

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

ORANGE UNIFIED SCHOOL DISTRICT.

OAH CASE NO. 2010100716

NOTICE: This decision has been
UPHELD by the United States
District Court. Click [here](#) to view
the USDC's decision.

DECISION

Administrative Law Judge Robert F. Helfand, Office of Administrative Hearings, State of California, heard this matter in Orange, California, on May 18-19 and 23-26, 2011.

Bruce Bothwell, Esq., Attorney at Law represented Parents and Student (Student). Celia Chang, Attorney at Law, was present on May 18, 19, 23 and 24, 2011. Student's mother (Mother) was present for the hearing, and Student's father was present each day of the hearing except for May 26, 2011.

S. Daniel Harbottle, Esq., represented the Orange Unified School District (District). Karen Hanson, Special Education Director for the District, was also present.

Student filed his due process request (complaint) on October 18, 2010. On October 25, 2010, the District filed a response to the complaint. On October 29, 2010, and February 4, 2011, OAH granted joint requests by the parties for continuances.

At the hearing, the ALJ received oral and documentary evidence. The following witnesses testified at the hearing: Dawn Bronson; Shari Franklin; Adrienne Kessler; Sara Zerby; Lindsay Horvath; Melissa Moss; Mother; Betty Tia; Robin Moss; Henry J. Moore, III; and Lindsay Mitchell.

At the request of the parties, the record remained open for the submission of written closing and rebuttal arguments. The parties filed their closing briefs on June 13, 2011. Rebuttal briefs were submitted on June 21, 2011, when the matter was submitted.

ISSUES

The following issues, as listed in the Prehearing Conference Order, were to be determined in this matter:

a) Did the District deny Student a free appropriate public education (FAPE) at the December 18, 2008 Individualized Education Program (IEP) meeting by:

(1) Failing to assess Student to determine if he was eligible for special education under the category of autistic-like behaviors;

(2) Failing to offer Student appropriate behavior support therapy;

(3) Failing to offer Student appropriate speech and language services; and

(4) Failing to have a special education teacher at the IEP meeting?

b) Did the District deny Student a FAPE at the March 12, 2009 IEP meeting by:

(1) Failing to offer Student behavior therapy services;

(2) Failing to provide Student with appropriate speech and language services;

(3) Failing to place Student in the least restrictive environment with the support of a trained one-to-one aide;

(4) Failing to assess Student in the area of occupational therapy (OT) and provide him with appropriate OT services; and

(5) Failing to have in attendance at the IEP meeting a speech and language pathologist?

c) Did the District deny Student a FAPE at the March 8, 2010 IEP meeting by:

(1) Failing to place Student in the least restrictive environment with the support of a trained one-to-one aide;

(2) Failing to provide Student with appropriate behavior therapy services;

(3) Failing to offer appropriate extended school year services as no applied behavior analysis therapy services were offered; and

(4) Failing to assess Student in all areas of suspected disability?

Student withdrew issues (b) (3) and (4) and (c) (1) and (4) during the hearing.

FACTUAL FINDINGS

Background

1. Student, an almost six-year-old boy, resides with his family within the geographical boundaries of the District. Student was found eligible for special education and related services on December 18, 2008, under the eligibility category of Speech or Language Impairment (SLI). On March 12, 2009, Student's eligibility category was changed to Autistic-like Behaviors. He currently attends a nonpublic school.

2. By age two, Student had failed to meet his development milestones. He seemed lost in his own world, failed to make eye contact with others, did not respond to his name when called, did not play with toys, fixated on Thomas the Tank Engine, was a picky eater, and engaged in behaviors such as tantrums, elopement, and jumping at inappropriate times.

3. Just prior to Student turning three years of age, Mother contacted the Orange County Regional Center for assistance as she thought her son might be autistic. Because of Student's age, Mother was referred to her school district. On October 23, 2008, Mother phoned the District. On November 7, 2008, Mother spoke to a District representative. Mother stated that Student can say "mommy" in Korean, points or pushes family members to what he desires, fails to respond to instructions, and that he pays attention to facial expressions and tries to imitate them. She also stated that he does not put words together, nor understands directions and simple questions, although he has passed a hearing test. An assessment was scheduled for November 21, 2008. At the assessment, Parents were handed an assessment plan form which indicated that the purpose of the assessment was "initial" and that the only area checked to be assessed was "language/speech/communication development."

Initial Assessment

4. Shari Franklin conducted speech assessments for pre-school children for the District in 2008 in cases where the sole suspected disability was related to speech and language. Franklin has a B.A. in speech and an M.A. in communications. She is a licensed speech language pathologist (SLP) and has her certificate of clinical competency (CCC). She has been a practicing SLP since 1993 and has worked in school settings for 15 years, plus three years in a hospital setting. Franklin currently is an SLP for the Temecula Valley School District. She worked for the District from 2000 through 2009, at elementary and pre-school levels. The purpose of the assessment was to determine whether Student was eligible to receive speech and language services. At the time of the assessment, Student was three years, three months of age.

5. Franklin interviewed Student's parents on October 23, 2008. They stated their primary concern was Student's lack of expressive language. In the home, the primary language spoken is Korean but English is also used about 20 percent of the time. Parents, on

the Parent Interview/Case History Form, reported that Student could follow two-step directions, use pencils and crayons to put marks on paper, match objects to pictures, clean up with assistance, directly interact with children when playing, ask appropriately for assistance, play appropriately with toys, handle change in routine or environment appropriately, and stay on-task for 10 to 15 minutes without direct adult supervision. Parents verbally informed Franklin that they were concerned that Student was autistic. Parents told Franklin that Student was not toilet trained, had a vocabulary of zero to three words, did not put at least two or three words together, did not engage in simple conversation, could not count up to five nor identify colors, could not attend to stories one-to-one for more than two to three minutes, did not make eye contact, appeared to be in his own world, liked order and routine, and did not respond to his name. Franklin administered the assessment testing on November 21, 2008. During the assessment, Student did not engage Franklin, demonstrated poor eye contact and attention, and had very little verbalization.

6. Franklin administered the Rossetti Infant-Toddler Language Scale (Rossetti), Language Sample, Pragmatic Profile, and conducted a parent interview and informal observation. During the parent interview, Student was fixated on Mother's cell phone and was affectionate with Father. Franklin noted that Student was interested in books, but he merely flipped pages rather than concentrating on the pictures. He had a lack of interest in any of the toys in the examination room. During testing, Student did not respond to most directed tasks. Franklin also observed Student's lack of facial expressions during the assessment.

7. The Rossetti is a criterion-referenced instrument designed to assess the language skills of children up to three years of age. The Rossetti consists of an interview with parents and covers the areas of play, language comprehension, language expression, pragmatics, and gesture. Student scored an age equivalency of 15 to 18 months in play. Play skills shows how the child interacts with inanimate objects as well as the ability to pretend, take turns, and play cooperatively with others. Student demonstrated language comprehension and language expression skills at the six to nine month level.¹ Student's pragmatic skills were at the nine to 12 month level. In gesture, Student was at the 18 to 21 month level.

8. The Language Sample is a collection of spontaneous utterances which is analyzed in terms of social intent, word usage, syntax, and grammar. Student did not appear to use verbal language intentionally except when squealing for pleasure. Student made six sounds: ka, momba, kuk, ba, didididi, and mamamimi. A typical child of 39 months has an average of three words to three and three-quarter words per intent and follows conversational rules. Student's sample placed him in an area of less than 12 months.

¹ Lindsay Mitchell, a private SLP who worked with Student later, testified that the language comprehension portion of the Rossetti was incorrectly scored as Student had not mastered "goodbye." Mitchell said Student's proper scoring would place him in the three to six month level.

9. Pragmatics is the effective and appropriate communication in relation to varying social and situational contexts. Pragmatics was measured by an informal observation. Student demonstrated inappropriate eye contact and limited facial expressions. He did not show joint attention. Franklin concluded that this was an area of “significant difficulty.” Student also did not respond to any directed activities to permit a measurement of articulation/phonology.

10. Franklin found Student eligible for speech and language services because Student’s expressive and receptive language skills were significantly delayed.

11. Franklin recommended speech and language services and a referral for a complete psycho-educational assessment for consideration of a placement in a special day class (SDC).

12. Franklin concluded that Student would require a more intensive assessment including a full psychological battery. Because of his poor test scores, she felt Student required more intense services. She filled out a Notice of Special Education Referral form on November 21, 2008. The form notifies parents that they will receive within 15 days an assessment plan showing which areas the child will be assessed.

December 18, 2008 IEP Meeting

13. On December 18, 2008, the District convened an initial IEP team meeting. The IEP team consisted of a general education teacher; Franklin; Laura Miller, an administrative designee; and both parents. The team did not include a special education teacher. The meeting commenced at 1:25 in the afternoon and ended at 2:50. The team discussed the Franklin assessment and Student’s need for speech and language services. The issue of autism was not raised. Parents brought up Student’s behaviors and this was discussed as these behaviors related to Student’s speech and language deficits. The IEP team found Student eligible for special education and related services under the category of speech or language impairment. The IEP failed to include present levels of performance in pre-academic /academic/cognitive/functional skills and social/emotional development as Student was not assessed in these areas. Under communication development, the IEP noted that Student had severely delayed expressive and receptive language and pragmatic skills as measured by the Rossetti. Motor development was found not to be an area of unique need. The team also did not note any special factors including behavior.

14. Three goals were adopted. The first was in the area of expressive language. The baseline was based on the Rossetti assessment measurement of Student’s expressive language skills at six to nine months. The goal called for Student by January 2010, to name three out of five objects/pictures in simple categories including clothes, food, toys, and animals, and use verbalization or gesture to indicate a desired object or activity at least three out of five times during a therapy session as measured by observation. The second goal was in receptive language. The baseline was that Student’s skills were in the six to nine month range as measured by the Rossetti. The goal required that Student answer simple/personal

yes/no questions to indicate want/need three out of five times, follow simple commands three out of five times, and identify common pictures by name three out of five times during a therapy session. Student's third goal was in the area of pragmatics. Again, the baseline was based on the Rossetti result in Pragmatics. The goal stated by January 2010, Student will point to, show, or give an object in attempts at joint attention three out of five times during a therapy session. This goal was to be measured by observation data. The IEP failed to include a speech production goal, although Franklin had noted that Student did not use verbal language intentionally.²

15. The District offered to provide Student with 50 group speech sessions of 90 minute duration from January 2009 through January 2010. The offer was the equivalent of two 90 minute sessions per week. The services were to be provided in a separate classroom at Crescent Elementary School by District staff. The District would also conduct a pre-school assessment of Student within the IEP year.

16. Parents consented to the IEP. On December 19, 2008, Franklin forwarded by facsimile a copy of her assessment report and Notice of Special Education referral to Chendal San, a District school psychologist. The cover sheet indicated that the information was for the school psychologist's review.

January 15, 2009, through March 12, 2009 IEP Meeting

17. Student began receiving speech and language services at Crescent Elementary School commencing on January 15, 2009, from Lindsey Horvath, a District SLP.³ Student joined Horvath's Tuesday/Thursday 12:30 p.m. group which comprised four other children and one instructional aide. The aide assisted by keeping the children in their seats and running activities during the 90-minute sessions. Student had the most severe deficits in the group, and he was the only group member who was autistic. At first, Student had problems transitioning into the group as he did not want to be separated from his mother. Student attended 10 of 17 sessions. He did not interact with the other children. He minimally participated in the sessions because of his lack of attention. Student would engage in hand flapping, jumping up and down, eloping, and using sensory toys to cover his eyes. He did

² Melissa Moss, a District SLP who worked with Student starting in March 2009, testified that she was surprised that Student's IEPs prior to October 12, 2009, did not include a speech production goal.

³ Horvath has a B.A. in communication disorders and an M.A. in human communication and disorders. She has received a clinical competence certification in speech-language pathology and a California Rehabilitative Services Credential in 2006. She worked as a SLP on a waiver-emergency credential with the Long Beach Unified School District in 2000-2002 and as an SLP during the 2005-2006 school year at the Cypress Unified School District. Since fall 2006, she has been employed as an SLP with the District. Since 2005, she has been on the adjunct faculty at Cerritos Community College in the Speech Language Pathology Assistant program.

not like loud noises and would frequently cover his ears. Horvath testified that the sessions were too long for Student to handle, so she requested Mother to pick Student up early. In teaching baby signs for “please” and “more,” Horvath had to use hand-over-hand prompting to get Student to use the signs. Student made little progress during his time with Horvath.

District’s Second Assessment

18. On or about January 16, 2009, Parents received a proposed assessment plan. The assessment plan called for Student to be assessed in the areas of academic/pre-academic achievement; intellectual development; social/emotional/behaviors status; psycho-motor development; health/vision/hearing; self-help/career/vocational abilities; and autism rating scale. Mother signed her consent on January 16, 2009.

19. The assessment team comprised of District personnel included Chendal San, a school psychologist; a school nurse; and an SDC teacher, Danny Lentini. Lentini conducted an academic assessment on February 19, 2009. Student was accompanied to the assessment at Taft Elementary School by Mother and his grandmother. Because Student had difficulty completing assessment tasks, Lentini was unable to assess him utilizing standardized measures. Student was unable to complete any receptive language, expressive language, or academic/cognitive tasks. The assessor noted that Student “had difficulty attending to task and being away from his mother and grandmother.”

20. A health and developmental assessment was conducted by Susan Salvador, a District school nurse. Student passed the functional visual and hearing screens based on observation and parental reports. Salvador was unable to conduct a color discrimination screen. Salvador also noted that Student had difficulty engaging in assessment tasks, displayed fleeting eye contact and spoke in jargon.

21. San conducted the intellectual development and social/emotion/behavior portions of the assessment on January 30, 2009, and February 6 and 23, 2009. San utilized a number of tools including reviewing available records; conducting parent interview and observations; and administering the following standardized tests: Differential Ability Scale, Preschool (DAS), Westby Symbolic Play Skills (Westby), Developmental Profile II (DP-II), and the Childhood Autism Rating Scale (CARS).

22. San made the following observations during the three assessment sessions:

[Student] is an adorable 3-year, 5-month old child who attempted some tasks asked of him. However, it was very difficult to get [Student] to attend to activities, as he was easily distracted, non-compliant and active. He was observed to often need prompting and redirection back to the task-at-hand. He was observed to have a difficult time following simple directions and did not respond to positive praise by the psychologist or the assessment team. [Student] was observed to enjoy playing with a Thomas the train book in the assessment center, however when he heard sounds from the book he

covered his ears. [Student] appeared to have a difficult time completing tasks in the testing environment.

23. Because a formal cognitive assessment was unable to be administered due to Student's inability to complete task items, the DPI-II was utilized. The DPI-II assesses a child's social and practical living skills based on information provided by a reporter, Mother. Student's IQ Equivalent standard score was below 60 which fell in the "extremely low" range. The IQ Equivalency was based on a limited number of items focusing on fine motor and speech and language skills. Because of these limitations, San stated in her report that this score should be viewed "cautiously."

24. The DPI-II also assesses social and practical living skills. Student measured within normal limits on the physical age scale with a score of 40 months. This scale assesses a child's abilities with tasks requiring large and small muscle coordination, strength, stamina, flexibility, and sequential motor skills. Self-help measures the child's ability to cope independently with his environment and includes tasks such as eating and dressing. Student scored at 34 months on the self-help scale, which was within normal limits. The social age scale measures interpersonal relationship abilities. Student scored in the delayed range with a score of 30 months. Mother reported that Student played with toys appropriately and took turns 75 percent of the time. Student scored at 17 months, which is in the delayed range, on the academic age scale. This scale measures a child's intellectual abilities by assessing the development of skills prerequisite to scholastic functioning. He also scored in the delayed range in the communication age scale with a score of 18 months. This scale measures a child's expressive and receptive language skills with both verbal and nonverbal language.

25. The Westby looks at a child's developmental acquisition of play skills. The assessor used her observations and information provided by Parents. Student's play skills were scattered at the 24 month level and solid at the 17 to 22 month level.

26. The CARS is utilized to evaluate the presence of autistic-like behaviors in children. Information is obtained through interviews and observations by the assessment team at assessment sessions. Total scores between zero and 30 are in the non-autistic range; 30 to 37 are in the mildly-moderately autistic range; and 37 to 60 are in the severely autistic range. Parent's total score was 29, while the assessment team score was 47.

27. The assessment team concluded that based upon the information gathered, "it appears he meets the eligibility for Special Education services under the criteria of Autism."

March 12, 2009 IEP Meeting

28. On March 12, 2009, the IEP team convened. The team consisted of Mother; a District administrative representative; a general education teacher; a special education teacher; and Laura Martinez, a District school psychologist. Absent were an SLP and San, who had conducted the second assessment. The second assessment was reviewed. The health and development portion was reviewed by the District administrator, and the special

education teacher reviewed the pre-academic skills portion. Martinez reviewed the cognitive, social and emotional portions. The team found Student eligible for special education services as “a student with autism.” The team no longer found Student eligible under speech or language impairment.

29. Under present levels of performance, the team noted that Student was unable to match colors or rote count, not potty trained, and had difficulty interacting with peers. For communication development, the IEP merely repeated the present levels of performance which had been listed in the December 18, 2008 IEP. The IEP notes failed to mention that the team discussed Student’s progress or lack thereof during the meeting.

30. The team adopted six annual goals in the areas of academics, fine motor, expressive language, receptive language, and pragmatics. Student’s first goal was academic and required him to sit and attend to a teacher directed task for five minutes without interruption in four out of five trials as observed by the teacher. The second academic goal was to have Student match five out of five colors in four out of five trials. The third goal was fine motor and required Student to copy a horizontal line, a vertical line, and a circle in four out of four trials. Student’s goals in expressive language, receptive language, and pragmatics were the same as the initial IEP.⁴ The IEP did not include goals related to speech production as Student was not saying words, socialization as Student had no interaction with peers, nor potty training as he was not toilet trained.

31. The IEP noted that “Student is expected to meet the same standards of curriculum mastery as non-special education students within his classroom without accommodations.” The IEP team required specialized academic instruction to develop Student’s learning skills such as joint attention and attention to task. The District’s FAPE offer was that Student would attend a mild-moderate SDC, receive 50 group speech therapy sessions yearly at 30 minutes per session, and attend Chapman Hills Elementary School. The SDC was not designed for autistic children nor did it include behavior therapy in the curriculum. Student would initially attend the SDC for 100 minutes weekly until he was integrated into the class when he would attend full time. Mother consented to the implementation of the District offer.

Student’s Performance in the SDC from March 2009 to June 2009

32. Following the March 12, 2009, IEP meeting, Student began attending the pre-school mild to moderate SDC class of Dawn Bronson.⁵ The class comprised 16 children and

⁴ The goals did not include short-term objectives so as to measure Student’s progress.

⁵ Bronson has a B.A. in early child development and an M.A. in special education. She is a certified early childhood teacher. Bronson attended a first tier (out of four tiers) autism training for two weeks for a total of 10 hours. She has not had behavioral intervention training.

three instructional aides.⁶ Bronson's class commenced at 9:40 a.m. and shared the classroom with a kindergarten SDC from 9:40 until 11:30 each day. Bronson's class finished at one o'clock. The schedule for Bronson's class was the students arrived and had calendar time at 9:40 followed by recess with the kindergarten class from 10:05 to 10:25. From 10:30-11:00, the classes worked on projects involving social skills, art, language, and fine motor skills. At 11:00, the pre-school SDC had lunch and bathroom break while the kindergarten class left. From 11:35 to 11:40, Bronson had circle time where the class worked as a group on math, language arts, music or movement. From 11:55 to 12:20, the class had center time where each child was assigned to work at a center. This was followed by recess for 10 minutes. At about 12:30, the class worked on the letter of the week in a small circle and then centers. At 12:50, there was a closing circle which included behavior charts for the children. At 1:00, the class was dismissed.

33. Student initially commenced his school day at about 11:30 a.m. to allow him to transition to a new environment. Student seemed curious and aware of his environment at first. He needed more individual attention than others and was not engaged in what was going on in the class. Student required maximum prompting to complete tasks including hand-over-hand prompts to allow him to model what was being done. During small groups such as circle time, Student would not be engaged, but he was not disruptive. He would look around and at others, stare at his fingers, and play with his fingers. When he was engaged in preferred activities, Student would attend to task for up to two minutes if an aide was present. Student would only attend to a non-preferred task for 30 seconds. During non-preferred activities such as labeling, counting and sorting, Student would have difficulty being directed by staff to perform tasks.

34. On June 10, 2009, Bronson reported in writing that Student was making progress on all his goals. Student understood classroom routines and transitions including looking at the class picture schedule. When Student wanted to get Bronson's attention, he would make eye contact and lead her by the hand to the object he wanted. Even though Student could sit in a group without disrupting the group, he still was not participating unless maximum prompting was used. Mother observed Student playing in dirt and eating the dirt and rocks while at recess. Mother did not see any progress in Student's speech and language skills. By the end of the school year, Student required individual prompting to attend two minutes on a preferred activity and to attend to a non-preferred activity for 30 seconds if rewarded by Cheerios, which Bronson used as a reinforcer. Because Student required maximum prompting, Bronson felt that he required ABA support, which led her to request a District ABA assessment.

Report by Marc A. Lerner, M.D.

35. On June 3, 2009, Student was examined by Dr. Marc A. Lerner, clinical professor of pediatrics at the University of California, Irvine. Dr. Lerner reviewed Student's developmental progress and developed an overall treatment plan. The CARS was

⁶ The instructional aides were not trained in behavioral support therapy.

administered to Parents and the resulting score was 35, which is “consistent with findings of a mild-to-moderate autistic disorder.” Dr. Lerner opined that “[Student] is a 3-year-old youngster whom we are diagnosing with an autistic disorder and associated communication difficulties.”

36. Dr. Lerner recommended that Student be placed in a special education setting emphasizing ABA/IBI and communication interventions including individual speech and language services.⁷ He also recommended a home intervention program by the local regional center.

Summer 2009

37. Student attended an SDC at the Villa Park Elementary School for the 2009 extended school year. Student seemed reluctant to go to school. On June 26, 2009, Student came home with facial bruising. Student then began exhibiting increased behaviors, including nail biting, which were severe enough to cause infections. He also did not want to go in the car each morning for school. Because there was no incident report from the school, Mother contacted the teacher, Ms. Welche, who was unaware of the situation. Mother notified the school that Student would no longer attend the summer pre-kindergarten class.

Cognitive Behavioral Assessment of August 27, 2009

38. Adrienne Kessler, a District autism specialist, conducted a cognitive behavioral assessment of Student on August 27, 2009, and produced a written report dated September 9, 2009.⁸ Kessler conducted a records review which included the March 12, 2009 IEP and a report from FOROCKIDS. She also conducted a one to one and a half hour classroom observation and interviewed Bronson, who continued to be Student’s teacher, on August 27, 2009. In her written report, Kessler reported on her observations in the areas of language/pragmatics, social cognition, and behavior.

⁷ Applied Behavior Analysis (ABA) and Intensive Behavior Intervention (IBI) are similar behavior support therapies that breakdown skills into small discrete tasks taught in a highly structured manner using a systemic reward or reinforcement to teach desired behaviors. “Over the past 30 years, several thousand published research studies have documented the effectiveness of ABA.” (Report of the MADSEC [Maine Administrators of Services for Children with Disabilities] Autism Task Force, Feb. 2000 (Rev. Ed.), p. 21.)

⁸ Kessler has a M.Ed. with an emphasis in clinical psychology and a Board Certified Behavioral Analyst (BCBA) certificate from the Chicago School of Professional Psychology. From 2002 through 2006, Kessler was a case consultant with the Center for Autism & Related Disorders (CARD). She was an autism specialist with Capistrano Unified School District from 2006-2007. Since 2007, she has been an autism specialist at the District where she created and operates an ABA clinic and the District’s training program.

39. Bronson told Kessler that Student was able to remain seated during circle time activities for up to 15 minutes with minimal redirection although he completed academic tasks with maximum prompting. Student's main means of communicating was to lead another by the hand and take the person to an item that Student desired. Student's vocabulary was limited to three words which he used at home. Student would resort to screaming when he is unable to express his wants and needs. He required maximum prompting to engage in play activities outside of his preferred repertoire. Because of Student's limited repertoire of play skills, his interactions with peers was minimal.

40. The only maladaptive behavior noted was that reported by Bronson that Student would scream to express frustration or being upset when his wants were not understood or when he was denied access to a preferred item. Kessler concluded that this behavior would decrease as Student's receptive and expressive communication increased.

41. During instruction, Student did not attempt to answer the teacher's questions nor did he engage in singing while in a group activity. During center time, Student was unable to identify numbers when asked to touch and label numbers on a chart. Student communicated his desire to get a puzzle during free time; he led staff by the hand to the cabinet where the puzzles were kept. When he was redirected to make another choice, Student found a Thomas the Tank Engine book. Kessler tried to engage Student in discussion about pictures in the book, Student attempted to communicate by babbling.

42. Social cognition refers to the ability to take another's perspective anticipating another's thoughts and feelings in social situations such as peer relationships and play. Student's repertoire of play skills was limited. Student often required hand-over-hand prompting to play with items. He was able to engage in parallel play with minimal prompting. To get Student to engage in cooperative play, he required maximum prompting. Student used eye contact and joint gaze to confirm that another understands his wants, but he did not engage in pointing or following another's pointing or gaze.

43. Student demonstrated difficulty in executive functioning. Although able to sit for long periods of time, he was able to sustain his attention inconsistently. He could redirect himself if the new activity was a preferred activity or prompted by staff. Student was able to follow one-step directions with verbal and visual prompts.

44. Kessler opined that Student's "deficits are impacting his ability to participate more independently in his current school placement and establish friendships with peers." She recommended that Student receive ABA services, although she did not indicate the extent and method by which the ABA services should be provided.

September 2, 2009 IEP Meeting and District ABA Services

45. On September 2, 2009, the IEP team met to review and consider the Cognitive Behavioral Assessment by Kessler. Present was Mother; Kessler; Bronson, as special education teacher; and a general education teacher. Mother provided the team with a

recommendation from Dr. Lerner, written on two prescription pad sheets. Dr. Lerner recommended Student needed behavioral intervention/ABA at home to address behaviors and sibling interaction, an occupational therapy evaluation and services to address Student's atypical hand use, oral habits and eating concerns. He also recommended that Student receive social skills intervention to remediate social learning deficits which result from Student's autism. Kessler presented a summary of her assessment findings and recommendations. The IEP team recommended that Student be provided ABA therapy on Tuesdays and Thursdays at the Parkside School following the school day. Each session would be for one and a half hours for a total of three hours weekly. The IEP team did not discuss or adopt goals for the ABA therapy. Mother consented to the ABA therapy at the meeting.

46. On September 3, 2009, Student attended ABA therapy with Miss Holly, a District staff member. The ABA facility was in a portable classroom with partitions which Mother found to be dark and dirty. Miss Holly refused to permit Mother to observe the session, which was in accord with District practices. On September 10, 2009, Student arrived for his second session. Mother learned that the ABA therapy would be provided by an aide rather than a behavioral therapist.⁹ On September 16, 2009, Mother forwarded a letter to the District objecting to the ABA services provided by the District. Mother objected that the ABA therapy would be provided by an aide in lieu of an ABA therapist, the lack of a written treatment plan and short-term and long-term goals, and the lack of parental involvement so as to maximize treatment outcome by having parents follow-up with the program at home. She requested ABA therapy by a certified therapist and to permit parent attendance. On March 12, 2010, Mother signed an amendment to the October 12, 2009 IEP stating that Student "will no longer be receiving ABA services through OUSD at this time, per parent request."

October 12, 2009 IEP Meeting

47. Following the recommendation of Dr. Lerner, The District conducted an occupational therapy assessment. The IEP team met on October 12, 2009, to discuss that assessment. In attendance were Mother; an administrative representative; a general education teacher; Kaye Pugh, an adapted physical education (APE) teacher; Denise Harewood, an occupational therapist; and Melissa Moss, a SLP who was then working with Student. Harewood reviewed her occupational therapy (OT) assessment, and the team adopted two goals for gross motor skills and three for fine motor skills. Pugh reviewed her APE assessment. One of the fine motor goals called for Student to attend to a fine motor table top task for two to three minutes with two or fewer verbal prompts in three of five attempts.

⁹ Kessler testified that District behavior aides attended training consisting of four lectures which total eight hours and a one to two week practicum which involves hands on training.

48. Moss had commenced working as Student's SLP in March 2009.¹⁰ She worked with Student individually for the first week so as to establish a baseline before including him in a group session which comprised Student and one other child. Moss reported that Student sequenced "cvcc including gaga, dada, and bibi" and was starting to vary his use of consonants and vowels consistently. She proposed, and the team adopted, the following goal:

By March 20, 2010 in speech and in class and home, when given verbal and visual cues, [Student] will produce CVC (pop dad), CCV1CV2 (puppy, people, daddy), and C1V1C2V2 (happy, bunny, tuna) combinations in words using pictures and or objects with 80% accuracy three consecutive therapy sessions.

49. Mother consented to the addition of OT and APE services and the new goals which had been proposed.

Providence Speech and Language Evaluation

50. Dr. Lerner referred Student for a speech and language evaluation. On October 21, 2009, Student was evaluated by Lauren Miles and Le Etta Vanderpool, two SLPs from the Providence Speech and Language Center (Providence) in Orange, California. Student was accompanied to the evaluation by his parents. Based on parental input, the evaluators reviewed Student's family history, health history, development and the December 18, 2008 IEP. Student had been tested by Providence in March 2009 "revealing minimum response levels to sound field within normal range." At first, Student retreated to his parents. As he became accustomed to the environment, he became engaged in appropriate interaction with the clinician. The evaluation consisted of the administration of the Communication and Symbolic Behavior Scales Developmental Profile Caregiver Questionnaire (CSBS-DP), play-based interactions, parental interview, informal oral motor observations and clinical observations.

51. The CSBS-DP is a questionnaire for parents and is used to determine whether a child has a developmental delay or disability in seven language areas: emotion and eye gaze, communication, gestures, sounds, words, understanding, and object use. This tool provides normative data for children between six and 24 months of age, but it can also be utilized for preschool children up to the age of six, whose developmental functioning level is less than 24 months. In the composite scores, Student scored in the "area of concern" for all three composite scores- social, speech and symbolic communication with scores in the second, fifth and ninth percentiles respectively. In his cluster scores, Student scored in the "area of concern" range for communication (ninth percentile), gestures (first percentile), and

¹⁰ Moss has a B.A. and M.A. in communication disorders as well as her CCC and clinical rehabilitation credential. She has been employed by the District since 2002 and as an SLP since 2005.

understanding (fifth percentile). Student scored in the 63rd percentile in emotion and eye gaze, the 16th in sounds, and 25th in object use.

52. The evaluators examined six areas which were behavior and play skills, social communications, speech communications, symbolic communications, speech production, and voice/fluency. Their conclusions were based on the CSBS-DP and their observations. In behavior and play skills, Student was able to play independently and would occasionally make eye contact and vocalizations with the clinician. Student did have difficulty following single step directions and participating in clinician-directed activities. Based on parent interview and the CSBS-DP, Student demonstrated “significant delays in all areas of social communication.” Student also demonstrated significant delays in all areas of speech communications. It was noted that Student is unable to use recognizable words to communicate nor does he put two or more words together. He also demonstrated significant delays in symbolic communication as Student had not demonstrated skills to understand words or short phrases without gesture, pretend play with toys, or put two or more actions together in sequence of play. As to speech production and voice/fluency, the evaluators were unable to assess due to Student’s limited verbal output and limited imitation.

53. The evaluators diagnosed Student with receptive and expressive language delay as he “presents with a severe expressive and receptive language delay characterized by limited vocalizations, no verbal output, no verbal imitation, limited gestural imitation, and limited listening comprehension secondary to a diagnosis of Autism.” They also observed that “[i]ndividual therapy is warranted at this time to address overall delays in communication, interaction, and play skills.” The evaluators recommended group speech and language therapy for 30 minutes twice per week.

54. The written report lists five long term goals as follows:

1. Encourage adult-child interaction through joint attention and play skills.
2. Improve social, speech, and symbolic communication skills.
3. Encourage the production of age-appropriate speech sounds within limits of oral-motor-sensory abilities.
4. Assess oral motor skills within the context of the therapy program.
5. Develop a home program to facilitate carry over of new skills into outside environments.

The report also contained seven short term goals as follows:

1. Student will respond to his name by looking in three out of five opportunities, as prompted during play or activities of daily living.
2. Student will participate in three circles of communication during play at least two times per therapy session.
3. Student will imitate fine and gross motor signs and gestures (e.g., pointing) during play, singing, or activities of daily living.

4. He will look at a known person or object of interest as directed in three out of five opportunities during play or activities of daily living.
5. He will communicate using gestures, reaching, or pointing to request an item of interest during play five times per session.
6. Student will take an item as prompted by clinician or parent as prompted (holding object out) and return it when prompted in four out of five opportunities during play or directed activities.
7. He will increase use of age-appropriate phonemes (p, b, m, t, n, k, g, w, and h) in babbling, CV/CVCV imitation, and functional vocabulary words (more, ball, go, hi) during play or activities of daily living as measured by parent report and clinician observation.

Providence March 18, 2010 Progress Report

55. Providence commenced providing services on March 18, 2010. Student's then SLP, Randi Horikawa, noted in a May 4, 2010 written report that Student "had made progress and was starting to imitate word approximations and gestures, initiate communication and take turns during play." Although Student had made progress, he had met only two of his 15 treatment goals. She also noted that Student had increased joint attention and ability to attend to structured tasks so that the duration of sessions could be increased.

CARD Functional Behavior Assessment

56. On September 24, 2009, the Orange County Regional Center referred Student to the CARD¹¹ for a functional behavior assessment. The purpose of the assessment was to assist Student's family in securing programming and services from the Regional Center. The assessment was conducted by Dana Kerby, a CARD case consultant. She produced a written report which was reviewed by Vincent L. Redmond, Jr., a CARD regional director. Student's referral behaviors, as confirmed by parent interview and direct observation by the assessor, were elopement, non-compliance, tantrums, physical stereotypy, and visual stereotypy. Parents reported that these behaviors have been ongoing since Student was two years old. Kerby also noted that Student had not as of that date received any behavioral interventions.

57. Kerby noted that Student's elopement, non-compliance, and tantrums were evoked by similar antecedents and followed by similar reinforcers. Non-compliance occurred when Student was asked to engage in a non-preferred activity or he was denied a preferred item. Kerby observed seven episodes of non-compliance which occurred three and a half times per hour. Parents had reported that Student engages in six non-compliant episodes per hour. Elopement, which was generally preceded by a period of non-engagement, occurred after Student was given a verbal request to engage in the non-preferred

¹¹ CARD is a state certified non-public agency (NPA) which provides one-to-one ABA services.

activity. Although Kerby did not observe an instance of elopement, Mother reported that such occurrences happen on a daily basis. Student would also sometimes go into tantrum when he was denied access to a toy or location or if instructional demand was placed on him. Tantrums would include screaming, crying, whining sometimes paired with throwing himself on the floor. Parents reported tantrums at a rate on one per hour, while Kerby observed one tantrum which was at frequency of one half per hour. The replacement behavior suggested was to teach Student to appropriately demand an alternative activity or maintain a desired item or cease the non-preferred activity.

58. Physical and visual stereotypy are evoked automatically and not as a result of any external social consequence. Physical stereotypy consisted of repetitive behaviors such as hopping up and down with an open mouth, placing the back of his hand to his mouth, pressing his mouth or chin against hard surfaces, lifting his shoulders, and tapping with an open palm. The frequency of such behaviors was 11 times per hour during Kerby's observations, which basically coincided with the parental report. Visual stereotypy consisted of using peripheral vision to look at items and squinting while holding an object directly in front of his face. Parents reported this behavior at five episodes per hour, while Kerby noted the same rate in the home but none in the community observation. These behaviors occurred during times when Student had no demands placed on him, when engaged in independent and/or joint activities. The stereotypy ended when Student was engaged in an appropriate activity.

59. Kerby recommended that differential reinforcement of alternative behavior (DRA) be utilized to extinguish Student's maladaptive behaviors of tantrum, elopement and non-compliance. This is accomplished by allowing Student to have a desired tangible or a break when he engages in an appropriate response. As to the stereotypy behavior, Kerby recommended differential reinforcement of incompatible behavior (DRI) to immediately engage Student in an appropriate incompatible behavior so that he is reinforced to engage in the appropriate behavior. An example is when Student engages in physical stereotypy, the therapist will prompt him to play with another item in an appropriate manner that differs from his stereotypic behavior.

60. Kerby recommended 13 annual goals to be worked on in the areas of response to name, verbal imitation, verbal directions, non-verbal imitation, manding (indicating wants), object discrimination, toileting, feeding/eating, grooming, independent play skills, imitative play, turn taking, and interactive play skills. Each of the goals included four month and eight month incremental goals. Kerby also recommended that Student receive 25 hours of direct ABA services per week on a one-to-one basis to focus on adaptive living skills, maladaptive behaviors, functional communication skills, social and play skills. Additionally, Kerby recommended that parent consultation be provided at eight hours per month and supervision of the program for eight hours per month.

Efficacy of the CARD Recommended ABA Program

61. Henry J. Moore, III, received a B.A. and M.A. in psychology and is currently a regional director with CARD.¹² He began as a behavior modification therapist from 1994 to 1995 with the UCLA Clinic for the Behavioral Treatment of Children, where he worked with Dr. O. Ivar Lovaas, a clinical psychologist who is considered the father of ABA technique. Moore joined CARD, which branched off from Lovaas, in 1995. Moore trains therapists in ABA techniques, consults with school districts, develops and supervises individualized programs for children with autism, and oversees the clinical and administrative management of multiple CARD offices. Moore describes ABA as a systematic way to intervene to improve socially significant behaviors. CARD provides home based ABA services designed to reduce maladaptive behaviors so as to allow the child to be able to function in the school and community environments. Moore cited several articles from peer reviewed journals that replicated the findings of the Lovaas original 1987 article as to behavioral treatment. He also pointed out that studies had shown that ABA intervention is also effective in the community setting as well as in the home. Moore also stated that the studies show that ABA therapy should commence as early as possible. Moore felt that Student required a comprehensive ABA program which would total 30 hours at both home and school with the home program at 25 hours and 5 hours at school based on Student's deficit areas and maladaptive behaviors.

62. Intensive behavioral programs should include a minimum of 20 hours weekly using ABA techniques. The precise frequency depends on several factors including age, severity of autism symptoms, rate of progress, tolerance of the child for the intervention, family participation and other health factors. ("Clinical Practice Guideline: Autism/Pervasive Developmental Disorders," New York State Department of Health Early Intervention Program, 2011, p. 93 of Exhibit S75.) "Comprehensive programs generally require 25 or more hours of active student engagement per week for two or more years and attempt to change the clinical course of an autistic spectrum disorder, including prevention or reduction in problem behaviors." ("Educating Children with Autism," Committee on Educational Interventions for Children with Autism, National Research Council, 2001, p. 119 of Exhibit S79.)

63. Based on the testimony of Moore, several articles from peer reviewed journals, and the New York practice guideline, the recommended ABA program by CARD was appropriate.¹³

CARD Services and May Progress Report

64. The regional center funded 19 hours per week of one-to-one in home ABA services, 8 hours of consultation monthly, and 8 hours monthly program supervision to

¹² CARD has twenty offices in California, Arizona, West Virginia, New Zealand and Australia.

¹³ The District offered no evidence to the contrary.

address Student's maladaptive behaviors and skill deficits related to home and general community settings. CARD commenced services on January 11, 2010.

65. Betty Tia started as Student's case supervisor when CARD services commenced. Tia has been with CARD since July 2004, starting as a therapist and today is a case supervisor. She has a B.A. in psychology and a M.A. in psychology, applied behavior analysis. CARD employs the discrete trial training (DTT) as its methodology. DTT is a teaching method based on repetition which involves prompting a specific behavior with the child receiving a reinforcer for generating the proper response. Student received ABA services from a senior therapist and four junior therapists who were under Tia's supervision. Tia is supervised by Moore who regularly reviews data collected, views video of sessions, and conducts observations. As part of her responsibilities, Tia reviews and analyzes data accumulated from the therapists to track frequency rate of behaviors, makes observations of the child, and drafts or revises goals based on the data. Student received in-home ABA five to six days per week. At the start of the CARD-provided home ABA services, Student was unable to communicate what he wants, engaged in stereotypical behaviors, had a low ability to discriminate objects, lacked the ability to engage in joint attention, eloped and threw tantrums to avoid non-preferred activities, was unable to follow simple directions, was non-compliant, and had toileting problems.

CARD May 1, 2010 Progress Report

66. On May 1, 2010 (approximately three and a half months after CARD services began), Kerby authored a written report detailing Student's progress. Student met his four and eight month goals in elopement and non-compliance. Student failed to meet his four month tantrum goal as his tantrums increased, which was attributed to the increased demands placed on Student. In both physical stereotypy and visual stereotypy, Student met his four month, eight month, and 12 month goals. In addition to the ultimate goals, CARD also worked on specific goals in the areas of receptive and expressive language, self-help, and self-direction. These goals were to be completed by November 2010.

a.) Receptive and Expressive Language. Student had six goals in the area of receptive and expressive language. As of April 2010, he had met three in the areas of name recognition, following verbal single-step compliance commands, and object discrimination. He also did not meet his goals in verbal imitation (imitate three consonants paired with five vowel blends), non-verbal imitation, and manding (he continued to require full verbal and partial physical prompting to select a desired item).

b.) Self-Help. Student was unable to meet any of his three self-help goals. In the area of toileting, Student was able to communicate his toileting needs in the area of urine only. In eating, Student was able to drink water and juice when offered but not able to eat baby carrots. In grooming, he was able to master the six steps in tooth brushing but only with 50 percent accuracy.

c.) Self-direction. Student was demonstrating “emerging skills” in the areas of imitative play, independent play, turn taking, waiting, manding (requesting) halting non-preferred tasks, and interactive play.

67. CARD added new specific goals in joint attention, receptive and expressive language, and self-help. In the receptive and expressive language, the three new goals were “yes/no” where Student communicated by gesture his desire for “yes” and “no;” follow two-step simple functional directions; categories; and understanding environmental sounds (i.e., car, whistle, siren). Student’s self-help goal was that he would independently un-button and un-snap his shirt or pants.

68. Kerby found that Student has demonstrated progress as the occurrences of maladaptive behaviors decreased from the October 2009 baseline levels. The functions of his maladaptive behaviors “continue to escape/avoidance of non-preferred tasks, to gain access to tangible items, or for automatic reinforcement.” Student made progress in receptive language with matching, following verbal directions, as well as name responding; expressive language with verbal approximations in regards to consonant-vowel blends; self-help skills with drinking water and juice; play skills with ball play; and self-direction with progress in turn taking for up to five turns. He also demonstrated delays in his ability to imitate fine motor actions; verbal language and functional communication; self-help skills; independent play and imitative play; and seeking out sensory input and manding for cessation. Student’s maladaptive behaviors were “occurring at a rate that significantly interferes or impedes his ability to acquire new skills and interferes with daily functioning across environments.”

69. Kerby recommended that Student continue to receive eight hours of monthly parent consultation and 20 hours of in-home, one-to-one ABA therapy focusing on adaptive living skills, maladaptive behaviors, functional communication skills, social skills, and play skills. Kerby also observed:

This recommendation of continual 1:1 individualized work is supported by recent and historical research indicating that a child with autism who demonstrates similar overall level of deficits as [Student] will learn and progress better in his social, educational and independent environments after receiving individualized instruction instead of ‘eclectic’ group instruction that is often found in special education classrooms or autism support groups.

March 8, 2010 IEP Meeting

70. On March 8, 2010, the IEP team reconvened for the annual IEP meeting. Parents were present; as were an administrative designee; a general education teacher; Bronson, special education teacher; Moss, SLP; Kaye Pugh, APE; and Laurie Welch, an OT therapist. Pugh and Welch reviewed Student’s progress in OT and APE. Moss reported that Student had met two out of his four speech and language goals. She reported that Student

could name five objects and five pictures from common noun categories using clear vocalization three out of five times. Socially, Student used primary verbalizations with pointing to request items, and get his needs met while participating in simple turn-taking activities three out of five trials. In receptive language, she reported that Student “demonstrated great understanding of common noun objects and identifying objects by function; however [he] can not answer ‘yes-no’ questions three out of five times in a speech session.” Student could also follow three out of five commands and identify common pictures by name. He also could repeat vowel sounds, vowel sequences, consonant sounds, consonants and vowels to make syllables, two syllables in sequence using different vowels in each syllable, short phrases using previously practiced syllables, and repeating one syllable words. Moss also stated that *Student made progress especially after starting ABA services with CARD*. She felt that Student needed individual attention to make progress in a short amount of time. Moss recommended that Student’s speech and language therapy be increased to three 30 minute sessions per week on an individual basis.

71. Bronson reported that Student had met both of his academic goals. Those goals from the March 16, 2009 IEP were that Student, in a classroom setting, sit and attend to a teacher-directed task for five minutes without interruption in four out of five trials; and he would be able to match five out of five colors in four out of five trials. Mother informed the team that although he would sit during circle time, Student was not attending to what was going on. Bronson replied that Student does pay more attention during music and singing, and that Student requires center time follow-up to understand concepts shared during circle time. In contrast, Bronson set the baseline for the attending to task goal as follows:

March 2010; [Student] is able to attend to preferred tasks for at least 5 minutes with no more than one verbal prompt. [Student] will complete non-preferred teacher directed activity for 5 minutes with 4-5 verbal prompts and/or a high rate of tangible reinforcement (i.e., cheerios after each step for the task).

Despite Bronson’s report of progress, the evidence was to the contrary as Student continued to require heavy and constant reinforcement by staff as to each step of a preferred activity, and he also continued to require numerous prompts to attend to non-preferred activities. After one year attending the SDC, Student had failed to increase his classroom participation.

72. Parents requested that Student receive academic ABA services with goals and objectives. Because Mother took ill, the meeting was ended following a quick review of proposed goals by Bronson. The Parents requested to take home the IEP paperwork to review. The District’s FAPE offer was for Student to continue in Bronson’s SDC for the remainder of the school year five days per week for 200 minutes per day; to attend a kindergarten mild/moderate SDC for the next school year; three individual speech and language therapy sessions per week for 30 minutes per session; two 90-minute ABA therapy sessions per week; and continue APE and OT services. Additionally, the District offered to

conduct an ABA assessment by an autism specialist.¹⁴ The District also offered Student to attend an SDC during the extended school year (ESY) from June 21 through July 16, 2010, five days per week for 200 minutes daily; speech therapy four times per week for 50 minutes per session; and OT and APE services. The ESY offer did *not* include behavior intervention services. Mother signed her consent to a proposed assessment plan to have an ABA assessment by an autism specialist at the meeting.

73. On March 12, 2010, Mother signed the IEP and consented to the IEP except for ABA services.

The District's April 21, 2010 ABA/Autism Assessment

74. The District's ABA/Autism Assessment was conducted by Sara Zerby, a District ABA supervisor at Chapman Hills Elementary School. Zerby has a B.A. in early childhood special education and a M.A. in special education with an emphasis in autism. She is a certified teacher in early childhood special education and mild/moderate special education. Since the 2003-2004 school year, she was a special education pre-school and kindergarten teacher for the District. Currently, Zerby teaches a mild/moderate kindergarten class. Since November 2009, she has also been an ABA supervisor. Zerby teaches for half the day and then conducts ABA therapy the second half of the day. Prior to this assessment, Zerby had conducted two other assessments. The evaluation occurred on March 22, 2010 and April 15, 19, and 20, 2010. Zerby produced a written report dated April 21, 2010. In her report, Zerby stated that the reason for referral was to determine if additional services were appropriate for Student and to provide present levels of performance in pragmatic language, social cognition and behavior. The assessment consisted of a teacher interview with Bronson, records review, and four observations. One of the observations was conducted in the home during an ABA session.

75. Bronson related that Student had made "great progress" since August 2009, as he was able to imitate on request, match his colors, name some letters and numbers, complete most tasks, and follow verbal directions. She also stated that he had made progress in joint attention and awareness of peers. Bronson listed as areas of weakness as attention, social interaction, academics and communication. His areas of strength were listening to and singing music, listening to stories and reading books, and being highly motivated in tasks involving letters and numbers. Student was also reported to be completing fine motor tasks such as tracing his name and coloring.

76. Zerby observed Student for a total of one hour on March 22, 2010, during library time and APE. During library, the class sat while Bronson read a story. At first, Student walked away from the group until Bronson requested he sit with her, which he did.

¹⁴ The written notes of the IEP do not mention that the District offered ABA services in the offer. The form documenting the FAPE offer does include ABA services twice per week for 90 minutes per session. But an amendment to the prior IEP was presented to Mother which eliminated ABA services (see paragraph 46.).

He sat with his head down in his lap, 10 times, until prompted. Student required 12 prompts and used babbling noises 22 times. During APE, Student required verbal and sign prompting each step. He did ask for (saying “pee-pee”) and used the bathroom without problem. The class divided into groups and Student transitioned to the assigned group. He did require verbal and sign prompts to complete the initial task and one-on-one prompting to complete additional tasks. During the 30-minute APE portion, Student required 11 verbal prompts, and he made babbling noises seven times when he was asked to sit. Student was not engaged in the class gross motor activity.

77. Zerby conducted a second observation on the morning of April 15, 2010, during recess. For the first 15 minutes of the half-hour recess, Student was riding and sharing a taxi bike. He willingly gave rides to peers, permitted others to ride the bike, and was given rides by peers. Student did cover up one ear and place the other on his shoulder. During the second half of recess, Student walked around the playground and picked up dirt which he ran through his fingers while watching it fall. Zerby noted that Student’s picking up dirt was a stereotypical behavior. When the teacher announced line up at the end of recess, Student walked to the correct line and stood with his hands over his ears until the other classes left. During the entire observation, Zerby did not observe Student having any interaction with peers unless approached by the peer. Any such interaction lasted for less than one minute.

78. Zerby next observed Student during circle time on April 19, 2010. Bronson was teaching a lesson about ladybugs and counting the dots on their wings. Student looked at the teacher while she spoke, but he did not participate when the class counted aloud. The teacher then read and explained a book on ants. Student did look towards the teacher while biting his nails. The class then participated by choral response. Student did not participate in this choral response. When the class was released to centers, Student went to the library and searched through various books. He flipped pages from back to front. He also pulled the books up to his face and opened his eyes wide. One book had stickers, Student touched each sticker. Zerby classified this action as a self-stimulating behavior. Student responded to a center when the teacher called his name. He required hand-over-hand assistance to trace letters. Student was able identify the numerals three and four, but he needed hand-over-hand prompting to identify numbers one and two. In completing an art project, Student required hand-over-hand assistance. Zerby observed Student at parallel play, but he did not initiate any interaction with peers.

79. Zerby’s fourth observation was in the home setting on April 20, 2010, during his ABA session. Student was engaged although he did request frequent breaks. He was able to complete all tasks. Often, the therapist would redirect Student’s attention by saying “look at me.” Zerby felt that Student appeared to making progress.

80. Zerby found in the area of pragmatic language that Student could follow one-step directions and use gestures to communicate wants and needs with prompting. In determining whether Student had made progress, Zerby relied on Bronson and progress reports. Although Student made some improvements in expressive language, he did not use

expressive language to communicate his wants, needs or thoughts compared to peers. In the area of social cognition, Student made consistent use of eye contact and demonstrated joint attention skills. Student did not demonstrate an understanding of emotions or cause and effect of contingencies. He was not able to sustain attention to task consistently. He had difficulty identifying solutions to simple obstacles in life. Student did not demonstrate maladaptive behaviors, but he did engage in stereotypical behaviors such as babbling, and opening the mouth and eyes wide while jumping or bouncing. Zerby's observations directly contradicted the information imparted by Bronson during her interview and the present level of performance contained in the March 8, 2010 IEP. Student demonstrated no evidence that his joint attention had improved as he did not attend to class activities in listening and singing, listening to stories or reading books, and was not highly motivated in activities involving numbers or letters.¹⁵ Instead, Student was merely present but not paying any attention to what the class was learning. Zerby recommended that (a) Student continue to attend a language based classroom with low student-to-adult ratio; (b) functional language be promoted throughout the school day, (c) socialization facilitated by classroom staff to promote social language and advancement of social cognitive skills; and (d) receive one-to-one ABA therapy services five 60-minute sessions per week. The District ABA services would work on functional skills needed in the academic environment and would take into account the CARD-provided home services.

April 23, 2010 IEP Meeting

81. On April 23, 2010, an IEP meeting was held to review the Zerby assessment. In attendance were a District representative, Bronson, Zerby and Mother. Zerby reviewed her assessment report and stated that Student was showing growth in the classroom and in the ABA sessions conducted by CARD. Mother reported that Student was demonstrating sensitivity to noise from the environment although the noise level is not loud to peers and others. She also reported that Student had a tendency to pull pictures or objects close to his face. Since Student's vision check-up showed no problems, Mother concluded that this behavior was due to visual stimulation issues. She also stated that Student uses peripheral vision to view objects. The District offered to provide Student five 60-minute sessions of ABA per week at Student's school, Chapman Hills, as recommended by Zerby. Mother expressed concerns as to the qualifications of the person (an ABA aide) providing the District ABA services. Mother stated that she would pay for an independent evaluation before deciding about the District offer. She also requested permission for the evaluator to observe Student in the classroom setting. The meeting then adjourned.

Independent Psychological Evaluation by Dr. Morris

82. Parents retained Robin L. Morris, Psy.D., a clinical psychologist to conduct a psychological evaluation of Student. Morris received her B.A. in 1991 and an M.A. in clinical psychology in 1992. She received a Psy.D. in 1997 with her doctoral project on

¹⁵ It also was apparent that Student's stereotypy had increased compared to when he began attending Bronson's class.

autistic children using physical play as an adjunct to treatment. She has been a registered psychologist since 1997. She was in private practice conducting cognitive behavior counseling for autistic children from 1994 through 1998; was a case manager at Value Options; and since 2001 has been a clinical psychologist in her own practice specializing in the areas of autism and learning disabilities. Morris' evaluation was conducted on May 5 and 10, 2010 when Student was four years, nine months of age. In conducting her evaluation, Morris conducted a document review consisting of the January 2, 2009 District assessment, the March 8, 2010 IEP, and the Zerby assessment; conducted interviews with Student's mother, teacher, and Kerby of CARD; observed Student in his classroom; conducted a three-hour behavior review in her office; and administered 10 standardized tests. The tests administered were the Mullen Scales of Early Development (Mullen); Psychoeducational Profile: TEACCH Individualized Psychoeducational Assessment of Children with Autism Spectrum Disorders-Third Edition (PEP-3); Bracken School Readiness Assessment- Third Edition (BSRA-3); Beery Developmental Test of Visual Motor Integration (VMI); Peabody Picture Vocabulary, Fourth Edition (PPVT-4); Gilliam Autistic Rating Scale-Second Edition (GARS-2); Autism Diagnostic Observation Schedule-Module One (ADOS); Child Development Inventory (CDI); and the parent and teacher forms of the Social Skills Rating System (SSRS).

83. Student's ABA supervisor, Kerby, reported that CARD was then working on promoting vocal language and verbal approximations (i.e., "I want ____"). At the time, Student's language was only beginning to emerge. He could communicate using some signs which would be paired with verbal approximations. As to Student's maladaptive behaviors, there had been drastic improvement in tantrums which still tended to occur when he was denied access to tangible objects and to escape. Student still continued elopement in the community. Student exhibited physical stereotypy including hand flapping and tapping of objects. CARD also worked on toilet training and teeth brushing.

84. Mother reported to Morris that over the preceding three months Student had shown improvement in his language and could say words such as "eat" when hungry and was beginning to use "I want____." Student would pull familiar adults by the hand and lead them to an object he desired. He was able to respond to his name with higher frequency and could follow one-step commands with greater regularity. Student continued to elope in the home and community and engage in self-stimulatory behaviors. Student was toilet trained but failed to wipe after a bowel movement and had urination accidents on occasion. Student would purposely wet his pants to avoid completion of a non-preferred task.

85. Bronson also reported that Student was starting to imitate speech by using "I want ____" to express desires. Student persistently led adults to preferred objects. He was able to follow verbal instructions if they were part of a routine, and he understood one-step directions that were familiar. Student was able to imitate new tasks (i.e., gluing down paper), after having the task modeled. Student was compliant, but he exhibited self-stimulatory behaviors including jumping when excited and using visual scrutiny of items. Student also turned over books and flipped pages repeatedly from back to front. Bronson reported that Student was aware of peers in his surroundings but did not interact with them. He required

constant one-on-one redirection to attend in a group setting. Student was able to match two-dimensional objects and had learned to point to colors.

86. On May 5, 2010, Morris observed Student at Chapman Hills Elementary School for 75 minutes. Student's class comprised 14 children (three were absent that day) and a teacher plus four aides. During recess, Student did not engage with the other children as he wandered the playground alone. He walked to a tree, rubbed it with his hands and then licked his fingers. For a 10-minute period, he then sat down in a sandy area and repeatedly poured sand from his hand watching it fall and then poured it down his shirt. He then poured the sand next to his ears and then his hair. When the teacher called for the class to enter the classroom, Student lined up and entered the classroom. During a lesson, Student sat quietly but did not pay attention nor participate in class recitation. Student was escorted to a workstation and was assisted by a class aide in a craft project. Later, Student was able to imitate gluing items on a paper at a new workstation without assistance. After completion of the task, Student did a puzzle. When instructed to clean up, Student did not comply and sat flipping pages in a book. At a music lesson, Student was not able to imitate dances the class was doing, and he became fixated with putting his hands in his pockets. Morris noted that Student could not participate independently in the class activities.

87. Morris observed Student during a three-hour evaluation. Student was able to sit in his chair appropriately for his age level but was restless and had difficulty attending. He required numerous prompts to attend. He was unable to understand instructions for testing designed for four year olds so that some tests could not be administered. Student got the majority of his needs met by bringing objects to his mother, who was present for part of the session, or Morris. Although highly motivated to verbalize, Student struggled as he could not say words. He was consistent in responding to his name. He was able to comply with one-step instructions when he understood them, but he was unable to follow two-step directions. Student engaged in stereotypy by taking a Thomas the Train book and flipping its pages from back to front, squinting his eyes tightly, moved objects close to his mouth in a repetitive fashion, jumped repeatedly, and opened and closed the door. During breaks, Student was offered a variety of toys in which he demonstrated limited interest. He would return to the Thomas book and flip the pages.

88. The Mullen assesses early intellectual development and school readiness for children up to 33 months in gross motor and 68 months in cognition. The Mullen is broken into five scales. Student was in the "very low" range in all areas. Student scored an age equivalent of below 33 months for gross motor and 39 months for fine motor. In visual reception, Student was an age equivalent of 26 months. He scored age equivalents of 14 months in receptive language and 15 months in expressive language. The BSRA-3 is utilized to measure academic readiness by evaluating a child's understanding of 85 functional concepts in categories of letters, colors, numbers/counting, sizes/comparisons, and shapes. The assessment was aborted because Student was unable to receptively identify colors,

numbers, letters, or shapes and comparisons.¹⁶ The PPVT-4, which measures receptive vocabulary, was also aborted due to Student's inability to point to a picture choosing from one of four quadrants.

89. The CDI is a parent questionnaire that measures development in the areas of social, self-help, gross motor, fine motor, expressive language, language comprehension, and letter and number skills. Student's general development score was an age equivalency of one year seven months and was in the "significantly delayed" range. Student scored "significantly delayed" in all areas. His age equivalencies were less than 12 months in social development, expressive language and language comprehension. He had an age equivalency of one year, nine months in fine motor; and one year six months in numbers. Student's age equivalent scores were two years five months in self-help; two years two months in gross motor; and two years seven months in letters. On the VMI, which assesses an individual's ability to integrate visual and motor abilities, Student received a standard score of 81, which was in the below average range with an age equivalency of three years six months.

90. On the GARS-2, which measures whether the child has many of the characteristics associated with autism, Student received an autism index score of 109 which fell in the "very likely" probability of Student having autism. The ADOS is a standardized assessment tool which aids in the diagnosis of autism spectrum disorders. Student's scores exceeded the autism cutoff in communication, reciprocal social interaction, and communication and social interaction. Student demonstrated limited responsiveness with Morris and no ability to smile in response to purely social overtures from an adult. He did not change facial expressions nor did he wave back to the examiner after she waved at him. When Morris attempted to engage Student in a tickle game, he did not integrate gaze, facial expressions and vocalizations.

91. The SSRS assesses a child's social behaviors by a questionnaire. Mother filled out the parent form, while Bronson did the teacher form. Mother's form scored Student with a standard score of 48 in social skills which fell below the second percentile (low range) and a 91 in problem behaviors which was in the 27th percentile and in the average range. Bronson scored Student with an 86 and 88 standard scores in social skills and problem behaviors respectively which were in the 18th and 21st percentiles ("average" range). Mother reported that Student never follows instructions, helps with household tasks, participates in group activities, introduces himself to new people, starts conversations, nor controls his temper. Bronson indicated that Student never makes friends, initiates conversations with peers, or accept peers' ideas for group activities. Mother reported problem behaviors including tantrums, fidgets excessively, never aggressive to people or objects, never acts sad, and never disobeys rules or requests. Bronson reported that Student very often follows instructions, controls his temper in situations with adults, waits turn in activities, and controls his temper with peers.

¹⁶ This is contrary to Bronson's progress reports, her statements made at IEP meetings, and the present levels of performance stated in Student's IEPs.

92. The PEP-3 comprises two parts. The first is a performance portion that uses direct testing and observations and a second portion as to behavior. On the performance portion, Student scored at 27 months in cognitive skills, less than 12 months on expressive abilities and 18 months in the area of receptive language. Student was at the 30 month level for fine motor abilities and 38 months for gross motor skills. In visual motor integration abilities, Student scored at the 32 month level. On the second portion, Student made unintelligible sounds, did not communicate at an age appropriate level, rarely communicated spontaneously, did not play in appropriate ways, and his attention span was not age appropriate.

93. Morris found that Student met the diagnosis criteria of an autism disorder and would meet the special education eligibility category for autistic-like behaviors. Morris noted during her observation at school Student was off task much of the time, but he could be redirected. But, many learning opportunities were lost because of aides' lack of involvement with Student since the teacher was the one who did the reinforcing of almost all behavioral problems. Morris concluded:

[Student] was thought to have benefitted from his current setting because of the tremendous motivation and energy the teacher displayed. Though the examiner believes the teacher is an appropriate fit for [Student], she is aware the teacher is unable to successfully offer him the individual support he needs. The examiner believes [Student] requires 1:1 aide who has significant training in the area of learning theory and can be supervised by a doctorate level or supervisor who holds a B.C.B.A. It is the examiner's belief 1:1 aide assistance is still needed during class time to address off task behaviors, promote socialization, increase smooth and efficient classroom transitions and increase correct pencil grip when participating in writing activities. It is recommended in the classroom and at home, social scenarios be set up between [Student] and children from school or in the neighborhood. These opportunities should be somewhat novel in nature with the goal of addressing his off task behavior simultaneously with encouraging prosocial behavior (taking turns, sharing, reciprocity). Social goals can also be addressed during the time [Student] participates in his typical classroom setting.

94. Morris recommended that Student (a) continue in his then current placement with the support of a trained one-to-one aide and that Student attend school five days per week for three hours per day; and (b) receive ABA therapy at the current rate at home and for a total weekly amount of 25 hours¹⁷ to address Student's behavior, increasing communication and teaching prosocial behaviors and establish goals regarding safety. Morris also recommended that parents continue to receive training on how to use positive behavioral management; goals should incorporate cognitive flexibility, compliance, tolerance for distressing auditory stimuli, social and adaptive living skills relating to toileting; and Student

¹⁷ This requirement would include the 19 hours Student received at home from CARD plus an additional six hours at school.

should be taught basic safety information. Morris recommended the following specific goals: (1) increase Student's eye contact when spoken to by an adult or peer across different settings; (2) increase Student's transitioning speed in class; (3) increase Student's ability to attend to teacher's instruction from a distance of two feet; (4) increase his ability to attend for longer time periods; (5) increase his use of gestures when communicating; (6) increase Student's ability to reproduce shapes and designs using paper and pencil; (7) increase his awareness of others' emotions; (8) address his ability to appropriately engage in age appropriate activities including looking at books, playing sports and board games; (9) decrease stereotypy; (10) decrease escape avoidance behaviors including wetting his pants; and (11) increase his ability to independently complete tasks including taking off shoes, brushing teeth, and wiping after a bowel movement.

May 18, 2010 and June 2, 2010 IEP Meetings

95. On May 18, 2010, a 50-minute IEP meeting was held at Mother's and Bronson's request to review the independent evaluation conducted by Morris and to discuss the District's offer to add ABA services. Mother, the Chapman Hills principal, Zerby, and Bronson were present. The Morris written report was discussed, and no one took exception to it. Mother requested that the District provide Student a one-to-one aide during the school day in lieu of ABA services after school as recommended by Morris. She also expressed concern as to the qualifications of the Behavior Support Aides who provide the District's ABA services. Mother requested that ABA services be provided by a credentialed ABA person in lieu of an aide.¹⁸ She also requested that Student's aide be from CARD to offer continuity from the home ABA to school. Zerby suggested that Student might be more appropriately placed within the District's Success Program, a moderate/severe SDC geared to autistic children. Mother and Bronson did not feel it was appropriate for Student because it was too restrictive an environment. After a discussion, the IEP team decided that the Success program was not an appropriate placement. The meeting was adjourned to June 2, 2010, to allow consultation with Kristi Franco, the District's special education coordinator for elementary schools.

96. On June 2, 2010, the IEP team reconvened to discuss the addition of ABA services and parental concerns related to such services. The District offered after-school ABA services five 60-minute sessions per week. Parents requested a one-to-one shadow aide provided by Student's current ABA provider, CARD, for the 2010-2011 school year in lieu of District offered ABA. Student had been placed in a kindergarten SDC for 2010-2011. Mother also pointed out that after school services would conflict with other services that Student was receiving outside of those provided by the District. Parents did not consent to the District's FAPE offer as they wanted to consult with others.

¹⁸ District ABA services were administered by a District-trained aide under the supervision of a District autism expert.

Notification of Private Placement

97. On June 8, 2010, Franco notified Parents in writing that their request for one-to-one CARD-trained aide and CARD-supervised shadow aide was denied because “the team agreed the aide is not required for [Student] to receive educational benefit from his program.” The letter also stated that “[t]he District did not consider any other options.”

98. Parents replied to the June 8, 2010 letter on June 17, 2010. Parents notified the District that they were withdrawing Student from his current SDC due to lack of support and placing him in a private kindergarten with a one-to-one aide starting July 2010. Parents also stated that they would seek reimbursement from the District. Parents cited in support of their position that Student has made no progress as evidenced that he had not met his goals and the Morris evaluation which demonstrated the necessity of a one-to-one aide.

99. On August 6, 2010, Franco forwarded a letter to Parents informing them that Student had been assigned to Zerby’s kindergarten SDC class at Chapman Hills starting on August 25, 2010. Parents responded on August 25, 2010, by letter addressed to the District stating that Student would begin attending a private school with an ABA therapy shadow aide starting September 8, 2010. Parents added that Student ‘has exhibited a significant improvement with an ABA therapy shadow in all areas during this summer.’”

September 22, 2010 Observation at the Private Placement

100. Student enrolled in the kindergarten at Salem Lutheran School (Salem), which was located close to his home. The class consisted of 17 pupils, a classroom aide and a teacher, Ms. Roper. Student attended three days per week for three and a half hours per day. Student also had a CARD shadow aide, Jackie Holland.

101. On September 22, 2010, Morris observed Student at Salem. During the first 15 minutes, Student was present without Holland and with two to three other children prior to the class entering. Morris noted that Student’s abilities and behavior differed without his aide present. Without his aide, Student moved from activity to activity staying only 30 seconds at each activity unless his teacher offered him individual attention. Without the aide, Student did exhibit gestures including shaking and nodding his head and pointing at desired objects. Holland had a structured approach which emphasized using language and social settings. Student had to verbally ask for items using sentences modeled for him by Holland. She also attempted to increase the length of words Student spoke spontaneously into sentences. Holland set up scenarios to engage Student in social situations with peers. Student’s play repertoire was minimal and he required significant modeling to engage in play with peers. After engaging in an activity for one minute, Student would engage in avoidant behavior. Holland would keep him at the activity by prompting. Holland said that the current goal was to have Student engage in an activity for two and a half minutes at a time.

102. Morris concluded that Student was benefitting from the Salem class with the aide support. She noted that Holland “was clearly knowledgeable in the principles of

learning theory and was noted to take data similar to programs based in Applied Behavior Analysis.” Morris concluded, “It is suggested [Student] continue participating in his current placement at Salem Lutheran School.”

Student’s Progress at Providence 2010-2011

103. Lindsay Mitchell, a SLP from Providence, began working with Student on December 1, 2010. Mitchell has a B.A. in communication disorders and an M.S. in speech language pathology. She has been a licensed SLP for seven years. She worked as a SLP for the Rialto Unified School District from 2006 through 2008 and with Pediatric Therapy Solutions from 2007 to 2010. In 2010, she joined Providence. Additionally, she works with the Children’s Hospital of Orange County (CHOC) with the cleft palate team. Mitchell estimates that over half of her case load involves children on the autism spectrum.

104. On December 16, 2010, Mitchell authored a written Speech and Language Plan of Care. On December 14, 2010, Mitchell administered the Preschool Language Scale-Fourth Edition (PLS-4). Student received standard scores of 50 in total language, auditory comprehension, and expressive communication which placed him in the first percentile. Student’s age-equivalencies were two years-one month in auditory comprehension and one year-11 months in expressive communication and total language.¹⁹ Mitchell noted that Student continued “to present with a severe receptive and expressive language disorder.” Providence had worked extensively on Student’s articulation skills as they greatly impacted his expressive language skills. Although Student’s attending had improved, he still required moderate prompting to redirect him. Mitchell recommended that Student continue with individual speech sessions twice per week. She also recommended that Student receive two weekly group therapy sessions to generalize the skills learned in the individual sessions and to work on social skills. Student commenced group session on January 12, 2011.²⁰

105. In May 2011, Student’s group was disbanded. On May 4, 2011, Horikawa, the group SLP, issued a discharge report. She described Student’s levels thusly:

He is now able to readily imitate verbal models and is beginning to use language in a functional manner. Group therapy has focused on developing skills which allow [Student] to participate appropriately in a group setting (sitting and attending, following directions, basic turn taking, using language to interact with peers, etc.). [Student] has had fair participation in his current treatment program. Attendance has been excellent. There has been good follow-up with carry-over at home.

¹⁹ In Franklin’s initial assessment, Student’s expressive and receptive skills had been measured in the six to nine month range and his pragmatic skills at nine to 12 months.

²⁰ In May 2011, Student’s group was discontinued.

Clinician reports limited measurable improvement within the treatment session.

CARD April 30, 2011 Progress Report

106. On April 30, 2011, Tia authored a written progress report. Student was receiving 20 hours of one-to-one ABA support including a classroom aide three days per week while Student attended a general education pre-kindergarten class at Salem. CARD also supplied eight hours per month consultation and eight hours per month of supervision. In addition to the CARD services, Student was receiving two 30-minute individual speech and language sessions weekly from Providence. Student still could not maintain attention so he required individual support.

107. As to Student's ultimate goals for elopement, non-compliance, tantrum and stereotypy, he had made some progress but had not met his six month goals. For elopement, Student had decreased these incidents from the rate of .72 times per hour six months earlier to .19 times. In a generalized setting (the community), Student decreased incidents of elopement in stores from 72 percent to 45 percent. In non-compliance, Student decreased incidents from 1.01 times per hour to .69 times. But in a generalized setting, his non-complaint behavior was at 45 percent of the time. Student reduced incidents of tantrum from .96 times per hour to .58 times. In a generalized setting, Student's tantrums decreased from 90 percent to 55 percent. Student did not make any progress on physical and visual stereotypy goals. Student met his joint attention short time goal as he was able to attend to a task or familiar person for up to two and a half minutes in 8 out of 10 opportunities. Student demonstrated progress in areas of communication and following simple instructions, toileting needs, and turn taking. He also demonstrated the ability to identify happy, sad, mad, tired, and silly when stimuli was presented in a field of three.

Costs Incurred by Parents for Private Placement and Services²¹

108. The cost to attend Salem was three hundred twenty dollars (\$320.00) per month for tuition plus a registration fee of one hundred seventy-five dollars (\$175.00). Student attended from September 13, 2010, to June 2, 2011. Student produced a billing statement from Salem which indicated that Student had paid the sum of three thousand four hundred forty-four dollars (\$3,444.00) to attend Salem for school year 2010-2011.

109. The cost to parents for the one-to-one shadow aide services provided by CARD for the 2010-2011 school year was sixteen thousand seven hundred seventy dollars (\$16,770.00).

²¹ Parents are not seeking reimbursement for the Providence speech and language services as these services were paid through insurance.

Appropriateness of District's Speech and Language Services Offers of December 8, 2008 and March 12, 2009

110. Mitchell, Student's expert, opined that the District's offer of speech and language services of two 45-minute group sessions was inappropriate for Student. Mitchell testified that Student required speech and language services two 45-minute individual sessions per week. This is somewhat contradicted by the recommendation by the Providence October 21, 2009 report that Student receive two 30-minute individual sessions per week to address his delays in speech, communication, and play skills. Mitchell felt that Student was not a candidate for group speech because of his poor attending skills although six of the seven goals in Providence's October 21, 2009 report could be worked on in a group session. The only goal requiring individual therapy was speech production, which was to increase the use of age-appropriate phonemes during play and daily living. Franklin indicated that small group speech sessions are preferable to work on eye contact, joint attention, spontaneous communication, imitating peers, and pragmatics. Franklin also noted that Student did not demonstrate joint attention, and he was a candidate for individual speech therapy because of the severity of his deficits. Moss testified that the absence of a speech production goal was "surprising." Student failed to more than minimally participate in the group because of his inability to interact with peers, maladaptive behaviors (i.e., arm flapping, jumping up and down), and his attending problems. This resulted in his SLP, Horvath, to ask that Mother pick Student up early as the sessions were too long for him to handle. Moss, who later was Student's SLP, recommended that he receive individual attention to progress in functional skills, speech aspects like word sounds and to increase the rate of progress in a short amount of time. Because of Student's slow progress, meeting only two of four speech and language goals, the IEP team at the March 8, 2010 IEP meeting, adopted Moss' recommendation to have Student's speech services increased to three individual 30-minute sessions.

Appropriateness of the District's Offers Regarding Behavioral Services

111. The consensus of experts in the field of autism is that early intervention, as soon as a child is suspected of having an autism spectrum disorder, is required. (National Research Council, "Educating Children with Autism," 2001, p.6 (National Research Council) (Exhibit S79).) "Thirty years of research demonstrated the efficacy of applied behavior methods in reducing inappropriate behavior and in increasing communication, learning, and appropriate social behavior." ("Mental Health: Report of the Surgeon General," 2003, p. 7 (Ex. S78).) "Because young children with autistic spectrum disorders lack social and communicative skills necessary for attending to an adult and learning from distal instruction, it is generally assumed that initial skill development will be accompanied from individual instruction." (National Research Council, Exhibit S79 at p. 137.)

112. Moore testified that most autistic children lack classroom skills to benefit from the curriculum because of maladaptive behaviors and an inability to attend. This coupled with their severe communication problems and lack of social skills prevents these children from being able to learn. Based on Student's levels, Moore opined that he would require at a minimum a 30-hour ABA program both at home and at school. Because of Student's

constant need to be redirected to stay on task and his maladaptive and stereotypical behaviors, Moore opined that Student required a full time ABA trained one-to-one aide. Bronson also testified that Student required maximum prompting for every step in a task in August 2009, and she was looking for ABA support to assist Student. Kessler noted that Student did not participate in circle time without constant prompting. An aide would assist in keeping Student on task, assist in socialization, reduce maladaptive behaviors, reduce stereotypy, and to continue and reinforce ABA techniques which were part of his home ABA program. Moore cited a number of peer-reviewed published studies and articles to support his position. Both Morris and Moore testified that they knew of no published articles or studies that would support the District's three-hour ABA program offered at the December 8, 2008 and March 12, 2009 IEP meetings. Kessler corroborated Morris and Moore as she testified that she also had no knowledge of any published articles to support the District's proposed three-hour ABA program for a child who presented with the levels of Student. Additionally, Zerby noted that as of April 21, 2010, Student still did not use expressive language to communicate his wants, needs, or thoughts. Student was able to follow one-step directions and use gestures to communicate his wants and needs with prompting. He was able to repeat certain words only when modeled by an adult. Zerby recommended that Student receive ABA one hour for five days per week.

113. Morris opined that Bronson's class was an "appropriate fit" for Student because of Bronson's motivation and energy as long as Student received the services of a trained one-to-one aide to address off-task behaviors and promote socialization. Kessler agreed that young autistic children lack the social and communicative skills necessary for learning from distal instruction, and it is generally assumed that initial skill development be accomplished from individual instruction. As described prior, Student rarely participated in class activities unless prompted. He had almost no interaction with peers. He often wandered alone during recess indulging in self stimulating behaviors like running sand through his fingers. Student constantly engaged in self-stimulatory behaviors and could not maintain joint attention independently. This was evidenced by the minimum, if any, progress Student made on his goals. Student showed no improvement in his academic readiness. Thus, Student was getting minimal academic benefit, if any, without a one-to-one ABA trained aide.

LEGAL CONCLUSIONS

Burden of Proof

1. In a special education administrative due process proceeding, the party seeking relief has the burden of proving the essential elements of his claim. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 163 L.Ed.2d 387].) In this case, Student has the burden of proof.

Jurisdiction

2. A child with a disability has the right to a free appropriate public education (FAPE) under the Individuals with Disabilities Education Act (IDEA or Act) and California law. (20 U.S.C. § 1412(a)(1)(A); Ed. Code, § 56000.) The Individuals with Disabilities Education Improvement Act of 2004 (IDEIA), effective July 1, 2005, amended and reauthorized the IDEA. The California Education Code was amended, effective October 7, 2005, in response to the IDEIA. The primary goal of the IDEA is to “ensure that all children with disabilities have available to them a free appropriate public education that emphasizes public education and related services.” (20 U.S.C. § 1400(d)(1)(A); see *J.L. v. Mercer Island School District* (9th Cir. 2009) 592 F.3d 938, 947 (*Mercer Island*)).

3. Under special education law, the parent of a disabled child has the right to present an administrative complaint with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE. (20 U.S.C. § 1415(b)(6)(A); 34 C.F.R. § 300.507(a)(2006)²²; Ed. Code, § 56501, subd. (a)(1)-(4).)

Definition of a FAPE

4. A child with a disability has the right to a FAPE under the IDEA and California law. (20 U.S.C. §1412(a)(1)(A); Ed. Code, § 56000.) A FAPE is defined as special education and related services that are provided at public expense and under public supervision and direction that meet the state’s educational standards and that conform to the student’s IEP. (20 U.S.C. §1401(9); Cal. Code Regs., tit. 5, § 3001, subd. (p).) Special education is defined as specially designed instruction and services (DIS), provided at no cost to parents, that meets the unique needs of a child with a disability and permits him or her to benefit from instruction. (20 U.S.C. § 1401(29); Ed. Code, § 56031.) Special education related services include transportation, and developmental, corrective, and supportive services, such as mental health counseling services, that may be required to assist the child with a disability to benefit from special education. (20 U.S.C. § 1401(26); Ed. Code, § 56363.)

5. “Language and speech development and remediation” are considered to be a DIS. (Ed. Code, § 56363, subd. (b)(1); Cal. Code of Regs., tit. 5, § 3051.1.) Behavior intervention is also considered a DIS. (Ed. Code, §§ 56520 et seq.; Cal. Code of Regs., tit. 5, § 3052.)

6. There are two parts to the legal analysis of whether a local educational agency (LEA), such as a school district, offered a student a FAPE. The first question is whether the LEA has complied with the procedures set forth in the IDEA. (*Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 176, 206-207 [102 S.Ct. 3034] (*Rowley*)). The second question is whether the IEP developed through those procedures was substantively appropriate. (*Id.* at p. 207.)

²² All references to the Code of Federal Regulations are to the 2006 version.

Procedural Violations

7. Procedural flaws do not automatically require a finding of a denial of FAPE. A procedural violation does not constitute a denial of FAPE unless the procedural inadequacy (a) impeded the child's right to a FAPE; (b) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE; or (c) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(i) & (ii); Ed. Code, § 56505, subd. (f)(2)(A)-(C); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1483-1484 (*Target Range*).

Assess in All Areas of Suspected Disability

8. Before any action is taken with respect to the initial placement of an individual with exceptional needs, an assessment of the pupil's educational needs shall be conducted. (Ed. Code, § 56320.) The student 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 determining an appropriate educational program for the student. (Ed. Code, § 56320, subds. (e), (f); 20 U.S.C. § 1414(b)(2); 34 C.F.R. § 300.304(b)(2), (c)(4)(2006).)

9. The threshold for suspecting that a child has a disability is relatively low. (*Dept. of Educ. v. Cari Rae S.* (D. Hawaii 2001) 158 F.Supp.2d. 1190, 1195. (*Cari Rae S.*)) A school district's appropriate inquiry is whether the child should be referred for an evaluation, not whether the child actually qualifies for services. (*Ibid.*)

Autistic-like Behaviors Eligibility Category

10. Pursuant to California Code of Regulations, title 5, section 3030, subdivision (g), a pupil meets the first prong of the eligibility criteria for autistic-like behaviors if he or she exhibits any combination of the following autistic-like behaviors, including but not limited to: (1) an inability to use oral language for appropriate communication, (2) a history of extreme withdrawal or relating to people inappropriately and continued impairment in social interaction from infancy through early childhood, (3) an obsession to maintain sameness, (4) extreme preoccupation with objects or inappropriate use of objects or both, (5) extreme resistance to controls, (6) displays peculiar motoric mannerisms and motility patterns, and (7) self-stimulating, ritualistic behavior. For the second prong of the criteria, a pupil must exhibit any combination of the above behaviors and also establish that the autistic disorder is adversely affecting his or her educational performance to the extent that special education is required. Only if both components are met does the pupil meet the eligibility criteria for autism. (20 U.S.C. § 1402; 34 C.F.R. § 300.8; Cal. Code Regs., tit. 5, § 3030, subd. (g).)

Determination of Appropriateness of an IEP

11. An IEP is an educational package that must target all of a student's unique educational needs, whether academic or non-academic. (*Lenn v. Portland School Committee* (1st Cir. 1993) 998 F.2d 1083, 1089.) The term "unique educational needs" is broadly construed and includes the student's academic, social, emotional, communicative, physical, and vocational needs. (*Seattle Sch. Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500[citing J.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106].) A disabled child's IEP must be tailored to the unique educational needs of that particular child, who, by reason of disability, needs special education and related services. (*Ibid.*)

12 Federal and State special education law require generally that the IEP developed for a child with special needs contain the present levels of the child's educational performance and measurable annual goals, including benchmarks or short-term objectives, related to the child's needs. (20 U.S.C. § 1414 (d)(1)(A)(ii); Ed. Code, § 56345, subd. (a).) The purpose of goals and measurable objectives is to permit the IEP team to determine whether the pupil is making progress in an area of need. (Ed. Code, § 56345.) In developing the IEP, the IEP team must consider the strengths of the child, the concerns of the parents for enhancing the education of their child, the results of the initial assessment or most recent assessment of the child, and the academic, functional and developmental needs of the child. (20 U.S.C. § 1414(d)(3)(A).) For each area in which a special education student has an identified need, the IEP team must develop measurable annual goals that are based upon the child's present levels of academic achievement and functional performance, and which the child has a reasonable chance of attaining within a year. (Ed. Code, § 56344.)

13. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (See *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314 (*Gregory K.*).) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) Nor must an IEP conform to a parent's wishes in order to be sufficient or appropriate. (*Shaw v. Dist. of Columbia* (D.D.C. 2002) 238 F.Supp.2d 127, 139.)

14 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* (3d Cir. 1993) 993 F.2d 1031, 1041 (*Fuhrmann.*).) Under this "snapshot rule," it must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*)

15 In *Rowley*, the United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the requirements of the IDEA. Under *Rowley* and state and federal statutes, the standard for determining whether a district's provision of services substantively and procedurally provided a FAPE involves four factors: (1) the services must be designed to meet the student's unique needs; (2) the

services must be reasonably designed to provide some educational benefit; (3) the services must conform to the IEP as written; and (4) the program offered must be designed to provide the student with the foregoing in the least restrictive environment. While this requires a school district to provide a disabled child with meaningful access to education, it does not mean that the school district is required to guarantee successful results. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56301, *Rowley, supra*, at p. 200.)

16 In *Rowley*, the Supreme Court held that the IDEA does not require school districts to provide special education students the best education available or to provide instruction or services that maximize a student’s abilities. (*Rowley, supra*, 458 U.S. at p. 198.) School districts are required to provide a “basic floor of opportunity” that consists of access to specialized instruction and related services individually designed to provide educational benefit to the student. (*Id.* at p. 201; *Mercer Island, supra*, 592 F.2d at p. 947.)

17. There is no one test 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* (2d Cir. 1998) 142 F.3d 119; *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; *M.H. v. Monroe-Woodbury Central School Dist.* (S.D.N.Y. March 20, 2006, No. 04-CV-3029-CLB) 2006 WL 728483, p. 4; *Houston Indep. School Dist. v Caius R.* (S.D.Tex. March 23, 1998, No. H-97-1641) 30 IDELR 578; *El Paso Indep. School Dist. v. Robert W.* (W.D.Tex. 1995) 898 F.Supp. 442, 449-450.) The issue is whether the IEP was appropriately designed and implemented and is reasonably calculated to convey a student with a meaningful benefit. (*Rowley, supra*, 458 U.S. at p. 192; *Adams, supra*, 195 F.3d at p. 149; *J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 439 (*Fresno*)).

Parent Participation in the IEP Process

18. Special education law places a premium on parental participation in the IEP process. Parents must have the opportunity “to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child.” (20 U.S.C. § 1415(b)(1).) In this regard, an educational agency must ensure that one or both of the parents of a child with a disability is present at each IEP team meeting. (34 C.F.R. § 300.322(a)(2006); Ed. Code, §§ 56341.5, subd. (a), 56342.5.) The United States Supreme Court has recognized that parental participation in the development of an IEP is the cornerstone of the IDEA. (*Winkelman v. Parma City School Dist.* (2007) 550 U.S. 516, 524 [127 S.Ct. 1994, 167 L.Ed.2d 904]. Parental participation in the IEP process is also considered “(A)mong the most important procedural safeguards.” (*Amanda J. v. Clark County School* (9th Cir. 2001) 267 F.3d 877, 882.)

19. Under these guidelines, an educational agency must permit a child's parents "meaningful participation" in the IEP process. (*Ms. S. v. Vashon Island School District* (9th Cir. 2003) 337 F.3d 1115, 1131-1132.) In order to fulfill the goal of parental participation in the IEP process, the school district is required to conduct, not just an IEP meeting, but also a meaningful IEP meeting. (*Target Range, supra*, 960 F.2d at p. 1485; *Fuhrman, supra*, 993 F.2d at p. 1036.) A parent has meaningfully participated in the development of an IEP when she is informed of her child's problems, attends the IEP meeting, expresses her disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools*. (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann, supra*, 993 F.2d at p. 1036.) Parents have an adequate opportunity to participate in the IEP process when they are "present" at the IEP meeting. (34 C.F.R. § 300.322(a); Ed. Code, § 56341.5, subd. (a).) An adequate opportunity to participate can include a visit by the parent to the proposed placement. (*Fresno, supra*, 626 F.3d at p. 461.) An adequate opportunity to participate can occur when parents engage in a discussion of the goals contained in the IEP. (*J.G. v. Briarcliff Manor Union Free School Dist.* (S.D.N.Y 2010) 682 F.Supp.2d 387, 394.)

Required Attendees at IEP Team Meetings

20. The IDEA and California education law require certain individuals to be in attendance at every IEP team meeting. In particular, the IEP team must include: (a) the parents of the child with a disability; (b) not less than one regular education teacher of the child, if the child is or may be participating in the regular education environment; (c) not less than one special education teacher, or where appropriate, not less than one special education provider of the child; (d) a representative of the school district who is knowledgeable about the availability of the resources of the district, is qualified to provide or supervise the provision of special education services and is knowledgeable about the general education curriculum; (e) an individual who can interpret the instructional implications of evaluation results, who may be a member of the team described above; (f) at the discretion of the parent or the district, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and (g) whenever appropriate, the child with a disability. (20 U.S.C. § 1414 (d)(1)(B); Ed. Code, § 56341, subd. (b)(1)-(7).)

ESY

21. In addition to special education instruction and services during the regular school year, ESY services must be provided only if the IEP team determines, on an individual basis, that the services are necessary for a child to receive a FAPE. (34 C.F.R. § 300.106 (2006); Ed. Code, § 56345, subd. (b)(3).) ESY services shall be provided to pupils who have handicaps which are likely to continue indefinitely or for a prolonged period, and interruption of the pupil's educational programming may cause regression, when coupled with limited recoupment capacity, rendering it impossible or unlikely that the pupil will attain the level of self-sufficiency and independence that would otherwise be expected in view of his or her handicapping condition. (Cal. Code Regs., tit. 5, § 3043.) An ESY program shall be included in the IEP when the IEP team determines that an ESY program is needed. (*Ibid.*)

The Appropriate Remedies for the District's Denial of FAPE

Reimbursement

22. A parent may be entitled to reimbursement for placing a student in a private school without the agreement of the school district if the parents prove at a due process hearing that: 1) the District had not made 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) (2006); Ed. Code, § 56175; see also *School Committee of the Town of Burlington v. Department of Education* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 385] (*Burlington*) [reimbursement for unilateral placement may be awarded under the IDEA when the District's proposed placement does not provide a FAPE].)

23. To be appropriate, the parent's private placement does not have to meet the standards of a public school offer of FAPE. (Ed. Code, §§ 56175, 56176; 34 C.F.R. § 300.148(c) (2006).) It must, however, address the student's needs and provide educational benefit to the student. (See *Target Range, supra*, 960 F.2d at p. 1487.) The Ninth Circuit recently clarified that a private placement need not furnish "every special service necessary to maximize [a] child's potential." (*C.B. v. Garden Grove Unified School District* (9th Cir. 2011) 635 F.3d 1155, 1159.) Instead, the private placement must provide "educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to benefit from instruction." (*Ibid.*)

Compensatory Education

24. Compensatory education is an equitable remedy designed to "ensure that the student is appropriately educated within the meaning of the IDEA." (*Parents of Student W v. Puyallup School District, No. 3* (9th Cir. 1994) 31 F.3d 1489, 1497 (*Puyallup*).) Compensatory education is designed to compensate a student who was actually educated under an inadequate IEP, and it is a prospective award of educational services designed to catch-up the student to the level he should have been absent the denial of FAPE. (*Brennan v. Regional School District No. Board of Educ.* (D. Conn. 2008) 531 F.Supp.2d 245, 265.)

25. The remedy of compensatory education depends on a "fact-specific analysis" of the individual circumstances of the case. (*Puyallup, supra*, 31 F.3d at p. 1497.) The court is given broad discretion in fashioning a remedy, as long as the relief is appropriate in light of the purpose of special education law. (*Burlington, supra*, 471 U.S. at p. 369.) There is no obligation to provide day-for-day compensation for time missed. (*Park v. Anaheim Union High School District* (9th Cir. 2006) 464 F.3d 1025, 1033.) An award of reimbursement may be reduced if warranted by an analysis of the equities of the case. The conduct of both parties must be reviewed and considered to determine whether relief is appropriate. (*Puyallup, supra*, 31 F.3d at pp. 1496-1498.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.)

DETERMINATION OF ISSUES

(a-1) Did the District deny Student a FAPE at the December 18, 2008 IEP Meeting by failing to assess Student to determine if he was eligible for special education under the category of autistic-like behaviors?

26. Student contends that the District denied Student a FAPE by its failure to assess Student for eligibility for special education and related services under the category of autistic-like behaviors. The District contends that it was not in possession of sufficient information to suspect that Student may be eligible for special education under the category of autistic-like behaviors as Parents' responses on the case history form failed to indicate that autism was a concern.

27. Although a number of parental responses on the case history form would not be indicative of a child with autism, other responses did. The information possessed by the District was not limited to that of the case history form. During Franklin's interview, Parents expressed concern that Student was autistic; and they stated that Student was in his own world, not toilet-trained, had no vocabulary, did not put two or three words together, did not engage in conversation, did not make eye contact, liked order and routine, and did not respond to his name. Franklin observed Student during the assessment and noted that he failed to make eye contact, was obsessed with his parent's cell phone, showed no interest in toys, randomly flipped book pages, and failed to respond to directed activities during testing. Based on the information possessed by Franklin, autistic-like behaviors would have been a suspected area of disability in that Student met the factors for this category (see Legal Conclusion 10) as he demonstrated an inability to use oral language for appropriate communication; history of withdrawal (in his own world); obsession for sameness (likes order and routine); extreme pre-occupation (Student's fixation with the cell phone); and extreme resistance to controls (Student's failure to respond to directed activities during testing). Franklin recommended that Student be given a psychoeducational assessment because she suspected that Student may be autistic. Instead of waiting for the scheduled IEP meeting, the District should have conducted such an assessment. Thus, the District failed to assess Student in all areas of suspected disability as required (see Legal Conclusions 8 and 9) for the December 18, 2008 IEP meeting. This failure by the District resulted in the deprivation of educational benefit for Student since he did not receive any services resulting from being eligible under the category of autistic-like behaviors until the March 8, 2009 IEP meeting. (Factual Findings 2 through 12.)

(a-2) Did the District deny Student a FAPE at the December 18, 2008 IEP meeting by failing to offer Student appropriate behavior support therapy?

28. As was discussed above, the District failed to assess Student for autistic-like behaviors, a suspected area of disability. The result was that the IEP failed to consider behavior intervention services for Student. Had Student been appropriately assessed, the IEP team would have recognized that Student was autistic and required behavior therapy. Because the IEP did not offer Student behavior support therapy due to the failure to

appropriately assess Student, the District denied Student a FAPE as its December 18, 2008 FAPE offer failed to meet Student's unique needs and was not reasonably designed to provide him with educational benefit. (Factual Findings 2 through 16, 111 and 112.)

(a-3) Did the District deny Student a FAPE at the December 18, 2008 IEP meeting by failing to offer Student appropriate speech and language services?

29. Student contends that the District's December 18, 2008 IEP offer of two 45-minute group speech and language therapy sessions (speech sessions) was not appropriate to meet Student's unique needs in view of his being non-verbal and his severely delayed receptive and expressive language and pragmatic language skills. Student contends that Student required individual speech sessions to meet his unique needs. The District counters that the speech sessions offered were appropriate and cite to the October 21, 2009 Providence report (Providence report) to support their position. The Providence report recommended that Student receive two 30-minute individual speech sessions per week.

30. An IEP is evaluated in light of the information available to the IEP team at the time it is developed. The IEP must target all of a student's unique needs. On December 18, 2008, the IEP team was aware that Student was non-verbal and had severe speech and language deficits including the lack of speech production. The severity of his speech and language deficits made him a candidate for individual speech sessions according to Franklin. Student's inability to maintain joint attention also made him a candidate for individual speech sessions. Both Mitchell, Student's expert, and Moss, the District SLP who worked with Student, were "surprised" that the IEP lacked a speech production goal. Although most of Student's speech and language goals could be worked on in a group session, speech production required individual speech sessions. Based on the information possessed by the IEP team on December 18, 2008, the District offer of two 45-minute group speech sessions was not appropriate as the IEP failed to include individual sessions to work on speech production. (Factual Findings 2 through 16 and 110.)

(a-4) Did the District deny Student a FAPE at the December 18, 2008 IEP meeting by failing to have a special education teacher present at the meeting?

31. Student contends that the District committed a procedural violation of the IDEA by failing to have in attendance at the December 18, 2008 IEP meeting a special education teacher. Student contends that the absence of a special education teacher prevented a full discussion of Student's deficits and needs and might have resulted in an IEP which met all of his needs.

32. The IDEA "imposes upon the school district the duty to conduct a meaningful meeting with appropriate parties." (*Target Range, supra*, 960 F.2d at p. 1485.) In *Deal v. Hamilton County Board of Educ.* (6th Cir. 2004) 392 F.3d 840, 860-861, the Court, ruling that the absence of a regular education teacher from an IEP meeting violated the IDEA, noted that "[t]he absence of this unique perspective that could have been provided by the regular education teacher...had a real impact on the decision making."

33. There is no dispute that the December 18, 2008 IEP team did not include a special education, a required team member. Here, the presence of a special education teacher likewise would have added a unique perspective as to Student and would have assisted the IEP team and Parents in evaluating and deciding what services Student needed to meet his unique needs. Parents often rely on the expertise of District personnel in making decisions regarding services and goals. Had a special education teacher been present and aware of Student's behaviors and deficits, there may well have been discussion on autism. The absence of this perspective prevented the Parents from meaningful participation in the IEP decision-making process. Therefore, the District denied Student a FAPE because it significantly impeded Parents' opportunity to participate in the decision-making process. (Factual Findings 13 through 16.)

(b-1) Did the District deny Student a FAPE at the March 12, 2009 IEP meeting by failing to offer Student behavior therapy services?

34. Student contends that the District's March 12, 2009 IEP FAPE offer was not appropriate as it failed to include any behavioral intervention services. The District contends that the District's FAPE offer was appropriate because Student did make "meaningful" education progress after starting the SDC class.

35. An IEP should be viewed at the time that it was developed. Student had been attending Horvath's speech sessions for approximately two months at the time of the IEP meeting. During that time, Student did not interact with the other four group peers; required hand-over-hand prompting to learn "baby signs;" engaged in maladaptive behaviors such as hand flapping, jumping, falling out of chair, and sitting improperly in chair; eloped; put toys close to face; had difficulty transitioning; and covered his ears. Student was observed only using two word approximations-"ga" for go and "ma" for mom. His behavior was so severe that Mother was asked to pick him up early from his 45-minute sessions. Horvath's CARS rated Student in the "severely autistic" range. Student was unable to attend to complete academic testing. It was clear that his deficits interfered with his ability to get educational benefit from the speech sessions. Based on the information obtained by Franklin and the District's second assessment coupled with Student's performance in Horvath's speech sessions, it was apparent that Student required behavioral intervention. Thus, the District failed to provide Student a FAPE at the March 12, 2009 IEP. (Factual Findings 3 through 12, and 17 through 31.)

(b-2) Did the District deny Student a FAPE at the March 12, 2009 IEP meeting by failing to provide Student with appropriate speech and language services?

36. Student contends that the District failed to provide Student with appropriate speech and language therapy services in that there was no speech production goal and that he should have been provided with individual speech sessions. The District contends that Student was making educational progress so that he was receiving a FAPE.

37. The evidence of educational progress was based on the testimony of Moss and Bronson. Moss and Bronson had testified that Student had met two of his four speech goals by naming three out of five objects in simple categories and was then recently verbalizing front sounds. Student had not met the receptive language goal and joint attention goal. In contrast, the Providence report said that Student was unable to produce words that were understandable, nor able to put two or three words together. Student was also not able to understand words or short phrases without gestures. Student had difficulty labeling, counting and sorting. He required maximum prompting to maintain joint attention. The Providence evaluators were unable to assess Student in speech production or voice/fluency because he had such limited verbal output and limited imitation. In her progress report of June 2009, Bronson reported that Student could identify colors, shapes and animals, but she also stated in that report he could only match colors in a field of two during a one-to-one activity. Bronson also reported that he could follow simple commands with maximum prompting, and can nod or shake his head to indicate desires inconsistently. In pragmatics, Student required visual and verbal prompts to point to a peer. Zerby, in her April 21, 2010 ABA/Autism Assessment (Zerby report), found that Student could follow one-step directions and use gestures with prompting, did not use expressive language to communicate wants and needs, did not understand emotions, and was not able to sustain attention to task consistently. During the March 2010 Morris assessment, Student was unable to identify colors, numbers, letters, or shapes. Thus, the evidence demonstrates that Student failed to make adequate educational benefit from his IEP as he continued to be at the same level of deficits. (Factual Findings 3 through 12, 14, 17 through 27, 29, 32 through 34, 39 through 44, 48, 50-55, 66, 74 through 80, 88, and 110.)

38. The IEP was not designed to meet Student's unique needs in speech and language nor give him meaningful benefit because it failed to include speech production services and goals. Both Mitchell and Moss indicated that Student's IEP should have included a goal for speech production. The failure to include such a goal and appropriate speech services to work on this goal deprived Student of a FAPE. It is interesting to note that Moss recommended that Student's IEP include such a goal and that he receive individual speech sessions to work on this goal at the March 8, 2010 IEP. (Factual Findings 2 through 12, 14, 17 through 27, 29, 32 through 34, 39 through 44, 48, 50-55, 66, 74 through 80, and 110.)

(b-5) Did the District deny Student a FAPE at the March 12, 2009 IEP meeting by failing to have in attendance a speech and language pathologist?

39. The IEP team for the March 12, 2009 IEP meeting failed to include an SLP. There was no report or update as to Student's present levels of performance in the area of speech and language. The annual goals adopted were identical to the goals in the preceding IEP. Without the input of an SLP, Student's largest area of deficit was not addressed in the IEP meeting. Parents were not provided with information crucial to their participation in the IEP decision making-that of the level of progress Student was making in his speech sessions. Therefore, Student was denied a FAPE because the absence of the SLP impeded Parents'

opportunity to meaningful participate in the IEP decision-making process. (Factual Findings 28 through 31.).

(c-2) Did the District deny Student a FAPE at the March 8, 2010 IEP failing to provide Student with appropriate behavior support therapy?

40. Both the District and Student do not dispute that Student required behavior intervention services to meet his unique needs. Student contends that the District offer of three hours weekly ABA services was inappropriate because Student had made no progress in class participation and required constant prompting to attend. The District contends that Student was making academic progress so that the ABA offer was appropriate.

41. In order to learn, a child must be able to attend to class activities. Even though Student could sit without disrupting the class, Student continued to require maximum prompting to attend to any class activities. Although Bronson continued to report progress, Student continued to require prompts to stay on-task for preferred activities and prompts coupled with constant reinforcements (cheerios) to attend to non-preferred activities. Basically, Student demonstrated no progress in this area. Morris opined that the Bronson class would be appropriate if Student had the services of a one-to-one trained behavioral aide to keep him on-task and to assist in socialization as Student still did not initiate any interaction with peers. Morris' observations were similar to that of Zerby where Student failed to attend to class instruction and required maximum prompting by class staff. In fact, Bronson's statements to Zerby as to Student's performance were contradicted by Zerby's observations. Thus, both Zerby and Morris made findings which demonstrate the need for a one-to-one trained behavioral aide.²³ In order to meet Student's unique needs to be reasonably designed to provide Student some educational benefit and to allow him to access his curriculum, the District should have provided Student a one-to-one trained behavioral aide. (Factual Findings 2 through 12, 17 through 36, 38 through 44, and 56 through 96.)

(c-3) Did the District deny Student a FAPE at the March 8, 2010 IEP meeting by failing to offer appropriate ESY service?

42. The March 8, 2010 IEP failed to include any behavioral support for ESY whatsoever. As stated above, both sides do not dispute that Student required behavior intervention services to meet his unique needs. The District recognized Student's need for such services by offering behavior intervention services twice weekly for 90 minutes per session as to the school year. Thus, the District's failure to include behavior intervention services for ESY failed to provide Student with a FAPE. (Factual Findings 56 through 96.)

²³ Zerby's conclusion that Student had made progress was made on the basis of the Bronson interview and her written progress reports which were inaccurate.

REMEDIES

Reimbursement

43. As stated in Legal Conclusions 22 and 23, parents are entitled to reimbursement for placing a child in a private school without the agreement of a school district if the parents prove that the District failed to make a FAPE available to the child prior to such placement and the private placement was appropriate. To be appropriate, the private placement must provide educational instruction specially designed to meet the child's unique needs supported by services necessary to permit the child to benefit from the instruction.

44. Student is entitled to be reimbursed for the costs of attending Salem and the provision of the one-to-one aide for school year 2010-2011 in an amount of \$20,214.00. (Factual Findings 108 and 109.) The private placement at Salem and the CARD provided one-to-one trained aide was appropriate as he was receiving educational benefit because the aide was using a structured approach emphasizing language and socialization as well as increasing Student's joint attention skills. Morris opined that the Student was benefitting from his placement at Salem because of the aide support utilizing ABA techniques to improve joint attention, language usage, and socialization skills.²⁴ Additionally, Student demonstrated progress in his problem behaviors during the CARD provided services following Student's withdrawal from the District. This was demonstrated by the decreased rate he engaged in maladaptive behaviors as evidenced by the April 30, 2011 CARD progress report. (Factual Findings 100 through 107.)

Compensatory Education

45. As stated in legal Conclusions 24 and 25, a student is entitled to compensatory education as an equitable remedy to compensate for him or her being denied a FAPE by a school district. Compensatory education should be designed to permit the student to catch-up to the level he should have achieved had he not been denied a FAPE.

46. As to the District's failure to provide appropriate behavior intervention services, the District shall provide Student with the services of an ABA-trained one-to-one aide from CARD for the school day for school year 2011-2012 and ESY 2012. The aide should be from CARD so as to ensure continuity with CARD-provided services both in his home program funded by the Regional Center and services provided during school year 2010-2011. Additionally, the District shall provide a total of four hours monthly of CARD provided supervision and four hours consultation services.

47. As to the District's failure to provide appropriate speech and language services, the District shall provide one 30-minute individual speech therapy session per week until January 30, 2012, dedicated to work on speech production in addition to any speech and language services provided by Student's IEP.

²⁴ The District offered no evidence to contest Morris' opinion.

48. As to the District's interference with Parents' right to meaningful participation in the IEP process, the District shall conduct a triennial assessment by persons who are not District employees in the areas of academic levels, intellectual development and cognition, social/emotional/behavioral, and speech and language no later than December 1, 2011.

ORDER

1. Within 45 days the District will pay the sum of \$16,770.00 (sixteen thousand seven hundred seventy dollars and zero cents) to Parents for the cost of the CARD provided one-to-one aide at Salem Lutheran School.

2. Within forty-five days, the District shall pay the sum of \$3,444.00 (three thousand four hundred forty-four dollars and zero cents) as reimbursement for the cost to attend Salem Lutheran School for school year 2010-2011.

3. The District shall fund the services of an ABA-trained, one-to-one behavioral aide from CARD to accompany Student at school for school year 2011-2012 and extended school year 2012 wherever he attends.

4. The District shall provide to Student one 30-minute individual speech therapy session per week to work on speech production until January 30, 2012, in addition to any other speech and language services provided by Student's IEP.

5. The District shall fund an independent triennial assessment in the areas of the areas of academic levels, intellectual development and cognition, social/emotional/behavioral, and speech and language no later than December 1, 2011.

6. All other requests for relief are denied.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, Student prevailed on all issues heard and decided in this matter.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by this Decision. Pursuant to Education Code section 56505, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within ninety (90) days of receipt.

Dated: July 27, 2011

/s/
ROBERT HELFAND
Administrative Law Judge
Office of Administrative Hearings