

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

OAH CASE NO. 2010091004

v.

SAN DIEGO UNIFIED SCHOOL
DISTRICT.

DECISION

Administrative Law Judge (ALJ) Adrienne L. Krikorian, Office of Administrative Hearings, State of California, heard this matter on December 6, 7, 8, and 9, 2010, at San Diego, California.

Attorney Megan Nunez represented Student. Student's mother (Mother) was present each hearing day. Assistant general counsel Patrick Frost represented San Diego Unified School District (District). District Representative Phyllis Trombi was also present on behalf of District on all hearing days. District's associate general counsel Katherine Allison observed the hearing for a few hours on two days of hearing.

On September 24, 2010, Student filed a request for due process hearing (complaint). On September 30, 2010, the parties' request for continuance was granted for good cause.

At the end of the hearing, the ALJ granted a continuance until January 14, 2011, to allow parties time to file closing briefs. The parties submitted their closing briefs within the time allowed, and the record was closed on January 14, 2011.

ISSUES¹

1. Did District deny Student a free appropriate public education (FAPE) from September 24, 2008 through September 24, 2010, by failing to assess student in the areas of: a) adaptive physical education (APE); b) gross and fine motor; c) sensory; d) social/emotional; and e) attention/organization?

¹ The issues in the complaint have been restated for organization of the Decision.

2. Did District deny Student a FAPE from September 24, 2008 through September 24, 2010, by failing to include in Student's individualized education program (IEP) measurable goals in the areas: a) social/emotional; b) attention/organization; and c) speech and language (SL)?

3. Did District deny Student a FAPE from September 24, 2008 through September 24, 2010, by failing to offer Student appropriate related services in the areas of a) attention/organization and (b) SL?

4. Did District deny Student a FAPE in the 2010-11 school year prior to September 24, 2010, by failing to convene an IEP team meeting to consider Student's independent assessment for attention deficit hyperactivity disorder (ADHD) and pervasive developmental disorder – not otherwise specified (PDD-NOS)?

5. Did District deny Student a FAPE prior to September 24, 2010, by failing to provide Student an appropriate placement?

6. Did District deny Student a FAPE prior to September 24, 2010, by failing to provide Parent with Student's cumulative file until nineteen days after District received Parent's request?

FACTS

Jurisdiction

1. Student is seven years old and lives with Mother in the District. His mother privately placed Student in first grade at Excelsior Academy Private School (Excelsior Academy) at the beginning of the 2010-2011 school year. Student is eligible for special education under the category of speech language impaired.

Educational History and Background

2. Student transitioned to a District preschool from regional center services in January 2007, when he was three years old. At the time of initiating transition to District, Mother requested that District assess Student for physical therapy (PT). Student's IEP team met on January 12, 2007. The resulting IEP included goal number four, which provided that Student would "initiate and respond to familiar social language with peers ten times during the school day on three of four days by teacher/SLP [speech language pathologist] records/language samples." The IEP team also recommended assessment for APE relating to his motor development. However, the district never assessed Student for APE. During the 2006-07 school year, Student's District speech therapist told Mother that the District would do the APE assessment at a later date. Mother concluded that if the District felt an APE assessment was necessary it would assess Student. She did not raise the issue again.

3. Student's IEP team met on November 13, 2007. Student's parents (Parents), a special education teacher and a district administrator were present. Student's progress reports through the school year noted that he often needed assistance with worksheets and assignments, he was developing a strong foundation in reading readiness, letter recognition, sound application and beginning sight words, and he continued to need work in social skills, attention and concentration. Student's IEP included four communication goals, including a communication/social skills goal to assist Student in initiating and responding to familiar social language. The IEP team offered placement in a general education preschool class, general physical education, forty-four one-hour sessions of pullout SL through July 20, 2008, and eight hours of SL from July 21, through November 12, 2008. District offered no additional supports or modifications. Parents consented to the IEP.

2008-09 School Year

4. In the 2008-09 school year, Student attended a District elementary school in District's half-day Primary Extended Program (PEP) for children whose birthdays were near the December 2 enrollment deadline. PEP utilized some of the kindergarten curriculum to give students a head start before they entered into a full kindergarten curriculum.

5. On October 23, 2008, District speech therapist and Student's special education case manager Tami Holtz (Holtz) orally notified Mother that Student was due for a SL assessment. Holtz is a licensed and certified speech therapist with a master's degree in speech and language pathology. She has worked as a speech pathologist for twenty-five years, providing both private and school-based speech therapy. She currently works for the District as a speech therapist and as a case manager for special education students, kindergarten through sixth grade. She testified at the hearing. On the same day that Mother was notified, Holtz responded to an email from Mother regarding whether the need existed for testing in other areas. Holtz advised Mother that a full evaluation would include cognitive, academic and occupational therapy. Holtz informed Mother that Student's academic skills were developing and that she thought Student was doing fine in academics. She also advised Mother that the District occupational therapist had observed Student in his classroom, and had confirmed that Student's fine motor skills appeared to be developing within schedule. Holtz believed that the 2008 assessments could be limited to communication. Holtz later told Mother that no assessments would be performed in the 2008-2009 school year, and that District intended to do all assessments in the 2009-2010 school year.

6. Student's teachers reported to Mother in a progress report dated November 19, 2008, that Student was well behaved, attentive to stories and tasks, and often needed assistance with worksheets and assignments. He was developing a strong foundation in reading readiness, with letter recognition, sound application and beginning sight words. He had made some progress on his social skills goal, did not stand out as socially impaired compared to other students, he was happy, not communicatively assertive, and he had begun to respond to and engage with other students.

7. Student's IEP team met on February 17, 2009. Parents, a district administrator, general education teacher Janice Seaton (Seaton), and Holtz attended. Seaton, who has thirty-two years experience as a teacher, holds a bachelor's degree in child development, a master's degree in reading, and is a credentialed reading specialist. She taught kindergarten for the past fifteen years, and started teaching first grade for the District at the beginning of the 2010-11 school year. Seaton testified at the hearing. Holtz presented a draft IEP to Parents for discussion.

8. The IEP team discussed Student's present levels of performance (PLOPs). However, the February 17, 2009 IEP team did not discuss goal number four from the January 12, 2007 IEP at its meeting and the goal was not included in the resulting IEP.

9. Student's academic/readiness skills were at a proficient level for pre-kindergarten literacy and math standards. He was unable to write a sentence independently. Student confused word order and grammar in expressive language. He interacted with peers using eye contact and speech. His conversational skills were emerging. He did not usually initiate verbal communication but was beginning to show more spontaneous comments to Holtz and peers. His communication deficits contributed to receiving adverse attention from his classmates. He did not communicate about events removed in time and place, and when cued with specific details he could produce a single word or phrase. Student partially met his goal in communication/sentence structure, which Holtz felt might have been too ambitious for him because of his weakness in attention and focus. Student did not meet his other two communication goals. Seaton observed Student on the playground during recess. He played well with typically developing peers, occasionally engaging in parallel play. Parents noted that Student had shown some improvement in his communication skills but needed improvement in expressive language skills. Parents did not raise any concerns to the IEP team relating to Student having possible deficits in the area of APE, gross or fine motor, sensory, social skills, or attention/organization. Neither Student's teachers nor Holtz observed any concerns regarding Student's ability to participate in general physical education.

10. The February 17, 2009 IEP offered Student placement in District's kindergarten class for the 2009-2010 school year, with general physical education (GPE). It identified communication as the only area of need. The IEP contained two communication goals and one written language goal. The IEP team offered to continue pullout SL services for thirty minutes twice a week. The IEP offered supports in the areas of repeated review/drill and increased verbal response time. District offered no other supports or program modifications. Mother signed her consent to the IEP.

11. District provided parents with periodic PEP Progress Reports during the 2008-09 school year. In addition to numeric scores ranging from one (emerging) to four (exceptional), Student's PEP teacher provided written comments. As of March 5, 2009, Student was becoming a good reader and continued to be an excellent citizen in class. He continued to need work on social skills, paying attention and concentrating on work. As of June 1, 2009, Student had a very successful year. His grades reflected that he made progress

from the beginning of the year in listening and speaking, reading readiness, writing and math, with his grades ranging from two-plus (developing) to three (secure). A grade of three met standard level. His grades were three in most skills, and four in some reading readiness skills. Student was developing in most listening and speaking skills, in writing some letters to tell about experiences and stories, and counting by rote to twenty. Student's grades in social/emotional and physical development ranged from two through three by the end of the year. His grades in the areas of gross and fine motor were three at the end of the year. His grades were two in the areas of exhibiting impulse control and self-regulation, and attempting to solve his own problems. Student's report card and progress reports did not mention that Student had any gross motor deficits or the need for APE.

12. Holtz evaluated Student's progress toward his IEP goals in a June 8, 2009 IEP goal progress report. Student made progress in all of his IEP goals, demonstrating the most progress in sentence structure. Holtz observed that Student displayed some distractibility during weekly shared-reading activities. However, his distractibility was not significantly more than typically developing peers.

2009-2010 School Year

13. District placed Student in Seaton's general education kindergarten class for the 2009-10 school year. On September 30, 2009, Holtz provided Mother with an assessment plan for a triennial assessment in language/speech communication development. On October 2, 2009, Mother consented in writing to the assessment plan. Holtz did not recommend and Mother did not request additional assessments.

14. Holtz conducted the SL assessment and issued a report dated October 27, 2009. Her assessment included a records review, observation in the classroom, and testing. During observation, Student required frequent verbal and visual redirection to complete tasks or to move to the next activity. He often appeared to be daydreaming, or looking around the room instead of at his teacher. He appeared confused by verbal directions, made brief gazes and looked away when asked to look at Holtz, and appeared uncomfortable with eye contact. He smiled and laughed a great deal and was an overall happy child, but during game playing, such as "Go Fish," he did not understand the concept of concealing his cards from other players. Student's peers liked him.

15. Student's scores on the Comprehensive Assessment of Spoken Language (CASL) placed him in the low average to below average range when compared to other students of his age. Student also placed below average on the Comprehensive Receptive and Expressive Vocabulary Test (CREVT-2). He was unable to define simple vocabulary words by actions or attributes, he confused the "he/she" pronouns, and he mixed up his word order making it difficult to understand the meaning of his writing. Student used simple sentences with frequent omission of grammatical forms such as past tense "-ed" endings on an expressive language sample.

16. Holtz concluded that Student continued to have significant weaknesses in using specific vocabulary, such as pronouns and verb tense inflections, to produce age-appropriate grammatical forms. He showed significant weakness using correct word order in sentences. He required an unusually long time to respond to open-ended verbal questions, and he was difficult to understand. His communication deficits interfered with communication between Student, his classmates and teachers, and they called negative attention to his communicative efforts. Student's deficits were impacting Student's progress in literacy standards, particularly those involving speaking, reading and listening tasks.

17. Student's IEP team met on October 28, 2009, for Student's triennial review. The meeting lasted for approximately thirty minutes. Holtz, Mother, and Seaton were present.² Holtz reviewed with Mother the SL assessment results and Student's PLOPs. Student's expressive language deficits were interfering with his reading comprehension, his ability to follow teacher directions and his written language skills. Communication was an area of need. In the area of social/emotional skills, Student tended to play by himself and he avoided eye contact with others, which interfered with his communication and social skills. He attempted to look at his listeners in conversation but quickly looked away. He greeted classmates when verbally cued or instructed, was kind, courteous and polite. He was verbally supportive when a friend was hurt or in trouble. Student displayed weak organizational skills. He frequently lost his lunch identification tag and misplaced or forgot his glasses. He was frequently off task, looked around the room and focused on objects while Holtz was talking to him about speech homework, and required redirection. Neither Seaton nor Holtz observed any concerns regarding Student's ability to participate in GPE.

18. The District offered placement in a general education kindergarten class, with GPE. It also offered two goals in communication and one in written language and two thirty-minute weekly pullout speech therapy sessions. District offered supports including directions given in a variety of ways, repeated review and drills, increased verbal response time, and assignment notebooks. Student's written language goal provided, in part, that "Student will use 10 descriptive words with 80 percent accuracy in 2 of 3 trials." District offered no other accommodations or modifications in the IEP. Holtz recommended deferring a full evaluation of Student to the following year because Holtz wanted to give Student time to mature to determine whether his attention and social/emotional issues were developmental rather than impairment. Mother did not request any additional goals or services for the IEP because she assumed that if Holtz or Seaton, who worked regularly with Student at school, had any additional concerns they would have recommended assessments, additional goals, supports and/or services. Mother signed the IEP giving her full consent.

² At the hearing, the parties offered conflicting evidence as to whether school Principal Jennifer Wroblewski (Wroblewski) actually attended the IEP meeting. However, the issue of whether or not she attended is not relevant to the issues as identified by the complaint. Therefore, the ALJ made no factual finding on whether or not she attended the meeting.

19. Mother kept in regular contact with Holtz by email during the 2009-10 school year, and she often stopped by Holtz' office to discuss Student when she was on campus. Holtz provided Mother with a written progress report dated November 12, 2009. Student showed some progress toward his communication and written language goals in the short time between the drafting of his IEP goals one month earlier and this report.

20. Seaton met with Mother during parent-teacher conferences in November 2009 and March 2010, and informally during the school year. Seaton was concerned Student could fall behind in first grade if his attention issues were not resolved; he was inattentive and distracted during whole-group work which affected his ability to learn. He became confused when Seaton gave instructions to break into groups for small group activities. He was having trouble following first-time directions, but performed well with repeated directions. Student had difficulty organizing his tasks and activities, he was frequently inattentive and withdrawn, he had attention issues, and he fidgeted in his seat. He had no difficulty doing schoolwork, but was often forgetful and confused during transitions from class to other activities.

21. He occasionally engaged in sensory seeking behavior, including chewing on his clothing. He had difficulty hanging and zipping his jacket, a task others his age had mastered. He sometimes babbled and acted strangely. However, Seaton did not observe that these behaviors interfered with Student's access to any aspect of his education.

22. Student could retell a descriptive story, he could answer with short phrases most of the time, and he did better in small groups in responding to oral questions. He was proficient in drawing, using a lot of detail. His work samples showed that he was very proficient holding a writing instrument and in drawing with detail. He enjoyed drawing at school. Although he had difficulty writing complete sentences, those deficiencies were related to his pragmatic communication deficits, rather than his physical ability to grasp or manipulate a writing instrument on paper.

23. Student would play by himself, which was not atypical of his age group, he did not bother other children, and he did not demonstrate aggressive behaviors. Although Student often cried and threw tantrums when Mother took him to school, and he asked to stay home from school, Student's behavior ended after Mother left the campus and he went into Seaton's classroom.

24. On one occasion near the end of the school year, Student reported to Mother that he was picked on by his classmates and he came home from school with his glasses scratched reportedly by a group of his peers. When asked by Mother about the scratched glasses, Seaton reported that she had not observed and was unaware of any bullying against Student.

25. During the school year, Mother informed Holtz that Student had a family history of schizophrenia and that Student had cousins diagnosed with ADHD or on the autism spectrum. Holtz responded that Student might have ADHD based upon her

observations of Student's difficulty in paying attention. Mother asked Holtz whether District could assess Student for attention issues. Holtz told Mother that the District did not assess students for attention issues. Holtz did not consult with a District school psychologist or refer Mother to the school psychologist to determine whether Student should be assessed by District for his attention/organizational issues. Mother eventually sought an opinion from a psychologist who diagnosed that Student had ADHD. As discussed below, Mother followed up with an independent assessment in the summer of 2010.

26. Near the end of the school year, Seaton tested Student's ability to communicate sentences and use periods. He performed at the ninety-second percentile in reading accuracy and at grade level in writing. He made progress toward his goal in writing and was accessing his education. Although he continued to have issues with maintaining attention and following directions, he maintained focus during individual deskwork and was not distracted.

27. On June 10, 2010, District provided Mother with an IEP goals progress report. Student made big improvements in expressive language and showed less difficulty retrieving words when sharing ideas/experiences. In communication comprehension, he completed a simple graphic organizer for kindergarten level stories, and was able to name the characters, setting, problem, and feelings of the characters when he was reminded to use the illustrations in the story to help him to articulate responses. Student made some progress toward achieving his written language goal in organization and focus, although Holtz determined that he needed to continue work to acquire additional unspecified elements of the goals. He used longer sentences to talk with classmates and teachers, more adjectives to describe objects and experiences, made up sentences for target words with varying complexity, and experienced some language growth.

28. Seaton prepared Student's year-end report card. Student ended the school year proficient, based upon standards benchmarks, in all areas except written and oral language conventions, where he was basic. A grade of proficient meant that Student consistently met standards as demonstrated by a variety of work that showed independent understanding and use of grade-level concepts. A grade of basic meant that Student occasionally met standards.

29. On or about June 15, 2010, at Mother's request, Holtz wrote a letter "to whom it may concern" in which Holtz described Student's learning deficits. Holtz reported, among other things, deficits in language and reading comprehension, cognitive-linguistic areas, maintaining eye contact when talking to others, and showing response to nonverbal communication messages. Student showed no comprehension of what he had read, and was unable to answer comprehension questions. Holtz reported that she and Seaton were very concerned about his ability to maintain his attention during group instruction or independent work. She further reported that he was unable to complete an activity at his desk without multiple reminders and that he looked around the class during whole group lessons, instead of paying attention. She reported that these behaviors had not improved since September 2009. Holtz concluded that she and Seaton were concerned that Student demonstrated atypical behaviors that needed to be evaluated, and that he continued to need significant

support to progress in all developmental areas. Holtz understood at the time she wrote the letter that its purpose was for mother to obtain insurance coverage for medical evaluations relating to Student's ADHD and not for school-based assessments. The letter was an incomplete reflection of her impressions of Student because it did not reflect the progress he had made through the school year, including his use of more complex language, improved comprehension skills, and making inferences in expressive language.

30. On the last day of the 2009-10 school year, Mother requested that Seaton complete several checklists for use in medical evaluations of Student for ADHD or Attention Deficit Disorder (ADD). Seaton filled out the Vineland Adaptive Behavior Scales, Second Ed. (Vineland-II), the Behavior Assessment System for Children Teacher Rating Scales, Second Ed. (BASC-2), and the Woodcock Johnson-III (WJ-III). Seaton reported that Student showed weaknesses in the areas of socialization and coping skills. On the BASC-2, Seaton reported that Student almost always had a short attention span, was unclear when presenting ideas, was never clear when telling about personal experiences, and was distractible, introverted, reserved and often forgetful when organizing tasks and activities. His activity level outside the classroom was similar to others of the same age and sex, and his style of motor activity was typical for his age or grade. He was always inattentive during instruction, playing with his clothing, which seriously impeded his opportunity to learn but was not disruptive. Student's slowness and hesitancy in responding to questions in the classroom were of most concern to Seaton, which she generally felt impaired his classroom performance. Although Seaton reported on the BASC-2 and Vineland-II that she had not observed Student engage in a number of activities, such as walking up and down stairs alternating feet, she did not report that Student had difficulties engaging in those behaviors she had not observed or that Student's behaviors in those activities impeded Student's ability to access his education in any respect.

31. School Principal Wroblewski has more than 20 years of experience as an educator in special education, and more recently as an administrator. She came to Student's school as principal in the 2009-10 school year. Wroblewski occasionally observed Student during lunch and recess, when Student was on the playground with large groups of other students. Student did not stand out to her as having gross motor or major social issues. She had only a limited number of communications about Student with Seaton and Holtz.

2010-11 School Year

32. During the summer of 2010, Student was medically diagnosed with ADHD/combined and PDD-NOS. Mother notified District in writing on September 2, 2010, that Student had been independently assessed and of the diagnoses. She expressed concern that District had not provided Student with an adequate education to address his learning needs, and requested that District provide transportation and reimbursement for a private school placement. Because Student was approaching seven years of age, Mother was concerned that the window of opportunity to address Student's attention deficits was quickly closing. She advised District that Holtz and Seaton had warned her that Student would fall behind in first grade if he did not learn to pay attention, that he did not pay attention in group

instruction, and that the attention issues had not improved throughout kindergarten. Mother informed District that she would consider a District offer of placement for Student that would appropriately address his needs.

33. Mother also informed both Holtz and Seaton of Student's medical diagnoses of ADHD and PDD-NOS. Seaton was happy that a diagnosis of ADHD had been made because his attention was a problem. Holtz requested a copy of the independent evaluation in order to avoid duplication in District's upcoming triennial testing and assessments.³

34. On September 3, 2010, Mother sent an email to District requesting Student's cumulative file. On September 16, 2010, Mother sent a follow up email advising that she had not yet received the cumulative file. Mother received the file a few days after her second request. Student offered no evidence that he suffered any harm from the delay.

35. On September 7, 2010, Student began attending Seaton's first grade class. Seaton tested Student at the beginning of the first grade in reading comprehension, writing, and math skills. Student scored within the 92d percentile in reading comprehension and math skills, and performed at grade level or above in writing. His ability to follow directions was excellent and he performed better than some of his peers.

36. Also on September 7, 2010, Holtz responded to Mother's September 2 letter and requested an IEP meeting the following week to consider the independent evaluation. On September 8, 2010, Mother responded by email with her availability, and requested that Student's private psychologist also attend the meeting. Holtz thereafter informed Mother that "the timeline for her request" for tuition reimbursement began on the first day of school, September 7, 2010, and that the District was preparing a response. On September 9, 2010, Holtz informed Mother by email that the District may need more than one meeting with Mother and that it would discuss the next steps after providing her with a response to her request for tuition reimbursement and transportation.

37. On September 14, 2010, Holtz notified Mother by email that District proposed to conduct a comprehensive evaluation of Student, including assessments in the areas of intellectual, sensory-motor, gross-motor, academic, APE and SL. Holtz advised Mother that an assessment plan would be offered not later than September 20, 2010. She informed Mother that, after the District received the signed assessment plan, District had sixty days to complete the assessments. The District would then schedule an IEP meeting to discuss the results of all evaluations and team recommendations, the independent evaluation, and it would receive input from Student's private psychologist. District declined to schedule an interim IEP team meeting to consider placement, supports and services until after the proposed assessments were completed. Wroblewski knew of no reason why District could not have convened an IEP team meeting to discuss Student's recent independent evaluation for

³ Student did not offer the independent assessment report into evidence, and the author of the report did not testify at the hearing.

ADHD and to consider a change in placement and supports until District assessments were completed.

38. On or about September 21, 2010, Mother sent an email to the District's executive director of special education expressing concern that Student's current educational placement and services were inappropriate and inadequate. Mother renewed her willingness for District to assess Student, although she had not yet received a formal assessment plan. Mother expressed concern, based upon his recent diagnoses of ADHD and PDD-NOS and his age, that Student was losing valuable time to acquire necessary skills to enable him to progress socially and academically. Mother again advised District that she was withdrawing Student from District's elementary school.

39. Student began attending Excelsior Academy effective September 22, 2010. Excelsior Academy is a private non-public school with a population of exclusively special needs children ranging in age from kindergarten through grade twelve. Student, who was the only first-grader, was placed in a class with a ratio of two teachers to eight students.

40. Mother paid Excelsior Academy \$2500 for September, which included tuition for September 2010 and start-up costs. Monthly tuition from October through the remaining nine months of the school year, including occupational therapy and SL services, was \$1606, which mother paid in installments. District did not challenge these amounts at hearing or in its closing brief. Mother drove Student to and from Excelsior Academy.

41. District did not provide Mother with an assessment plan until after she withdrew Student from the District placement and filed the complaint in this matter.

Expert and Other Testimony

42. District school psychologist Kristie Calton (Calton) has a master's degree in school psychology. She was been a school psychologist with District for thirteen years. Her job duties included providing professional development and training, supervision of others as a senior psychologist, performing student assessments, and providing therapy to students. Calton was familiar with Student but had not met him. Calton collaborated at the beginning of the 2010-11 school year with Holtz, who gave her information on Student's needs. She reviewed the independent evaluation that diagnosed Student with ADHD and assisted in preparing Student's September 2010 assessment plan for a comprehensive evaluation. Student's reported inability to focus on his teacher, not paying attention during group instruction, raising his hand and forgetting his thoughts suggested that Student may have processing disorders. No reason existed to delay assessing Student for attention/organizational deficits at age five or six. School psychologists can assess whether a child at those ages has symptoms and characteristics consistent with ADD/ADHD for purposes of writing IEPs for academic support. Age appropriate assessments included ruling out learning processing disabilities, determining social/emotional issues, rating scales, interviews with parents and teachers, observations and standardized tests measuring attention.

43. In November 2010, Neuropsychologists Robert Gray Ph.D. (Dr. Gray) and Nicole Eberle Ph.D. (Dr. Eberle) independently evaluated Student at Mother's request and prepared a written report. District received Dr. Gray's report shortly before the hearing. Both Dr. Gray and Dr. Eberle testified at the hearing.

44. Dr. Gray is a licensed clinical pediatric neuropsychologist. His experience includes working of with children in school settings, including conducting approximately 2000 neuropsychological evaluations. Gray reviewed Student's records from regional center, his school records from District, including Holtz' June 2010 letter, the July independent evaluation diagnosing ADHD, and a variety of other documents. Dr. Gray did not observe Student in the classroom. He did not attend any of Student's IEP team meetings and did not discuss Holtz's letter with her.

45. Dr. Gray administered the Wechsler Intelligence Scale for Children-Fourth Edition (WISC-IV). Student's performance fell within the average range. On the Test of Everyday Attention for Children (TEA-Ch), which evaluated multiple aspects of visual and auditory attention, Student's performance fell within the average range. Mother completed the Behavior Rating Inventory of Executive Function (BRIEF). The results showed areas of concern in impulsivity, shifting flexibly between tasks, poor emotional control, limited independent skills, poor working memory capacity, and difficulties with planning and organization. Dr. Gray assessed Student's rote verbal learning with the California Verbal Learning Test-Children's Version (CVLT-C). Student's performance fell within the below to well-below average ranges, indicating poor initial recall and minimal gains over several trials. Student's scores on the Purdue Pegboard, designed to test fine motor functioning, fell within the low average range when using his right and left hand, and within below average range on the bilateral tasks requiring simultaneous right and left finger/hand dexterity, coordination, and speed. Student scored within the average and low average ranges on the Wechsler Individual Achievement Test-Second Edition (WIAT-II), which measured basic word reading, spelling and math calculation skills. Student completed the NEPSY-II Affect Recognition task, which determined his ability to recognize emotions based upon facial expressions. Student scored within the well below average range. Mother and Student's teacher at Excelsior Academy, Lisa Kogan (Kogan), completed the BASC-2. Mother's and Kogan's ratings revealed significant concerns with hyperactive, inattentive and odd/atypical behaviors. Teacher's ratings on the BASC-2 regarding Student's adaptive and social skills revealed concerns with Student's functional communication. Student's scores on the BASC-2 Adaptive Scale from both Mother and Kogan were considered "at-risk" in the areas of adaptability and leadership, and clinically significant in social skills and activities of daily living.

46. Dr. Eberle, who is a second year post-doctoral fellow in neuropsychology and who works with Dr. Gray, observed Student at Excelsior Academy in November 2010. Student was placed in a class with eight students ranging from first through fifth grade. Kogan and classroom aide Alyssa Norton (Norton) provided the students with extensive individualized attention. Dr. Eberle also visited Seaton's first grade class at District, which

consisted of sixteen students. Seaton's teaching assistant worked in the back of the classroom. Both observations lasted thirty minutes. Eberle collaborated with Dr. Gray in connection with his final report.

47. Dr. Gray credibly testified that Student had historically demonstrated learning deficits in the areas of functional communication, social/emotional skill development, and attention and academic acquisition pre-dating his withdrawal from his District school in September 2010. Student experienced long-standing difficulties with emotional and behavioral regulation that may have exacerbated his academic and social difficulties. He had a long-standing history of social and emotional deficits and atypical behaviors. Student became increasingly aware of his inability to successfully navigate typical social scenarios, resulting in a variety of typically maladaptive behaviors including social withdrawal, fear of social situations, and requests for his mother to speak for him when inviting children to play. When combined with his language deficits and poor self-monitoring, children avoided and teased Student rather than interacted with him. Children demonstrating those types of developmental deficits at an early age should be timely assessed because they typically do not grow out of those types of developmental problems without supports and services.

48. Dr. Gray also credibly testified that Student had many areas of strength, including average performance on measures of nonverbal/visual spatial reasoning, and elements of academic functioning. However, Student also presented with multiple areas of deficit, characterized by below average performance across measures of language/communication, verbal reasoning, verbal memory executive functioning, fine motor speed, social information processing and social/emotional awareness.

49. Both Dr. Gray and Dr. Eberle concluded that Student would have difficulty succeeding in Seaton's general education classroom setting without structured support, simplified routines and help with daily social navigation. Student required an intensive level of interventions in the school setting, including smaller class size, frequent one-to-one assistance, low classroom distractions with limited transitions, and increased supervision and monitoring during social activities.

50. In November 2010, licensed speech language therapist Joanne Gerstein Hein (Hein) assessed Student in the area of speech and language pathology and wrote a report. She testified at the hearing. Student did not provide Dr. Hein's report to District until shortly before the hearing. Hein has been a private practitioner for twenty-four years. She started the speech therapy program at Excelsior Academy in 1992, but is no longer affiliated with that school.

51. Hein reviewed Student's District records and Student's medical history. She saw no evidence during her records review that Student met his 2007 IEP goal number four. The goal was not included in his February 2009 IEP and was not mentioned by the February 17, 2009 IEP team. Hein found that Student had made some progress during the 2008-09 based upon the services he received. In Hein's opinion, Student's 2009 IEP communication goal in vocabulary/concept development required more detail to determine measurability.

She did not attend any of Student's IEP meetings or consult with Holtz or Seaton regarding Student. She concluded that Student historically demonstrated "red flags" that suggested that he should have been assessed for deficiencies in motor skills, social skills, and focus and attention, and that his IEP goals should have been more comprehensive, including goals for comprehension, expressive language and social pragmatic skills. In addition to her clinical observations in her office and at Excelsior Academy, Hein administered a series of tests, including the Test of Auditory Comprehension of Language-Third Edition (TACL-3), the Test of Narrative Language (TNL), the Clinical Evaluation of Language Fundamentals-Preschool-Second Edition (CELF-P2), the CELF-4 Observation Rating Scale, which Mother completed, and the Test of Auditory Processing Skills-Third Edition (TAPS-3). Hein never observed Student at his placement in Seaton's classroom, and was not aware of what supports Seaton offered in her classroom. Based upon her findings in November 2010, Hein disagreed with Student's reported levels of progress reported in his June 18, 2010 report card. She made recommendations for prospective SL services based upon her own assessment results, which, as discussed below, were not applicable retrospectively.

52. Cathy Davis is the founder and director of Excelsior Academy. Davis is a certified, credential teacher and resource specialist with a master's degree in language arts. Davis observed Student when he first came to Excelsior Academy. Both Davis, and instructional assistant Norton, testified at the hearing. Excelsior Academy personnel informally assessed Student in the classroom to determine what educational materials would be used in his instruction. Student was the only first grade student in Kogan's class. He received direct attention and supervision from Kogan and Norton during class and received intensive SL services and occupational therapy. In Davis's opinion, Student's attention issues would prevent him from accessing his education in a classroom with a ratio of twenty-four students to one teacher without adequate resource supports, including one-to-one assistance, maximum teacher prompts and redirection, and pull-out resource services.

LEGAL CONCLUSIONS

1. As the petitioning party, Student has the burden of proof on all issues. (See *Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].)

Issue 1: Failure to assess

2. Student contends that District denied him FAPE from and after September 24, 2008, by failing to assess in the areas of APE, gross and fine motor, sensory, social/emotional and attention/organization. Specifically, Student contends that District knew Student had a history of gross motor deficits when he came to District from regional center, recommended an APE assessment, then neglected to assess him at any time thereafter. He contends that District knew that, in 2009, Student was unable to zip up his jacket, hang up his backpack, was clumsy holding writing instruments, and that he demonstrated frequent sensory seeking behavior including chewing on his clothes. He also contends that in 2008 and 2009 he demonstrated long-standing difficulties with social play

with his peers, often playing by himself. He also contends that in 2008 and 2009 District staff, and in particular Holtz and Seaton, knew Student had considerable attention deficits and they voiced concerns that he may have ADHD. Student also contends that Holtz inappropriately and incorrectly advised Mother that 1) District did not assess children of Student's age in the area of attention/organization and 2) Student might grow out of his deficits; and that Student was therefore deprived of an educational benefit.

3. District contends that Student was not denied a FAPE because he made progress and received some educational benefit during the 2008-09 and 2009-10 school years.

4. An IEP is a written document detailing, in relevant part, the student's current levels of academic and functional performance; a statement of measurable academic and functional goals; a description of the manner in which goals will be measured; a statement of the special education and related services that are to be provided to the student and the date they are to begin; an explanation of the extent to which the child will not participate with nondisabled children in a regular class or other activities; and a statement of any accommodations that are necessary to measure the academic achievement and functional performance of the child on State and district-wide assessments. (20 U.S.C. § 1414(d); Ed. Code, § 56345, subd. (a).) When developing an IEP, the IEP team must consider the child's strengths, the parent's concerns, the results of recent assessments, and the academic, developmental and functional needs of the child. (Ed. Code, § 56341.1, subd. (a).)

5. To determine the contents of an IEP, a student eligible for special education under the Individuals with Disabilities Education Act (IDEA) must be assessed in all areas related to his or her suspected disability and no single procedure may be used as the sole criterion for determining whether the student has a disability or whether the student's educational program is appropriate. (20 U.S.C. § 1414 (a)(2), (3); Ed. Code § 56320, subd.(e), (f).)

6. A school district's failure to conduct appropriate assessments or to assess in all areas of suspected disability may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High School District, et al.* (9th Cir. 2006) 464 F.3d 1025, 1031-1033.) In matters alleging procedural violations, the denial of a FAPE may only be shown if the procedural violations 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, or caused a deprivation of educational benefits. (Ed. Code, § 56505, subd. (f)(2); see also *W.G. v. Board of Trustees of Target Range School District No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.) The hearing officer "shall not base a decision solely on non-substantive procedural errors, unless the hearing officer finds that the non-substantive procedural errors resulted in the loss of an educational opportunity to the pupil or interfered with the opportunity of the parent or guardian to participate in the formulation process of the individualized education program." (Ed. Code, § 56505, subd. (j).)

7. The Ninth Circuit Court of Appeals has endorsed the “snapshot” rule, explaining that the actions of the district cannot “be judged exclusively in hindsight” but instead, “an IEP must take into account what was, and what was not, objectively reasonable ...at the time the IEP was drafted.” An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) “An IEP is a snapshot, not a retrospective.” (*Id.* at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.)

8. A child with a disability has the right to a FAPE under the IDEA. (20 U.S.C. § 1412(a)(1)(A); Ed. Code, §§ 56000, 56026.) FAPE means special education and related services that are available to the student at no cost to the parent or guardian, that meet the state educational standards, and that conform to the student’s IEP. (20 U.S.C. § 1401(9); Ed. Code, § 56031; Cal. Code Regs., tit. 5, § 3001, subd. (o).) The term “related services” (in California, “designated instruction and services”), includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from education. (20 U.S.C. § 1401(26); Ed. Code, § 56363, subd. (a).)

9. In *Board of Education of the Hendrick Hudson Central School District, et al. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that “the ‘basic floor of opportunity’ provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to” a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204, 207; *Park v. Anaheim Union High School District, supra*, 464 F.3d at 1031.)

10. No one test exists for measuring the adequacy of educational benefits conferred under an IEP. (*Rowley, supra*, 458 U.S. at pp. 202, 203 fn. 25.) A student may derive educational benefit under *Rowley* if some of his goals and objectives are not fully met, or if he makes no progress toward some of them, as long as he makes progress toward others. A student’s failure to perform at grade level is not necessarily indicative of a denial of a FAPE, as long as the student is making progress commensurate with his abilities. (*Walczak v. Florida Union Free School District* (2nd Cir. 1998) 142 F.3d 119, 130; *E.S. v. Independent School Dist., No. 196* (8th Cir. 1998) 135 F.3d 566, 569; *In re Conklin* (4th Cir. 1991) 946 F.2d 306, 313; *El Paso Indep. School Dist. v. Robert W.* (W.D.Tex. 1995) 898 F.Supp.442, 449-450; *Perusse v. Poway Unified School District* (S.D. Calif. July 12, 2010, No. 09 CV 1627) 2010 WL 2735759.)

11. A parent shall request an impartial due process hearing within two years of the date the parent knew or should have known about the alleged action that forms the basis of the complaint. The time period does not apply where a parent was prevented from requesting the due process hearing due to either 1) specific misrepresentations by the local educational

agency (LEA) that it had solved the problem forming the basis of the due process hearing request and 2) the withholding of information by the LEA from the parent that was required to be provided to the parent. (Ed. Code §56505(1).)

Analysis of Issue 1(a): APE

12. Student contends that, because District agreed to assess Student for APE in January 2007 at Mother's request and failed to do so, it was on continuing notice that Student had suspected needs in the area of APE and should have assessed Student. However, as discussed below, Student did not demonstrate by a preponderance of the evidence that the District should have assessed him in this area between September 24, 2008 and September 24, 2010, the relevant statutory period.

13. Student established that when he came to District at age three, District had notice of a suspected disability that would require an APE assessment, but it failed to assess Student. Student's January 12, 2007 IEP team recommended an APE assessment which was never done. For the time period before September 24, 2008, Student offered no evidence that District made any misrepresentation to Parents that would have impeded their ability to file a claim for due process on the APE issue in 2007. Student offered no evidence that District withheld any required information from Parents regarding APE. Although Mother testified that Student's speech therapist in 2007 told Mother that District would assess Student in APE at a later date, the therapist's statement alone was not enough to create an exception to the limitations period prior to September 24, 2008. District's failure to assess for APE before September 24, 2008 falls outside of the two-year statute of limitations. Factual Findings 2, 3; Legal Conclusions 1, 3-13.

14. During the 2008-09 school year Student's IEP team dropped the recommendation for the APE assessment from his IEP and did not assess him. Mother did not raise the issue of an APE assessment at his February 2009 IEP team meeting or in parent-teacher conferences. Student's 2008-09 report card and teacher comments made no mention of gross motor deficits. The fact that Student received physical therapy from regional center as a toddler was not enough to establish that, during the 2008-09 school year, Student had suspected needs in APE that required District to assess him. Student offered no evidence that, in 2008-09 school year, he demonstrated a need for APE, or that he was unable to access his education, either in the classroom or during breaks or lunch, because of any suspected needs that required APE. Student did not meet his burden of persuasion for the 2008-09 school year. Factual Findings 4, 5, 7, 8, 9, 10, 11; Legal Conclusions 1, 3-10, 13, 14.

15. In the 2009-10 school year, Student's October 2009 IEP team offered GPE, to which Mother consented. Student offered no evidence that he was unable to participate in general physical education activities during the 2009-10 school year, or that District had notice of a suspected disability in APE at the time of his October 2009 IEP. Seaton observed that Student had difficulty zipping up his jacket and hanging his backpack in the classroom, although his inability to do so did not interfere with his access to education. She reported on

the Vineland-II at the end of June 2010 that she had not observed Student perform several tasks in gross motor skills, such as walking up and down stairs alternating feet. However, she did not report that Student had difficulties engaging in those behaviors she had not observed or that Student's behaviors in those activities impeded Student's ability to access his education. Finally, Seaton and Wroblewski observed Student during recess and on the playground, and did not see any indication that Student had suspected needs requiring an APE assessment. Therefore, Student did not meet his burden of persuasion that District denied him FAPE by not assessing Student in the area of APE for the 2009-10 school year. Factual Findings 9, 10, 11, 13, 17, 18, 21, 30, 31; Legal Conclusions 1, 3-10, 13-15.

16. For the 2010-11 school year up to September 24, 2010, Mother removed Student from his District placement before District had the opportunity to assess Student in the area of APE for the 2010-11 school year. Therefore, District did not procedurally violate IDEA for failing to assess Student in the area of APE from the beginning of the 2010-11 school year and before September 24, 2010. Factual Findings 32, 33, 37 – 39, 41; Legal Conclusions 1, 3-10, 16.

Analysis of Issues 1(b) and 1(c): Gross and Fine Motor Skills and Sensory Needs

17. Student contends that District failed to assess him in the 2008-09, 2009-10 and 2010-11 school years through September 24, 2010, in the areas of gross motor skills, fine motor skills, and sensory needs.

18. At the time of his February 2009 IEP, and during the 2008-09 school year, Student offered no evidence that he had difficulties in the areas of gross and fine motor and sensory that would have put District on notice of the need to assess. Student's year-end report card and progress notes did not reflect that Student's teacher observed any concerns in those areas. On October 23, 2008, Holtz advised Mother that an occupational therapist had observed Student in his classroom and had advised Holtz that she felt Student was developing normally in the area of fine motor skills. Student's 2008-09 year-end report card reported that Student made progress during the year and met standards in gross and fine motor skills. Student offered no evidence that he had a suspected need in the areas of gross and fine motor and sensory during the 2008-09 school year. Therefore, Student has not met his burden of persuasion. Factual Findings 4, 5, 7, 8, 9, 11; Legal Conclusions 1, 3-11, 18.

19. At the time of Student's October 2009 IEP, the evidence did not establish that Student had needs in the areas of gross and fine motor and sensory that would have put District on notice of the need to assess. During the 2009-10 school year, Student's work samples from Seaton's class demonstrated that he was very proficient holding a writing instrument and in drawing with detail. Although Student had difficulty writing complete sentences, those deficiencies were related to his pragmatic communication deficits, rather than his physical ability to grasp or manipulate a writing instrument on paper. Seaton and Wroblewski testified that, based upon their observations of Student in the classroom, in group play, on the playground and in the lunch area, Student did not exhibit any behavior in the area of either gross or fine motor skills that caused them concern. On the other hand, Seaton

observed that Student had difficulty hanging up his backpack and zipping up his jacket. He occasionally engaged in sensory seeking behaviors, including chewing on his clothes. Seaton noted in her June 2010 Vineland-II and BASC-2 checklists that Student was unable to perform some gross and fine motor tasks. In other areas, Seaton reported that she had not observed Student engaging in tasks such as climbing stairs, which did not lead to the conclusion that Student could not engage in those tasks and skills. Seaton's observations on the Vineland-II that Student had some difficulties during the 2009-10 school year with some gross and fine motor tasks, along with her observations that Student had trouble zipping his jacket and hanging his backpack, was sufficient to put District on notice of a suspected need in the areas of gross and fine motor and sensory. Student established that District procedurally violated FAPE by failing to assess in these areas of suspected disability.

20. However, Student offered no evidence that District's failure to assess him in the areas of gross and fine motor and sensory impeded his right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or caused a deprivation of educational benefits. His year-end report card and progress reports showed that Student had accessed all areas of his education during the 2009-10 school year, including academics, social, emotional and language, and he made progress, which is all that IDEA requires. Student offered no credible expert testimony that, had he been assessed, he may have required occupational therapy services as a related service. Therefore, Student did not meet his burden of persuasion that District substantively denied him a FAPE by not assessing him in these areas in the 2009-10 school year. Factual Findings 4-13, 17, 18, 20, 21, 22, 28, 30, 31; Legal Conclusions 1, 3-10, 18-20.

21. As discussed above, at the beginning of the 2010-11 school year, Mother removed Student from his District placement before District had the opportunity to assess Student. Therefore, District did not procedurally violate IDEA for failing to assess Student in the area of gross and fine motor and sensory from the beginning of the 2010-11 school year and before September 24, 2010. Factual Findings 32, 33, 37 - 39, 41; Legal Conclusions 1, 3-10, 21.

Analysis of Issue 1(d): Social/Emotional

22. Student contends that District denied him a FAPE by failing to assess in the area of social/emotional for the 2008-09 and 2009-10 school year and for the 2010-11 school year through September 24, 2010.

23. At Student's February 2009 IEP and during the 2008-09 school year, the evidence did not establish that Student demonstrated a need for assessment in this area. In the fall of 2008, Student had made some progress on his social skills IEP goal, he did not stand out as socially impaired compared to other students, he was happy, not communicatively assertive, and he had begun to respond to and engage with other students. Student's 2008-09 report card showed that Student began the year with grades in social/emotional in the range of developing and meeting standard. At the end of the year, his grades met standard except in the areas of exhibiting impulse control, self-regulation and

attempting to solve his own problems, where his grade was a “2+”, meaning “developing.” Student offered no evidence or expert testimony that, if he had been assessed in this area, he should have received related services or supports during the 2008-09 school year. Student has not met his burden of persuasion that District denied him a FAPE. Factual Findings 4-11; Legal Conclusions 1, 3-10, 23.

24. However, for the 2009-10 school year, Student established by a preponderance of the evidence that District procedurally violated IDEA by failing to assess Student’s social/emotional needs. Both Holtz and Seaton testified that Student, who was then six years old, had difficulty playing with his fellow students, and with initiating conversations and making eye contact with his classmates. His communication deficits contributed to Student receiving adverse attention from his classmates. Holtz attempted to address these needs by incorporating activities in Student’s communication therapy designed to address Student’s social skills. Seaton observed Student socially engaging with one or two classmates while in the classroom, and occasionally playing with his peers. He often engaged in typical parallel play with his classmates, where he did not interact with but played next to his classmates, and performed well in small group activities.

25. Mother testified that Student was picked on by his classmates, he had been bullied, and, shortly before the end of the 2009-10 school year, he came home from school on a particular day with his glasses scratched reportedly by a group of his peers. On the other hand, Seaton credibly testified that she was unaware of any bullying of Student at school until Mother brought the scratched glasses to Seaton’s attention. Although the evidence did not establish that Student’s peers bullied him, it did establish that Student’s social/emotional issues contributed to adverse attention by his peers.

26. Additionally, both Seaton and Holtz observed that Student had attention/organization issues that negatively impacted his relationship with his peers. Based upon behaviors reported by Holtz and Seaton throughout the 2009-10 school years, District school psychologist Calton concluded that she would have wanted to assess Student’s social/emotional needs in conjunction with an assessment for attention/organization.

27. Dr. Gray observed that Student had a long-standing history of social and emotional deficits and atypical behaviors. He concluded that Student had become increasingly aware of his inability to successfully navigate typical social scenarios, resulting in a variety of maladaptive behaviors including social withdrawal, fear of social situations, requests for his mother to speak for him and to invite children to play. When combined with his language deficits and poor self-monitoring, children avoided and teased Student rather than interacted with him. Dr. Gray’s conclusions from his November 2010 assessment credibly established that, if District had assessed Student in the area of social/emotional, it would have had enough information to determine whether Student required additional services and supports in the area of social/emotional.

28. District’s school psychologist Calton and Dr. Gray concurred that Student could and should have been assessed for social/emotional issues at five or six years old,

particularly in connection with attention/organization deficits. Instead, Holtz mistakenly informed Mother at his October 28, 2009 IEP, and thereafter, that Student might grow out of his behaviors and she recommended deferring all assessments to the following year.

29. District had enough information from Seaton's and Holtz's observations of Student's behaviors and from Mother's voiced concerns during the 2009-10 school year to have triggered District's obligation to offer to assess Student in the area of social/emotional. As a result, District procedurally violated IDEA by failing to assess Student for suspected social/emotional needs in the 2009-10 school year.

30. However, the evidence established that Student made progress in and continued to develop his social skills through the 2009-10 school year. He participated in classroom activities, and he played successfully with or alongside his peers both during group activities and during recess and lunch. The evidence did not establish that Student was negatively impacted by his social/emotional needs to the extent that he did not acquire some benefit from his education during the 2009-10 school year. District did not substantively deny Student a FAPE in the 2010-11 school year for failing to assess Student in the area of social/emotional. Factual Findings 4-30, 42-47; Legal Conclusions 3-10, 24-30.

31. As discussed above, at the beginning of the 2010-11 school year, Mother informed District that Student had been diagnosed with ADHD and PDD-NOS. Mother removed Student from his District placement before District had the opportunity to assess Student in the area of social/emotional for the 2010-11 school year. Therefore, District did not procedurally violate IDEA for failing to assess Student in the area of social/emotional from the beginning of the 2010-11 school year and before September 24, 2010. Factual Findings 32, 33, 27, 37-39, 41; Legal Conclusions 3-10, 31.

Analysis of Issue 1(e): Attention/organization

32. Student contends that District failed to assess him for attention/organization deficits at any time up through September 24, 2010.

33. In the 2008-09 school year, Student was enrolled in PEP, which was designed for Students who had late birthdays, and who needed some assistance in reaching a level that would enable them to succeed in a regular kindergarten class. Student's teachers reported that by March 5, 2009, Student continued to need to work on his paying attention and concentrating on work skills. Holtz observed that, while Student demonstrated some distractibility during weekly shared-reading activities, he was not significantly different from typically developing peers. However, only a few months after the beginning of the 2009-10 school year, Holtz expressed her concern to Mother about Student's attention/organization needs, which she had observed during the 2008-09 school year. Dr. Gray concluded that Student had a history of long-standing attention/organizational needs. Student demonstrated by a preponderance of evidence that he had a suspected need in this area and that District should have assessed him during the 2008-09 school year. Calton concurred. Therefore, District procedurally violated IDEA in the 2008-09 school year by failing to assess Student

in the area of attention/organization. However, Student's year-end grades and his June 8, 2009 IEP progress report showed that, although he was not assessed, Student made progress in all areas by the end of the year and that he accessed his academic education. District did not deny Student a FAPE by failing to assess Student in attention/organization during the 2008-09 school year. Factual Findings 4-12, 42-47; Legal Conclusions 3-10, 33.

34. Student met his burden of demonstrating by a preponderance of the evidence that District procedurally violated the IDEA by failing to assess Student in attention/organization during the 2009-10 school year. Holtz and Seaton knew at the time of Student's October 28, 2009 IEP that Student had attention/organization issues. Holtz reported in her October 27, 2009 assessment report that Student required frequent redirection to complete tasks, often appeared to be daydreaming, and looked around the room rather than at the teacher. Under the "snapshot rule," District had enough knowledge at the time of his IEP that it could have assessed Student's needs in attention/organization.

35. Additionally, based upon progress reports from Holtz and Seaton, Mother repeatedly expressed her concerns regarding Student's attention issues to Holtz and Seaton throughout the 2009-10 school year. Although Seaton expressed less concern that Student was not making progress academically in the 2009-10 school year, she voiced her concern to Mother that Student may fall behind in the first grade if he did not improve his attention. Seaton's and Holtz's testimony regarding Student's history of attention deficits was corroborated by Calton, Dr. Gray and Hein.

36. Holtz told Mother during the 2009-10 school year that Student may have ADHD. Both Seaton and Holtz expressed concern that Student would fall behind in first grade, where curriculum was more demanding, unless his attention issues were addressed. Holtz reported in her June 2010 letter that she and Seaton were very concerned about his ability to maintain his attention during group instruction or independent work. She further reported that he was unable to complete an activity at his desk without multiple reminders and that he looked around the class during whole group lessons, instead of paying attention. She reported that these behaviors had not improved since September 2009. Holtz concluded that she and Seaton were concerned that Student demonstrated atypical behaviors that needed to be evaluated, and that he continued to need significant support to progress in all developmental areas.

37. Holtz also mistakenly told Mother that District did not assess attention issues in Students, or diagnose students to confirm ADHD, and that she recommended waiting until Student started first grade to assess him to see whether Student grew out of his attention deficits. Holtz did not consult with a District school psychologist or refer Mother to the school psychologist to determine whether Student should be assessed for his attention/organizational issues. Mother eventually sought an opinion from a psychologist and she received a diagnosis confirming that Student had ADHD. She followed that with an independent assessment in Summer 2010, confirming that Student was also on the autism spectrum with PDD-NOS.

38. Calton credibly testified that the District could, and did, assess children at the ages of five and six years old for attention issues although not for medical diagnostic purposes, and that IEPs could be drafted to address attention issues. Dr. Gray credibly testified that children do not typically “grow out of” attention deficits without appropriate supports. Dr. Gray’s November 2010 assessment results, which were conducted reasonably close in time to Student’s departure from District, established that, had District assessed Student for attention/organization deficits during the 2009-10 school year, it would have had enough information to determine appropriate supports and services for the 2009-10 school year.

39. The District had ample notice of Student’s suspected attention/organization deficits during the 2009-10 school year to offer to assess him, and, by failing to do so, District procedurally violated the IDEA.

40. However, as discussed above, the evidence established that, while Student had needs in attention/organization that should have been assessed, he made progress during the year. Student made progress toward his IEP goals and academically, and he ended the year proficient in most areas. The evidence did not establish that District’s failure to assess Student in attention/organization impeded his ability to make some academic progress. Therefore, District did not substantively deny Student a FAPE by failing to assess Student for attention/organization deficits in the 2009-10 school year. Factual Findings 11-14, 17, 19-30, 42-51; Legal Conclusions 3-10, 33-40.

41. As discussed above, in the beginning of the 2010-11 school year and before September 24, 2010, Mother withdrew Student from District before it had an opportunity to assess Student for a suspected disability in attention/organization. District did not procedurally violate the IDEA for failure to assess attention/organization during that time period. Factual Findings 32, 33, 37-39; Legal Conclusions 3-10, 41.

Issue 2: Measurable goals

42. Student contends that District denied him a FAPE in the past two years by failing to include in his IEPs appropriate and measurable goals in the areas of attention/organization and social/emotional. Student also contends that District dropped a social language goal from his November 13, 2007 IEP and did not include it in subsequent years’ IEPs; and that his February 17, 2009 written language IEP goal was not measurable because it was inconsistent and too low to indicate meaningful progress.

43. District contends that Student’s IEPs included appropriate and measurable goals, that Student obtained an educational benefit in the applicable school years, and that it did not deny Student a FAPE.

44. A school district’s failure to establish measurable goals is a procedural violation of the IDEA. As discussed above, an IEP is a written document detailing, in relevant part, the student’s current levels of academic and functional performance; a

statement of measurable academic and functional goals; a description of the manner in which goals will be measured; a statement of the special education and related services that are to be provided to the student and the date they are to begin; and a statement of any accommodations that are necessary to measure the academic achievement and functional performance of the child on State and district-wide assessments. (20 U.S.C. § 1414(d); Ed. Code, § 56345, subd. (a).) When developing an IEP, the IEP team must consider the child's strengths, the parent's concerns, the results of recent assessments, and the academic, developmental and functional needs of the child. (Ed. Code, § 56341.1, subd. (a).) A procedural violation is only a denial of FAPE if Student meets his burden of establishing that the procedural violations 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, or caused a deprivation of educational benefits. (Ed. Code, § 56505, subd. (f)(2).

45. As discussed above, the Ninth Circuit Court of Appeals has endorsed the "snapshot" rule, explaining that the actions of the district cannot "be judged exclusively in hindsight" but instead, "an IEP must take into account what was, and what was not, objectively reasonable ...at the time the IEP was drafted." An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon, supra*, 195 F.3d at 1149.) "An IEP is a snapshot, not a retrospective." (*Id.* at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Education, supra*, 993 F.2d at 1041.)

Analysis of Issues 2(a) and 2(b): Social/emotional, Attention/organization Goals

46. Here, Student's IEPs from February 2008, February 2009, and October 2009 contained no goals in the areas of social/emotional and attention/organization, and, as discussed above, District did not assess Student in either area before those IEPs. Student did not provide Dr. Gray's and Hein's reports to District until shortly before this hearing, and, based upon the "snapshot rule," they are irrelevant to a finding of what goals would have been appropriate during the school years prior to those assessments.

47. Regarding Student's February 17, 2009 IEP, the evidence failed to establish that, at the time of the IEP team meeting, District had information before it that Student required specific goals in social/emotional or attention/organization. Student also offered no credible evidence of what specific goals in those areas should have been included for the 2008-09 school year. As discussed above, the IEP team did not substantively deny Student a FAPE by failing to assess Student in the areas of attention/organization and social/emotional for the 2008-09 school year. Based upon the knowledge it had at the time regarding Student's needs and academic performance and social skills, including a review of Student's PLOPs, the IEP team offered Student goals that were reasonably calculated to provide Student some academic benefit during the 2008-09 school year. Student made progress toward his goals, social skills, and in all academic areas. District did not procedurally violate the IDEA for failing to include measurable goals in social/emotional and attention/organization for 2008-09. Factual Findings 4-12, 41, 43, 47, 48, 50; Legal Conclusions 3-10, 23-41, 44-47.

48. Student's October 28, 2009 IEP addressed Student's attention/organization needs by incorporating supports including directions given in a variety of ways, repeated review and drills, increased verbal response time, and assignment notebooks. The evidence established that, during the 2009-10 school year, Seaton and Holtz recognized that Student had suspected needs in social/emotional and attention/organization. Seaton and Holtz worked with Student during SL therapy and in the classroom, addressing his social skills and attention/ organization deficits, including involving him in small group activities, and by redirecting him where needed. The evidence did not establish that District should have convened an interim IEP during the school year to consider adding goals to Student's IEP in these areas because Student continued to make progress in academics and social skills through the school year. Additionally, Student did not offer any credible or relevant evidence as to what specific goals would have been appropriate in these areas for the 2009-10 school year. As discussed above, under the "snapshot" rule, based upon the information known at the time the October 28, 2009 IEP team offered goals that were reasonably calculated to provide some educational benefit to Student during the school year, and Student made progress academically and in his social skills. District did not procedurally violate the IDEA or deny Student a FAPE. Factual Findings 13-30, 43, 50; Legal Conclusions 3-10, 44-48.

49. Regarding the 2010-11 school year, Student did not offer any relevant information as to what goals in social/emotional and attention/organization would have been appropriate for 2010-11 school year through September 24, 2010, because Mother withdrew Student from District before District had an opportunity to consider Mother's independent assessment diagnosing Student with ADHD and PDD-NOS. Student did not meet his burden for this time period. Factual Findings 32, 33, 37-39, 41, 43, 50; Legal Conclusions 3-10, 44-46, 49.

Analysis of Issue 2(c): SL Goals

50. Student contends that his January 17, 2007 IEP goal number four, providing that Student would initiate and respond to familiar social language with peers ten times during the school day on three of four days by teacher/SLP records/language samples," was never met and was not included in subsequent IEPs. He also contends that his written language goal in his October 28, 2009 IEP was not measurable.

51. Hein testified that she saw no evidence during her records review that Student met his 2007 IEP goal number four. Goal number four was not included in his February 2009 IEP and was not mentioned by the February 17, 2009 IEP team. However, Student failed to establish that he did not make progress toward the goal, that he required this goal in subsequent school years or that its absence in his IEPs for school years 2008-09, or 2009-10 deprived him of access to his education.

52. Student's PLOPs from subsequent years showed that he made progress in speech and language, and Holtz testified that Student continued to make progress toward his communication goals. Holtz conducted a SL assessment in October 2009, and, after

discussing Student's PLOPs with mother at the October 2009 IEP team meeting, she incorporated her recommendations into Student's IEP, including a goal in vocabulary and concept development. In Hein's opinion, Student's 2009 IEP communication goal in vocabulary/concept development required more detail to determine measurability. However, her opinion was not persuasive because she did not offer any credible testimony on whether its lack of specificity impeded Student's access to his education. The evidence established, on the other hand, that Student made progress toward the goal and that he accessed his education in general, as discussed above.

53. In Hein's opinion, Student's written language goal in the October 28, 2009 IEP did not give a clear picture of what skills were being measured. The written language goal provided, in part, that "Student will use 10 descriptive words with 80 percent accuracy in 2 of 3 trials." However, Holtz, who worked regularly with Student during the school year, reported at the end of the year that Student made some progress toward achieving the goal, and that, while he met some of the performance elements in the goal, he needed to continue work to acquire additional unspecified elements. Both Seaton and Holtz reported that at the end of the school year Student had made progress and was basic or proficient in most areas of communication. Based upon their familiarity with Student, Seaton's and Holtz's testimony was more persuasive than Hein's.

54. District was not required under the IDEA to ensure that Student met his goals but, instead, District was required to provide him with goals that were reasonably calculated to provide him with some educational benefit, which it did. Student did not meet his burden of persuasion that lack of specificity of his SL goals rose to the level of a procedural violation of IDEA. Factual Findings 2, 8, 12, 14, 15, 19, 26-28, 50, 51; Legal Conclusions 3-10, 44-46, 51-55.

55. In summary, as discussed above, Student failed to meet his burden of persuasion that District committed procedural violations of the IDEA by dropping a 2007 social language goal from his subsequent IEPs, by offering Student a written language goal in his February 17, 2009 IEP that was not measurable because it was inconsistent and too low to indicate meaningful progress, and by failing to include in his February 2009 and October 2009 IEPs appropriate and measurable goals in the areas of attention/organization and social/emotional.

Issue 3: Related services in attention/organization and SL

56. Student contends that District denied him a FAPE by failing to offer appropriate related services in the areas of attention/organization and speech and language. District contends that it did not deny Student a FAPE and that Student received the necessary supports and services in order to make progress in all areas during the school year.

57. As discussed above, the Ninth Circuit Court of Appeals has endorsed the "snapshot" rule, explaining that the actions of the district cannot "be judged exclusively in hindsight" but instead, "an IEP must take into account what was, and what was not,

objectively reasonable ...at the time the IEP was drafted.” An IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon, supra*, 195 F.3d at 1149.) “An IEP is a snapshot, not a retrospective.” (*Id.* at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Education, supra*, 993 F.2d at 1041.)

58. Under *Rowley, supra*, 458 U.S. at 201, “the ‘basic floor of opportunity’ provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to” a child with special needs. *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204, 207; *Park v. Anaheim Union High School District, supra*, 464 F.3d at 1031.)

59. A student may derive educational benefit under *Rowley* if some of his goals and objectives are not fully met, or if he makes no progress toward some of them, as long as he makes progress toward others. A student’s failure to perform at grade level is not necessarily indicative of a denial of a FAPE, as long as the student is making progress commensurate with his abilities. (*Walczak v. Florida Union Free School District, supra*, 142 F.3d at 130; *Perusse v. Poway Unified School District, supra*, 2010 WL273579.)

Analysis of Issue 3(a): Attention/organization

60. In the 2008-09 school year, based upon the information it had at the time, Student’s February 2009 IEP team did not offer any specific accommodations or services designed to meet Student’s needs in attention/organization. However, the evidence established that Student’s PEP teachers and Holtz were aware of his attention/organization issues, and that they addressed his needs in the classroom and during SL therapy. At the end of the school year, his report card demonstrated that he accessed his education and made progress in all areas, including social skills and academics. Student did not meet his burden of persuasion that District had information regarding Student’s needs in attention/organization that the IEP team failed to or should have considered, or that would have led them to add supports and services in his IEP for those needs. District did not procedurally violate the IDEA. Factual Findings 4-12; Legal Conclusions 3-10, 57-60.

61. However, Student met his burden of persuasion that, during the 2009-10 school year, and based upon the information known at that time, Student’s IEP team failed to offer Student necessary supports and services for his deficits in attention/organization. Both Holtz and Seaton were concerned at the October 28, 2009 IEP meeting that Student would have difficulty keeping up in first grade if his attention/organizational deficits were not resolved. Mother inquired about assessing Student for his attention/organization issues. Holtz mistakenly recommended to Mother that District defer assessments of Student’s attention/organizational issues be deferred for a year to give Student time to grow out of the problems. Dr. Gray, whose assessment was done shortly after Student left District, disagreed that Student would grow out of the types of attention/organizational issues he manifested in 2009-10. Dr. Gray also concluded, based upon his review of Student’s education history,

that Student was unable to manage the demands of the typical public school classroom environment. His significant communication, social and attention problems interfered with his learning progress, despite provision of speech and language services.

62. Dr. Gray recommended, based upon his records review and his own assessments, that Student would be more successful in a small classroom with intensive academic instruction. While Dr. Gray's opinions and recommendations were not known to the October 28, 2009 IEP team at the time, they were relevant to show that Student demonstrated suspected needs in attention/organization known to the October 28, 2009 IEP team, and that the IEP team should have considered offering additional goals, supports and services to address those needs. Based upon the information known at the time to Student's October 28, 2009 IEP team, District procedurally violated IDEA by failing to offer supports and services in the area of attention/organization.

63. However, the evidence also established that Student made progress toward his IEP goals throughout the 2009-10 school year, that he was proficient or basic in all areas on his report card, that he was performing at or above grade level in some academic areas, and that, despite the impact his attention/organizational issues had on his social skills and his attention to tasks, he made progress in completing tasks and assignments. Seaton found that Student was able to participate in class, play and interact with his peers, and succeed academically succeed, with added supports when needed.

64. Because District offered Student sufficient supports and services for him to access his education and make some progress academically and socially, Student has not met his burden of persuasion that District substantively denied him a FAPE for the 2009-10 school year and through September 24, 2010. Factual Findings 13-30, 35, 39, 43-49; Legal Conclusions 3-10, 57-64.

Analysis of Issue 3(b): SL

65. Student's February 17, 2009 IEP team offered services in SL for the 2008-09 school year that were reasonably calculated to provide Student with access to his education based upon all of the information before it at that time. Student offered no credible evidence to the contrary. Hein's findings, conclusions and recommendations relating to the amount of speech and language services Student required carried no evidentiary weight because Hein's assessments were conducted after Student left the District school and filed his due process complaint. Her testimony and report were considered for the limited purpose of confirming Hein's review of Student's background and history and to support her opinions related to her review of records. Based upon her record review, Hein found that Student had made some progress during the 2008-09 based upon the services he received. Student failed to meet his burden of persuasion that District procedurally violated the IDEA. Factual Findings 4-12, 50, 51; Legal Conclusions 3-10, 57-59, 65.

66. Similarly, for the 2009-10 school year, Student's October 28, 2009 IEP team offered services in SL that were reasonably calculated to provide Student with access to his

education based upon the information known to the team at that time. Holtz assessed Student in SL shortly before Student's IEP team meeting. Based upon her assessment, she recommended SL services on a pull-out basis one hour a week. Student offered no evidence that, at the time of Student's IEP team meeting, any information existed that would have suggested that Student required more SL than what District offered. As discussed above, Hein's recommendations from November 2010 were outside of the "snapshot" and therefore irrelevant. Student failed to meet his burden of persuasion that District procedurally violated the IDEA. Factual Findings 12-31, 50, 51; Legal Conclusions 3-10, 57-59, 65-67.

67. In summary, Student has not met his burden of persuasion that District denied him a FAPE before September 24, 2010 by failing to provide appropriate related services in attention/organization and SL.

Issue 4: Failure to hold Interim IEP

68. Student contends that District denied him a FAPE by refusing to convene an IEP meeting to consider his independent evaluation diagnosing him with ADHD/PDD-NOS until after District assessed Student, and that District should have convened an IEP meeting to discuss whether a change of placement, with additional supports and services was appropriate. District contends that Student was making progress at his District placement, and that Student's placement was appropriate and therefore District did not deny Student a FAPE.

69. If a parent or guardian obtains an independent educational assessment at private expense, the results of the assessment shall be considered by the public agency with respect to the provision of a FAPE to the child. (Ed. Code § 56329 (c); 34 CFR § 300.502(c)(1).)

70. An individualized education program team shall meet whenever a parent or teacher requests a meeting to develop, review, or revise the individualized education program. (Ed. Code § 56343(c).) A meeting of an individualized education program team requested by a parent to review an individualized education program pursuant to subdivision (c) of Section 56343 shall be held within 30 days, not counting days between the pupil's regular school sessions, terms, or days of school vacation in excess of five schooldays, from the date of receipt of the parent's written request. (Ed. Code § 56343.5.)

71. The parents of a child with a disability must be afforded an opportunity to participate in IEP team meetings. (34 C.F.R. § 300.501(a) & (b) (2006)⁴; Ed. Code, §§ 56500.4, 56341, subd. (b), 56341.5, subds. (a) & (b).) "Among the most important procedural safeguards are those that protect the parents' right to be involved in the development of their child's educational plan." (*Amanda J. ex rel. Annette J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877, 882.) A parent has meaningfully participated in the development of an IEP when he or she is informed of the child's

⁴ All subsequent references to the Code of Federal Regulations are to the 2006 edition.

problems, attends the IEP meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Bd. of Educ.*, *supra*, 993 F.2d at 1036 [parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].)

72. In matters alleging procedural violations, the denial of a FAPE may only be shown if the procedural violations caused harm to Student or the parent. (Ed. Code, § 56505, subd. (f)(2); see also *W.G. v. Board of Trustees of Target Range School District No. 23*, *supra*, 960 F.2d at 1484.) The hearing officer "shall not base a decision solely on non-substantive procedural errors, unless the hearing officer finds that the non-substantive procedural errors resulted in the loss of an educational opportunity to the pupil or interfered with the opportunity of the parent or guardian to participate in the formulation process of the individualized education program." (Ed. Code, § 56505, subd. (j).)

73. If the hearing officer finds that a procedural violation significantly impeded the parents' opportunity to participate in the IEP process, the analysis does not include consideration of whether the student ultimately received a FAPE, but instead focuses on the remedy available to the parents. (*Amanda J.*, *supra*, 267 F.3d at 892-895 [school's failure to timely provide parents with assessment results indicating a suspicion of autism significantly impeded parents right to participate in the IEP process, resulting in compensatory education award]; *Target Range*, *supra*, 960 F.2d at pp. 1485-1487 [when parent participation was limited by district's pre-formulated placement decision, parents were awarded reimbursement for private school tuition during time when no procedurally proper IEP was held].)

74. Here, on September 2, 2010, Mother notified District in writing that she had privately initiated an evaluation of Student, that Student had been diagnosed with ADHD and PDD-NOS, that she had concerns regarding District's failure to provide Student with a FAPE during the 2009-10 school year relating to his attention/organization deficits, that she intended to remove Student from District and privately place him, and that she would consider an alternative placement offer from District. Holtz first attempted to schedule an interim IEP meeting to discuss the independent evaluation. However, two weeks after Mother's September 2 letter, District inexplicably changed courses and informed Mother that it would not hold an interim IEP meeting to discuss Student's independent evaluation or alternatives for placement and services. Instead, Holtz reported to Mother that District proposed to convene an IEP and consider the independent evaluation only after Mother consented to an assessment plan, and after District completed Student's triennial assessments. District's proposed timeline extended into December 2010, ninety days after Mother notified District of the independent assessment. Wroblewski knew of no reason why District could not have convened an interim IEP sooner to consider the independent evaluation that diagnosed Student with ADHD and PDD-NOS, and to consider placement, supports and services on an interim basis until District assessments were complete.

75. Student has met his burden of establishing that District procedurally violated the IDEA by failing to timely consider Mother's independent assessment after Mother notified District in writing that she had the assessment. District's offer to meet with Mother after it completed its own assessments, and not before, was unreasonable because District's proposed timeline would have extended into December 2010, and would have caused Student to be deprived of appropriate placement, and necessary supports and services given his age and late diagnoses of ADHD and PDD-NOS. At the time Mother withdrew Student from District, she invited District to consider an alternative placement, and she agreed to allow District to assess Student. District did not send Mother an assessment plan until after Mother withdrew Student from District and privately placed him.

76. District's refusal to hold an interim IEP meeting within thirty days after Mother's written request to consider Student's independent evaluation, and instead declining to meet until at least ninety days after it received Mother's written notice, significantly impeded Mother's opportunity to participate in the decision-making process regarding the provision of a FAPE. Therefore, Student met his burden by the preponderance of evidence on this issue. The appropriate remedy is discussed below. Factual Findings 1, 32-41; Legal Conclusions 1, 69-76.

Issue 5: Placement

77. Student contends that private placement at Excelsior Academy was and is the appropriate placement for Student based upon his diagnosis of ADHD and PDD-NOS, his attention/organization issues, social/emotional deficits, and his need for more direct attention in the classroom, and that placement in Seaton's general education first grade classroom was not appropriate to meet Student's needs. Student also contends that placement at a District elementary school was not the appropriate placement for Student based upon Dr. Gray's and Hein's recommendations and findings.

78. District contends that placement in a general education setting at District's elementary school with appropriate supports and services was the least restrictive environment (LRE), that Student was making progress in his District placement, and that placement at Excelsior Academy was too restrictive.

79. In determining the educational placement of a child with a disability a school district must ensure that: 1) the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and takes into account the requirement that children be educated in the LRE; 2) placement is determined annually, is based on the child's IEP and is as close as possible to the child's home; 3) unless the IEP specifies otherwise, the child attends the school that he or she would if non-disabled; 4) in selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and 5) a child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum. (34 C.F.R. § 300.116.)

80. To provide the LRE, school districts must ensure, to the maximum extent appropriate: 1) that children with disabilities are educated with non-disabled peers; and 2) that special classes or separate schooling occur only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. 300.114 (a); Ed. Code, § 56031.) To determine whether a special education student could be satisfactorily educated in a regular education environment, the Ninth Circuit Court of Appeals has balanced the following 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] had on the teacher and children in the regular class”; and 4) “the costs of mainstreaming [the student].” (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Daniel R.R. v. State Board of Ed.* (5th Cir. 1989) 874 F.2d 1036, 1048-1050]; see also *Clyde K. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 35 F.3d 1396, 1401-1402 [applying *Rachel H.* factors to determine that self-contained placement outside of a general education environment was the LRE for an aggressive and disruptive student with attention deficit hyperactivity disorder and Tourette’s Syndrome].)

81. If it is determined that a child cannot be educated in a general education environment, then the LRE analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R. v. State Board of Ed.*, supra, 874 F.2d at p. 1050.) The continuum of program options includes, but is not limited to: regular education; resource specialist programs; designated instruction and services; special classes; nonpublic, nonsectarian schools; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; and instruction using telecommunication instruction in the home or instructions in hospitals or institutions. (Ed. Code, § 56361.)

82. Here, as discussed above, based upon the “snapshot rule,” District’s offers of placement before September 24, 2010 were reasonably calculated to confer some benefit to Student, and Student accessed his education and made progress in all respects before September 24, 2010. Student did not provide any relevant evidence that Excelsior Academy was the appropriate placement in the LRE before September 24, 2010. Student did not meet his burden on the issue of placement before September 24, 2010.

83. Instead, Student relied heavily on Dr. Gray’s and Hein’s opinions to support his contention that placement at Excelsior Academy was the appropriate placement for the future. As discussed above, Hein’s and Dr. Gray’s assessments and resulting recommendations were generated after the complaint was filed, and their reports were not provided to or considered by Student’s IEP teams. Therefore, they carried no weight as to recommendations for placement and services prospectively. Additionally, Dr. Gray and Davis concurred that Student might benefit from a general education class with typically developing peers if he had appropriate supports and services, the level of which are dependent on assessments the District has not yet completed or considered.

84. A determination on the appropriate prospective placement for Student is not at issue until Student's IEP team has considered Student's independent assessments and District's assessments. Student has not met his burden of persuasion on the issue of placement, except as discussed below in connection with remedies. Factual Findings 1-31, 33, 43-52; Legal Conclusions 4-11, 13-21, 23-31, 33-41, 44-49, 51-55, 57-67, 79-84.

Issue 6: Cumulative File

85. Student contends that he was denied a FAPE because District did not timely respond to Mother's request for Student's cumulative file in September 2010. District contends that District did not deny Student a FAPE.

86. A parent shall have the right and opportunity to examine all school records of his or her child and to receive copies within five business days after the parent makes the request, either orally or in writing. (Ed. Code section 56504.)

87. As discussed above, in matters alleging procedural violations, the denial of a FAPE may only be shown if the procedural violations 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, or caused a deprivation of educational benefits. (Ed. Code, § 56505, subd. (f)(2) and (j); see also *W.G. v. Board of Trustees of Target Range School District No. 23*, *supra*, 960 F.2d at 1484.)

88. Here, Student's Mother requested Student's records on September 3, 2010, before the 2010-11 school year had commenced, and followed up her request on September 16, 2010 when she had not yet received them. Mother received the records on or about September 22, 2010. Although District failed to provide Mother with Student's records within five business days after Mother's request, Student must still establish that the procedural violation caused some harm. Student offered no evidence that District's delay in providing Mother with Student's records caused Student or Mother any harm. Student offered no evidence that Mother's opportunity to participate in the decision-making process regarding the provision of FAPE was significantly impeded as a result of the delay in receiving records. Mother had already notified District on September 2, 2010 of her intent to withdraw Student from District and privately place him, which she did on September 22, 2010, the same day she received the records. Therefore, Student has failed to meet his burden of persuasion that he was denied a FAPE because the District provided Mother his records in an untimely manner. Factual Findings 1, 32, 34; Legal Conclusions 86-88.

Remedies

89. Student contends Mother's unilateral private placement of Student at Excelsior Academy near the beginning of the 2010-11 school year was reasonable because of District's decision to delay holding an interim IEP in September 2010. District did not address Mother's sought after remedy in this context at hearing or in its closing brief. As discussed

below, Student met his burden of persuasion that District denied him a FAPE, and is therefore entitled to tuition reimbursement.

90. A parent may be entitled to reimbursement for placing a student in a private placement without the agreement of the local school district if the parents prove at a due process hearing that: 1) the district did not make a FAPE available to the student prior to the placement; and 2) that the private placement is appropriate. (20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.148(c); see also *School Committee of Burlington v. Department of Ed.* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 385] (reimbursement for unilateral placement may be awarded under the IDEA where the district's proposed placement does not provide a FAPE).) In cases where cooperation fails, "parents who disagree with [a District's] proposed IEP are faced with a choice: go along with the IEP to the detriment of their child if it turns out to be inappropriate or pay for what they consider to be the appropriate placement." (*Id.*, at 370, 105 S.Ct., at 2003.) For parents willing and able to make the latter choice, "it would be an empty victory to have a court tell them several years later that they were right but that these expenditures could not in a proper case be reimbursed by the school officials." (*Ibid.*) Because such a result would be contrary to the IDEA's guarantee of a "free appropriate public education," the Supreme Court held that "Congress meant to include retroactive reimbursement to parents as an available remedy in a proper case." (*Ibid.*; *Florence County School Dist. Four v. Carter By and Through Carter* (1993) 510 U.S. 7, 12, 114 S.Ct. 361, 364 – 365 [126 L.Ed.2d 284].) The private school placement need not meet the state standards that apply to public agencies in order to be appropriate. (34 C.F.R. § 300.148(c); *Florence County School Dist. Four v. Carter, supra*, at 510 U.S. 14 (despite lacking state-credentialed instructors and not holding IEP team meetings, unilateral placement was found to be reimbursable where the unilateral placement had substantially complied with the IDEA by conducting quarterly evaluations of the student, having a plan that permitted the student to progress from grade to grade and where expert testimony showed that the student had made substantial progress).)

91. Reimbursement may be denied based on a finding that the actions of parents were unreasonable. (20 U.S.C. § 1412(a)(10)(C)(iii)(III); 34 C.F.R. § 300.148(d)(3).) The cost of reimbursement may be reduced or denied if 1) at the most recent IEP team meeting the parents attended prior to removal of the child from the public school, the parents did not inform the IEP team that they were rejecting the placement proposed by the public agency to provide a FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or 2) at least ten business days prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information; 3) if, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in Sec. 300.503(a)(1), of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for the evaluation; or 4) upon judicial finding of unreasonableness with respect to actions taken by the parents. (34 CFR 300.148 (d))

92. Here, as discussed above in Issue 4, District denied Student FAPE by declining to hold an IEP until after it conducted its own assessments, disregarding that it had received Student's independent assessment in September 2010, which, as Wroblewski testified, it could have considered more immediately after Mother's written request that it do so. District did not provide Mother with an assessment plan until after she withdrew Student from the District placement. Mother was reasonably concerned that, given the historic lack of supports for Student's ADHD and PDD-NOS, a further delay of 60 days or more while District conducted its own assessments would deprive Student of necessary supports and services and that his window of additional opportunity was limited at his age. The evidence established that Student received more direct attention and additional services once placed in a smaller classroom at Excelsior Academy.

93. Student established by a preponderance of evidence that Mother's decision to privately place Student at Excelsior Academy was reasonable and appropriate under the circumstances. Mother gave District timely notice of her intent to withdraw Student from District and privately place him. Therefore, because District denied Student FAPE as discussed above in Issue 4, Mother was entitled to tuition reimbursement. The evidence established that Mother paid \$2500.00 for tuition and start-up costs in September 2010, and \$1606.00 per month for tuition, SL and OT services for the months of October, November and December 2010, and for January through June 2011, for a total of \$16,954.00. District did not challenge these amounts at hearing or in its closing brief.

94. Student was in the middle of the second semester of the 2010-11 school year at the time this Decision was issued. The evidence supports a finding that requiring Student to transition back to a District placement during the school year would be disruptive to Student. Student is therefore entitled to remain at Excelsior Academy through the last school day of the 2010-11 school year. Factual Findings 33-40, 46, 49, 52; Legal Conclusions 69-76, 90-94.

95. Other than tuition reimbursement, school districts may be ordered to provide compensatory education or additional services to a student who has been denied a free appropriate public education. (*Student W. v. Puyallup School District* (9th Cir. 1994) 31 F.3d 1489, 1496.) The conduct of both parties must be reviewed and considered to determine whether relief is appropriate. (*Id.* at p. 1496.) These are equitable remedies that courts may employ to craft "appropriate relief" for a party. An award of compensatory education need not provide a "day-for-day compensation." (*Id.* at p. 1497.) 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.*)

96. Here, Student requested transportation as a remedy in addition to tuition reimbursement. Mother testified that she drove Student to school in the mornings, and that Student attended after-school day care. However, Student offered no evidence as to what cost he incurred for transportation to and from Excelsior Academy, on what days he attended Excelsior Academy, what the round trip mileage was between his home and Excelsior

Academy, nor did he offer receipts for fuel or other transportation costs. Therefore, Student is not entitled to reimbursement for transportation costs previously incurred.

97. Based on the findings above in connection Issue Four, Student is entitled to reimbursement for round trip transportation between home and school for each day of attendance from the date this Decision is issued through the end of the 2010-11 school year, subject to proof of each day of attendance and documentation of round trip mileage and cost of fuel. Factual Findings 1, 33-41; Legal Conclusions 69-76, 90-97.

ORDER

1. District shall reimburse Student up to \$16,954.00 for tuition at Excelsior Academy from September 22, 2010 and continuing through the last school day of the 2010-11 regular school year, or for as long as Student remains at Excelsior Academy during the 2010-11 school year, whichever is earlier. District shall reimburse Mother \$8030.00 within forty-five days of the date of this Decision, representing tuition and services through February 28, 2011. For all amounts spent on and after March 1, 2011, and through the last school day of the 2010-11 regular school year, District shall reimburse Mother within forty-five days of District's receipt of proof of payment by Mother.

2. District shall also reimburse Student at the rate of \$.51 per mile for the cost of one round trip by car between Student's home and Excelsior Academy for each school day of Student's actual attendance beginning on the date of this Decision and ending on the last school day of the 2010-11 regular school year. Mother shall submit to District proof of mileage based upon Google Maps or MapQuest for one round trip from home to Excelsior Academy, and proof of Student's attendance for each school day for which Mother seeks reimbursement. District shall reimburse Mother for mileage within forty-five days of District's receipt of proof of mileage and attendance, as described above.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. Student prevailed on Issue 4. District prevailed on Issues 1, 2, 3, 5 and 6.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by it. Pursuant to Education Code section 56506, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within ninety days of receipt.

Dated: February 23, 2011

/s/

Adrienne L. Krikorian
Administrative Law Judge
Office of Administrative Hearings