his art project, the BECA aide was present in the room
5 but only observed G.D. Ms. Weiner never observed noncompliance or
6 tantrums by G.D. and she described G.D.'s behavior as similar to a
7 typical child, and she noted that he ran inside, transitioned
8 fine, washed his hands, and went to the restroom without priming⁴
9 or prompting. Ms. Weiner also had a 20 minute discussion with
10 G.D.'s teacher at Crossroads about his progress and was informed
11 that academics was an area of G.D.'s strength and not really an
12 area of concern, that G.D. knew most of his letters and sounds,
13 and that G.D. required work with reading comprehension. The
14 Crossroads teacher also informed Ms. Weiner that G.D. required
15 prompting at times in order to follow the classroom routine but
16 that the level of prompting was very minimal, even during the
17 absence of a BECA aide, and that G.D. fit in with the class and
18 played well with all the other students.

19

20 **(c) Tami Dowgiewicz**

21 Ms. Dowgiewicz, who has been a District program specialist
22 for three years, has taught students with disabilities for five
23 years, and was a resource specialist for four years, observed G.D.
24 at Crossroads for approximately one hour, during which time G.D.
25 performed table top activities, transitioned between activities,
26 and sang songs in a group. Ms. Dowgiewicz noted that when

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28 ⁴ Priming is the preparation of an individual for an
upcoming action or event by informing the individual of the
action or event in advance.

1 instructed by his teacher, G.D. was able to transition between
2 activities by getting up and taking a book out of the closet,
3 sitting down, turning to a particular page, tracing the letters
4 and shapes on that page, and then transitioning to a group
5 activity in which the pupils sang songs and danced, all of which
6 G.D. did independently. During these activities, G.D.'s BECA aide
7 interceded twice, once to assist in instructing G.D. and other
8 pupils to move off the rug, and once to talk with G.D. for
9 approximately ten seconds to determine how he was doing.
10 Otherwise, his BECA aide sat in her chair for fifty-eight of Ms.
11 Dowgiewicz's sixty minute observation. In addition, Ms.
12 Dowgiewicz observed G.D. interacting with his peers when he helped
13 a peer find the right page, interacted with peers in a group, and
14 acted in a manner that was more appropriate than some of the other
15 pupils in the class. Ms. Dowgiewicz summarized G.D.'s present
16 levels of functioning, based upon her observation of him at
17 Crossroads as being on task, completing his work, capable of
18 transitioning, and, in general, being totally engaged and looking
19 very, very much on target for how a child should look when coming
20 into kindergarten.

21

22 **(d) Jennifer Fisher**

23 In or about March or April 2010, Ms. Fisher observed G.D. at
24 Crossroads. During circle time, G.D. received no classroom
25 assistance from his BECA aide and had no difficulty communicating
26 with peers. G.D. was able to independently participate in circle
27 time, which included singing songs, pantomiming to the lyrics, and
28 reciting prayers or Bible verses. G.D. was also able to

1 independently transition from circle time to snack time,
2 communicate with his peers in the classroom, and to engage with
3 peers during snack time. During snack and outside time, the BECA
4 aide redirected G.D. to an area where his peers were located so
5 that he could participate in their activities.

6 On the basis of her Crossroads observations, discussions with
7 G.D.'s Crossroads teacher, and a review of the BECA reports, Ms.
8 Fisher summarized G.D.'s present levels of performance in an April
9 2010 "Facts Facts," and concluded that G.D. was friendly,
10 persistent, happy, and smart. She also concluded that G.D.
11 attended to his assigned tasks during the school day, sat on the
12 carpet as long as his classmates, independently participated in
13 circle time, cooperatively engaged with adults, followed group
14 instruction, understood classroom rules, enjoyed circle time
15 activities, verbally expressed his wants and needs, did not
16 require supervision during snack, engaged in symbolic play, and
17 initiated play with peers. On a Kindergarten Readiness List, Ms.
18 Fisher noted that G.D. had mastered 13 important skills, had
19 emerging skills in 3 skill areas, and had no complete lack of
20 skills in any skill area.

21
22 **(e) BECA**

23 In approximately February 2010, a month or two before the
24 Crossroads observations by the IEP team members, Anthony
25 Alberding, who has been a BECA educational consultant since 2008,
26 assumed responsibility for determining the nature of BECA services
27 that would be provided to G.D. Prior to Mr. Alberding assuming
28 his duties, BECA personnel had determined that G.D. had difficulty

1 with expressive language, which impacted his socialization. Mr.
2 Alberding initially observed G.D. at Crossroads on February 11,
3 2010, for approximately two hours. During his observations, G.D.
4 pledged allegiance to the United States, to the Bible, and to the
5 Christian flag during circle time, sang a Bible song, and, because
6 his best friend was not present, engaged in solitary play during
7 recess for approximately 15 to 20 minutes before interacting with
8 another peer.

9 On April 15, 2010, Mr. Alberding again observed G.D. at
10 Crossroads, and he observed G.D. playing appropriately with cars
11 during free time and independently joining an activity with his
12 peers at another table. Mr. Alberding also observed G.D. for
13 three hours on April 19, 2012, and noted that while G.D. exhibited
14 an increase in shouting out answers and responses without raising
15 his hand, he was attentive and not disruptive during circle time.
16 Based on his observations, Mr. Alberding was unable to conclude if
17 the presence of G.D.'s BECA aide contributed to his success
18 because the aide was always present, even if only acting as a
19 shadow. BECA never observed or tested G.D.'s abilities without
20 the presence of his BECA aide.

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(f) G.D.'s Mother

According to G.D.'s Mother, at about the time of the Spring
2010 IEP team meeting, G.D. was able to initiate play on the
playground with other children by G.D. saying hello, asking if the
child wanted to play with him, and then engaging in joint play.
G.D.'s Mother also testified that G.D. continued to have

1 difficulty describing things, understanding wh- questions⁵,
2 engaging in pretend play, sustaining play that he initiated,
3 communicating intent during play, and sustaining attention in
4 completing tasks.

5

6

4. April 28, 2010 IEP

7 On April 28, 2010, G.D.'s IEP team conducted the Spring 2010
8 annual review, during which time the IEP team developed goals for
9 the forthcoming year, determined the services that G.D. required
10 in order to access the curriculum, and determined the placement
11 and setting in which G.D. should receive special education
12 services. Ms. Juarez wrote the proposed goals, and those goals
13 required G.D. to maintain and generalize his social skills across
14 social play opportunities, as demonstrated by initiating and
15 joining in group play activities, responding to play statements,
16 sustaining play, and appropriately transitioning between play
17 activities for the duration of recess without adult assistance.
18 The IEP team also developed goals that required G.D. to produce
19 four to six word sentences when interacting with peers; to use
20 appropriate eye contact during interactions; to respond to who,
21 what, when, where, and why questions by using four to six word
22 sentences with correct syntax and grammar; to respond to who,
23 what, when, where, and how questions about an instructional level
24 text; to correctly produce age-appropriate phonetic sounds; to
25 determine a reasonable spelling using pre-phonetic knowledge,
26 letter sounds, and knowledge of letter names; to create a number

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28 ⁵ Wh- questions are those that ask who, what, why, or
where. Questions that ask "how" are often part of goals
involving wh- questions.

1 sentence of addition and subtraction word problems by using
2 drawings or manipulatives to model the problem; and to follow the
3 classroom routine.

4 G.D.'s Spring 2010 IEP team also considered ten goals that
5 had been proposed by BECA prior to the meeting. Those goals were
6 designed to address G.D.'s inability to tolerate some frustration,
7 to independently transition between play activities, to respond to
8 his name being called when engaged in a preferred activity, to
9 account for the visual perspective of others, to engage in
10 appropriate play behavior with his peers, to appropriately use
11 nouns, to use wh- questions, to respond to wh- questions, to
12 independently join peers' conversations, and to provide
13 directions, instructions, and explanations. The proposed BECA
14 goals were incorporated into the IEP, as appropriate, combined
15 into or subsumed by a more global goal, or not included because
16 the IEP team determined that they were either inappropriate or
17 unnecessary. In addition to considering and incorporating BECA's
18 proposed goals into the IEP, the IEP team also relied on BECA's
19 proposed goals in determining G.D.'s present levels of
20 functioning in specific areas, or "baselines."

21

22 **5. Results of the April 28, 2010 IEP**

23 G.D.'s April 28, 2010 IEP team offered placement in a general
24 education kindergarten classroom and related services that
25 included group behavior intervention services for fifteen minutes
26 each school week, provided by ASSISTT; consultative behavior
27 intervention services for twenty minutes per consultation, with
28 two consultations per school week, provided by ASSISTT;

1 specialized academic instruction and consultation for thirty
2 minutes per consultation, with three consultations per school
3 week, provided by a learning center teacher; individual speech and
4 language therapy for thirty minutes each school week; and small
5 group speech and language therapy for thirty minutes each school
6 week.

7 The direct ASSISTT services would be provided either during
8 recess or lunch in a natural environment, such as the play yard or
9 at the lunch benches. The direct ASSISTT services could be either
10 passive support, such as taking data and observing, or active
11 support, such as prompting G.D. to use specific language or
12 skills, prompting other pupils to approach or interact with G.D.,
13 or directing or initiating play in order to draw in others. The
14 direct ASSISTT services would be overseen by Ms. Juarez as part of
15 her regular duties. The ASSISTT consultations would consist of
16 direct work with G.D. during classroom social playtimes, speaking
17 with the teacher, providing the teacher with strategies in
18 presenting instruction to G.D., or identifying opportunities for
19 reinforcement by a supervisor or an assistant. ASSISTT would also
20 implement the goal that required G.D. to maintain and generalize
21 his social skills across social play opportunities through
22 priming, providing G.D. with the language to use for initiation of
23 play, identifying activities with which G.D. might want to
24 participate in, priming and practicing the language before G.D.
25 approached peers, and then fading the prompts and priming and,
26 instead, assisting G.D. with increasing his responses to play
27 statements and sustaining play.

28

1 Learning center support was also offered for three sessions
2 per school week, thirty minutes per session, in order to address
3 reading comprehension, wh- questions, phonetics, behavior, and
4 social skills. Based on G.D.'s level of functioning as of April
5 28, 2010, the District members of the IEP team concluded that G.D.
6 did not require home-based services. In addition, the April 28,
7 2010 IEP team considered whether G.D. would require an
8 instructional assistant or paraeducator, and decided that such
9 support was unnecessary because G.D. was functioning independently
10 throughout the school day, was on target, participated in the
11 classroom, was academically on par with his peers, had appropriate
12 behaviors, was not disruptive, and did not require additional
13 attention.

14

15 **6. G.D. Was Provided Services Pursuant to the "Stay**
16 **Put" Provisions of the Settlement Agreement**

17 G.D.'s Parents refused the April 28, 2010 IEP offer of a FAPE
18 and G.D. remained enrolled at Crossroads until Fall 2010, at which
19 time, pursuant to the earlier settlement agreement, G.D. entered a
20 District general education kindergarten class. G.D. was placed in
21 Ms. Konishi's kindergarten class at Lincoln Elementary School, and
22 was provided stay put BECA services for the initial four weeks of
23 the term. Thereafter, behavior intervention services were
24 transitioned to a District paraeducator, Ms. Garcia.⁶ G.D. was
25 also provided speech and language therapy.

26

27

28 ⁶ G.D.'s Parents, by filing for due process with respect
to the April 28, 2010 IEP, invoked the stay put provisions of
the settlement agreement.

1 **II. CONCLUSIONS OF LAW**

2 **A. Jurisdiction And Venue**

3 This case involves a review of a hearing officer's decision
4 regulated by the IDEA. As such, the Court has original
5 jurisdiction over this matter under 20 U.S.C. § 1415(i)(3)(A).

6 Venue in the United States District Court for the Central
7 District of California is properly invoked pursuant to 28 U.S.C. §
8 1391(b) on the grounds that the events giving rise to the
9 District's claim occurred in the Central District of California.

10 The parties do not dispute the facts necessary for federal
11 jurisdiction and venue.

12

13 **B. Standard Of Review**

14 The standard for the District Court to review an
15 administrative decision under IDEA is set forth in 20 U.S.C. §
16 1415(i)(2)(C). That section requires the decision to be supported
17 by a preponderance of the evidence, and provides as follows:

18 In any action brought under this paragraph, the court -
19 (i) shall receive the records of the administrative
20 proceedings;

21 (ii) shall hear additional evidence at the request of a
22 party; and

23 (iii) basing its decision on the preponderance of the
24 evidence, shall grant such relief as the court
25 determines is appropriate.

26 This modified *de novo* standard requires that "due weight" be given
27 to the administrative proceedings. *Bd. of Educ. v. Rowley*, 458
28 U.S. 176 (1982).

1 Judicial review under IDEA is less deferential than in most
2 administrative cases. *J.L. v. Mercer Island School Dist.*, 592
3 F.3d 938, 949 (9th Cir. 2010). When a party challenges the
4 outcome of an IDEA due process hearing, the reviewing Court
5 receives the administrative record, [and] hears any additional
6 evidence" and "basing its decision on the preponderance of the
7 evidence," can grant relief as the Court determines is
8 appropriate. 20 U.S.C. § 1415(i)(2)(C). In applying the
9 preponderance of the evidence standard, the Court must reach
10 "independent" decisions. *Rowley*, 458 U.S. at 205.

11 Nonetheless, "[b]ecause Congress intended states to have the
12 primary responsibility of formulating each individual child's
13 education" this Court must give "'due weight' to the decisions of
14 the states' administrative bodies." *Hood v. Encinitas Union*
15 *School Dist.*, 486 F.3d 1099, 1104 (9th Cir. 2007) (internal
16 citations omitted). The amount of deference afforded to the ALJ's
17 decision is subject to the Court's discretion. *Gregory K v.*
18 *Longview School District*, 811 F.2d 1307 (9th Cir. 1987). In making
19 that determination, the thoroughness of the hearing officer's
20 findings should be considered, with the degree of deference
21 increased when the findings are thorough and careful. *Capistrano*
22 *Unified Sch. Dist. v. Wartenburg*, 59 F.3d 884, 891-92 (9th Cir.
23 1995). "[S]ubstantial weight" should be given to the hearing
24 officer's decision "when it 'evinces his careful impartial
25 consideration of all the evidence and demonstrates his sensitivity
26 to the complexity of the issues presented.'" *County of San Diego*
27 *v. California Special Education Hearing Office*, 93 F.3d 1458, 1466

28

1 (9th Cir. 1996) (quoting *Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d
2 1467, 1476 (9th Cir. 1993)).

3 Accordingly, any "'thorough and careful' findings of a
4 hearing officer are entitled to deference." *Hood*, 486 F.3d at
5 1104; see also *Wartenburg*, 59 F.3d at 891-92 (holding that "[t]he
6 hearing officer's report was especially careful and thorough, so
7 the judge appropriately exercised her discretion to give it quite
8 substantial deference"); *Jackson*, 4 F.3d at 1476 (9th Cir. 1993)
9 (holding that a hearing officer's decision is entitled to
10 "substantial weight" where the "decision evinces his careful,
11 impartial consideration of all the evidence and demonstrates his
12 sensitivity to the complexity of the issues presented");
13 *California Special Education Hearing Office*, 93 F.3d at 1467
14 (holding that hearing officer's decision was entitled to
15 substantial weight because it was "intensive and comprehensive");
16 *Glendale Unified Sch. Dist. v. Almasi*, 122 F. Supp. 2d 1093, 1100
17 (C.D. Cal. 2000) (giving the hearing officer's decision
18 "substantial weight" where the hearing officer issued a lengthy,
19 detailed opinion, supported her findings with testimony and
20 documentary evidence, and her decision was impartial and her
21 reasoning was sensitive to the complexities of the case).

22 In addition, the Court must "not substitute [its] opinions of
23 sound educational policy for those of the school authorities which
24 [it is] reviewing." *Adams v. State of Oregon*, 195 F.3d 1141, 1149
25 (9th Cir.1999); see also *K.D. v. Department of Education*, 665 F.3d
26 1110, 1117 (2011) (holding that Court "must give due weight to
27 judgments of education policy when reviewing state hearings and
28 must take care to not substitute our own notions of sound

1 educational policy for those of the school authorities we review")
2 (internal citations and quotations omitted). However, "the court
3 is free to determine independently how much weight to give the
4 state hearing officer's determinations." *Ashland Sch. Dist. v.*
5 *Parents of Student R.J.*, 588 F.3d 1004, 1009 (9th Cir. 2009).
6 Deference should generally be given to the state hearing officer's
7 findings when they are "thorough and careful." *K.D.*, 665 F.3d at
8 1117.

9 The ALJ's Decision in this matter, like the *Wartenburg* and
10 *California Special Education Hearing Office* cases, was not only
11 "thorough and careful," but also "intensive and comprehensive."
12 The ALJ's thirty-four page, single spaced Decision provided a
13 thorough discussion and application of the facts of this matter to
14 the relevant legal contentions made by the parties. The ALJ fully
15 and completely explained the basis of her opinions, the inferences
16 she drew from the testimony and the documentary record, and her
17 rationale for affording greater weight to certain evidence and
18 testimony. As a result, the ALJ's Decision is clearly entitled to
19 substantial deference as discussed in more detail below.

20

21 **C. Additional Evidence**

22 On August 26, 2011, G.D. filed a motion seeking to supplement
23 the administrative record with additional evidence consisting of
24 the following: (1) IEP meeting documents from February 25 and
25 April 28, 2011, and an email exchange between special education
26 teacher Susan Weiner and G.D.'s mother Hong Dang from March 14 and
27 March 15, 2011 regarding paraeducator support for G.D.; (2) oral
28 testimony of Ms. Weiner and Ms. Dang regarding the above

1 documents, and (3) additional testimony by Ms. Weiner regarding
2 the services offered.

3 On September 30, 2011, Judge Valerie Baker Fairbank issued an
4 order deferring in part and denying in part G.D.'s motion to
5 supplement the record. Judge Fairbank denied G.D.'s request to
6 supplement the administrative record with the additional witness
7 testimony, and took under submission until after the trial the
8 issue of whether to permit G.D. to supplement the administrative
9 record with additional documents.⁷

10 When the results of the administrative hearing are appealed
11 to the district court, the court "shall hear additional evidence
12 at the request of a party." 20 U.S.C. § 1415(i)(2)(C)(ii). In
13 determining whether to supplement the administrative record with
14 additional evidence, the proper inquiry is whether the additional
15 evidence is "relevant, non-cumulative and otherwise admissible."
16 *E.M. v. Pajaro Valley Unified School*, 652 F. 3d 999, 1005 (9th
17 Cir. 2011). Additional evidence may be excluded where it repeats
18 or embellishes evidence from the administrative hearing, or
19 changes the character of the hearing from one of review to a trial
20 de novo. *Id.* at 1004. Evidence from events subsequent to the
21 administrative hearing bearing on the child's condition may help
22 determine the reasonableness of a school's action at the earlier
23 date. *Id.*; see also *Ojai Unified School Dist v. Jackson*, 4 F.3d

24

25 ⁷ On October 26, 2011, this action was transferred to
26 this Court by Notice of Reassignment of Case Due to
27 Unavailability of Judicial Officer. Judge Fairbank's
28 decision is law of the case. However, to the extent her
decision is not law of the case, this Court has independently
reviewed Judge Fairbank's decision denying G.D.'s request to
supplement the administrative record with the additional
witness testimony and concurs in her decision.

1 1467, 1472-73 (9th Cir. 1993). Even if it would have been
2 impossible for the school to account for such evidence because it
3 was unavailable at the time of the decision, the Ninth Circuit has
4 held that the intent of the statutory mandate is that prior
5 actions should be reviewed with the help of subsequently available
6 evidence. *Pajaro Valley*, 652 F.3d at 1005.

7 In this case, G.D. argues that the IEP meeting documents and
8 email exchange show that the District recognized that G.D.
9 required some level of classroom aide support and therefore this
10 evidence is relevant to whether such services should have been
11 offered in the April 28, 2010 IEP. However, the District argues
12 that G.D. admitted at the administrative hearing that the
13 assessments of G.D. conducted in October and November of 2010 were
14 not relevant to G.D.'s needs in April 2010, and because the
15 assessments reflected in the proffered documents were conducted
16 even later in time, they are not relevant to the appropriateness
17 of the April 28, 2010 IEP.

18 The Court agrees with the District and denies G.D.'s request
19 to supplement the administrative record with the 2011 IEP meeting
20 documents and email exchange because those documents admittedly
21 are not relevant to the issue of the appropriateness of the April
22 28, 2010 IEP. *See, e.g., Pajaro Valley*, 652 F.3d at 1006 (holding
23 that, when considering the admissibility of after-acquired
24 evidence, "[t]he proper inquiry was whether the [evidence] was
25 relevant, non-cumulative, and otherwise admissible"). In this
26 case, the 2011 IEP meeting documents and email exchange were
27 created several months after the April 28, 2010 IEP, and G.D. has
28 failed to demonstrate how his behavior at that time, well after

1 the implementation of the agreed upon stay put services, are
2 relevant to and support a conclusion that the services proposed in
3 the April 28, 2010 IEP were inappropriate or otherwise demonstrate
4 that, at the time of the April 28, 2010 IEP, G.D. required some
5 level of classroom aide support.

6 The fact that the District recommended a paraeducator or aide
7 for G.D. in February 2011 does not support the conclusion that
8 such support was required at the time of the April 28, 2010 IEP.
9 Although not relevant, the District's recommendation demonstrates
10 that the District appropriately responded to a change of
11 circumstances and recognized G.D.'s need for a paraeducator or
12 aide and promptly recommended that such support be made available
13 to G.D. See, e.g., *Schaffer v. Weast*, 554 F.3d 470, 477 (4th Cir.
14 2009) ("And more importantly, if services added to a later IEP
15 were always used to cast doubt on an earlier one, school districts
16 would develop a strong disincentive against updating their IEPs
17 based on new information. This scenario is the exact opposite of
18 what Congress intended when it provided for regular review and
19 revision of IEPs, . . . , and it would do little to help the
20 interest of disabled children").

21
22 **D. The April 28, 2010 IEP Offered to G.D. Constituted a**
23 **FAPE**

24 The Supreme Court held in *Board of Education v. Rowley*, 458
25 U.S. 176 (1982), that the IDEA does not require school districts
26 to provide special education students with the best education
27 available, or to provide instruction that maximizes the student's
28 abilities. Instead, school districts are required only to provide

1 a "basic floor of opportunity" that consists of access to
2 specialized instruction and related services individually designed
3 to provide educational benefits to the student, and the choice of
4 methodology in providing special education and related services is
5 the prerogative of the school district. *C.P. v. Prescott Unified*
6 *School District*, 631 F.3d 1117, 1122 (9th Cir. 2011) (holding that
7 IDEA allows educators the discretion to select from various
8 methods in order to meet the individualized needs of a student if
9 those practices are reasonably calculated to provide educational
10 benefit).

11 The District offers a "free appropriate public education if
12 the program (1) addresses the child's unique needs, (2) provides
13 adequate support services so that the child can take advantage of
14 the educational opportunities, and (3) is in accord with the
15 individual educational program." *Wartenberg*, 59 F.3d at 893
16 (citing *Rowley*, 458 U.S. at 188-89); see also *Katherine G. v.*
17 *Kentfield School District*, 261 F.Supp. 2d 1159, 1171-72 and n. 12
18 (N.D. Cal. 2003).

19 Under *Rowley* and the applicable federal and state statutes,
20 the standard for determining if a school district's provision of
21 services substantively and procedurally provides a FAPE involves
22 consideration of four factors: (1) services designed to meet the
23 student's unique needs; (2) services reasonably designed to
24 provide some educational benefit; (3) services conform to the IEP
25 as written; and (4) the program offered must be designed to
26 provide the student with the foregoing in the least restrictive
27 environment. The program developed by the school district must
28 result in more than minimal academic advancement and the

1 educational benefit is measured by the degree to which a student
2 succeeds in achieving progress on the goals established by the
3 IEP.

4 Only the first two factors are at issue before this Court -
5 whether the program in the April 28, 2010 IEP addressed G.D.'s
6 unique needs and whether that program was reasonably designed to
7 provide the required educational benefit to G.D. G.D. alleges
8 that the April 28, 2010 IEP failed to meet G.D.'s unique needs and
9 was not designed to provide meaningful benefits. The District
10 contends that the IEP adequately addressed G.D.'s weaknesses and
11 unique needs, and that G.D. made progress in all areas.

12 As explained below, the Court finds that G.D. has not
13 established that the April 28, 2010 IEP offered violated IDEA or
14 state law.

15

16 **1. Behavioral Services**

17 **a. School Based Services**

18 G.D. argues that the District failed to provide him a FAPE
19 because the April 28, 2010 IEP failed to offer appropriate
20 behavior support in the classroom. However, the Court finds the
21 evidence amply supports the ALJ's findings that the April 28, 2010
22 IEP addressed G.D.'s needs, provided meaningful benefits, and
23 constituted a FAPE, especially given the due deference to which
24 the ALJ's findings on this issue are entitled. As of April 28,
25 2010, BECA support for G.D. in the classroom was minimal, and G.D.
26 was interacting with others more appropriately and attending to
27 tasks more effectively than many of his typically developing
28 peers. In fact, G.D. showed significant progress since his

1 initial IEP team meeting, including the ability to function
2 independently in the classroom for the majority of the school day,
3 interacting and playing independently with peers during free time
4 with minimal redirection. G.D. generally required no more support
5 in the classroom than would be otherwise provided by the structure
6 and guidance supplied by a general education teacher.

7 In addition, witnesses for both G.D. and the District agreed
8 that a key component of G.D.'s social deficits resulted from the
9 delayed development of his language skills. In fact, Dr. Freeman
10 opined that communication was a contributing factor in G.D.'s lack
11 of socialization skills because his language and speech issues
12 affected his ability to meaningfully interact with his peers, and
13 that language, in particular, was probably holding G.D. back.
14 BECA personnel, including Mr. Alberding, testified that G.D. had
15 difficulty with expressive language, which also impacted his
16 socialization skills. However, the District clearly recognized
17 and considered those concerns, because the District included
18 provisions for language and speech therapy for G.D. in the April
19 28, 2010 IEP.

20 Accordingly, the Court concludes that the behavioral services
21 offered in the April 28, 2010 IEP were adequately designed to
22 address G.D.'s unique educational needs, were reasonably
23 calculated to provide G.D. with the required educational benefit,
24 and constituted a FAPE.

25

26 **b. Home Based Services**

27 G.D. argues that the District failed to provide him a FAPE
28 because the April 28, 2010 IEP discontinued the five hours per

1 week of home based behavior services, which were services
2 recommended by BECA. However, the Court finds the evidence amply
3 supports the ALJ's findings that the April 28, 2010 IEP offered
4 did address G.D.'s needs, provided meaningful benefits, and
5 constituted a FAPE, especially given the due deference to which
6 the ALJ's findings on this issue are entitled. Ms. Juarez
7 testified that G.D. did not require home based services because
8 G.D.'s level of need was not significant, and he was exhibiting a
9 sufficient level of skills at school. At the administrative
10 hearing, there was ample evidence presented that established that
11 G.D. demonstrated a sufficient number of necessary skills that
12 obviated the need for home based services. The evidence
13 demonstrated that those skills included G.D.'s successful
14 placement in a general education setting, identification of
15 friends and peers, engaging in classroom activities, engaging in a
16 number of play activities, and being academically on target.

17 In addition, G.D.'s Mother admitted that she had seen an
18 overall improvement in G.D.'s performance, and the skills
19 identified by the BECA's home based services - such as remaining
20 quiet, making eye contact, and attending to tasks - were skills
21 that G.D. had mastered in the classroom. Although G.D.'s Mother
22 testified that she believed that G.D. needed home based services,
23 her testimony was not persuasive. Even if the home based services
24 preferred by G.D.'s Mother might have resulted in a greater
25 educational benefit to G.D., the District is not required to offer
26 such services so long as the program offered was designed to
27 address G.D.'s unique educational needs and was reasonably
28 calculated to provide G.D. with the required educational benefit.

1 Accordingly, the Court concludes that the behavioral services
2 offered in the April 28, 2010 IEP, even though those services did
3 not include home based behavioral services, were designed to
4 address G.D.'s unique educational needs, were reasonably
5 calculated to provide G.D. with the required educational benefit,
6 and constituted a FAPE.

7

8 **2. Failure to Include BECA Behavior Goals in the IEP**

9 G.D. argues that the District failed to provide him a FAPE by
10 failing to develop and incorporate appropriate goals in the April
11 28, 2010 IEP because the behavioral goal for G.D. to maintain and
12 generalize social skills across play opportunities should have
13 been separated into multiple goals, including the ten goals
14 proposed by BECA. However, the Court finds the evidence amply
15 supports the ALJ's findings that the April 28, 2010 IEP offered
16 addressed G.D.'s needs, provided meaningful benefits, and
17 constituted a FAPE, especially given the due deference to which
18 the ALJ's findings on this issue are entitled. The IEP goals were
19 appropriate and focused on the areas most crucial to G.D.'s
20 development, which included socialization. The fact that the
21 April 28, 2010 IEP did not incorporate each of the goals as
22 specifically written by BECA does not result in the conclusion, as
23 G.D. and his Parents seem to argue, that the goals prepared and
24 proposed for inclusion by the IEP team were inappropriate and did
25 not provide a FAPE for G.D. Although they may have been phrased
26 or worded differently, the majority of BECA's significant goals,
27 such as correctly responding to wh- questions and requiring G.D.
28 to join in peer conversations, were, in fact, incorporated as

1 goals in the April 28, 2010 IEP. With respect to the BECA goals
2 that were not incorporated in the April 28, 2010 IEP, the members
3 of the IEP team, based on their observations of G.D. and their
4 knowledge of the needs of special education students such as G.D.,
5 appropriately determined that the BECA goals were either
6 unnecessary or not age appropriate. Thus, the ALJ properly
7 concluded based on the evidence that the goals proposed in the
8 April 28, 20110 IEP addressed G.D.'s needs and provided meaningful
9 benefits, even though they did not include each and every goal
10 proposed by BECA.

11 In addition, the main and most important behavioral goal
12 identified in the April 28, 2010 IEP - to maintain and generalize
13 social skills across play opportunities - included a number of
14 specific socialization goals for G.D., such as initiating and
15 joining group play activities, responding to play statements,
16 sustaining play, and appropriately transitioning between play
17 activities for the duration of recess without adult assistance,
18 adequately considered and incorporated the goals proposed by BECA.
19 Even Dr. Freeman, who testified on behalf of G.D., admitted that
20 the 2010 IEP goals of working on initiating and joining play
21 activities with peers, transitioning effectively from one activity
22 to another, sustaining play, responding to and asking wh-
23 questions, and following the classroom routine were adequate and
24 appropriate goals for improving G.D.'s principal area of deficit,
25 which was his lack of socialization skills. Moreover, G.D. was
26 offered services, including behavior intervention services and
27 speech and language therapy which adequately addressed G.D.'s
28 development in those areas of concern. See, e.g., *K.D.*, 665 F.3d

1 at 1125 (where IEP showed a focus on evaluating the areas most
2 crucial to the student's development and offered related services,
3 the Court held that the goals were reasonably calculated to enable
4 the student to receive educational benefits and provided the
5 student a FAPE).

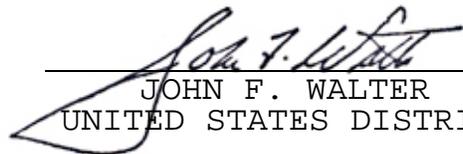
6 Accordingly, the Court concludes that the behavioral goals in
7 the April 28, 2010 IEP were appropriate and provided G.D. a FAPE.

8
9 **III. CONCLUSION**

10 For all the foregoing reasons, the Court affirms the ALJ's
11 decision in this matter as both careful, reasoned, and supported
12 by the preponderance of the evidence. The Court concludes that:
13 (1) the record demonstrates that the District provided G.D. with a
14 FAPE in the April 28, 2010 IEP; and (2) therefore, G.D. and his
15 Parents are not entitled to relief.

16 The parties are hereby ordered to meet and confer and agree
17 on a joint proposed Judgment that provides for judgment consistent
18 with these Findings of Fact and Conclusions of Law. The parties
19 shall lodge the joint proposed Judgment with the Court on or
20 before March 14, 2012. In the unlikely event that counsel are
21 unable to agree upon a joint proposed Judgment, the parties shall
22 each submit separate versions of a proposed Judgment along with a
23 declaration outlining their objections to the opposing party's
24 version no later than March 14, 2012.

25 Dated: March 8, 2011

26 
27 _____
28 JOHN F. WALTER
UNITED STATES DISTRICT JUDGE