

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

ETIWANDA SCHOOL DISTRICT.

OAH CASE NO. 2011081122

**DECISION**

Administrative Law Judge (ALJ) Clara L. Slifkin, Office of Administrative Hearings (OAH), heard this matter in Etiwanda, California, on November 28, 2011 through December 2, 2011, December 5, 2011 through December 7, 2011, and January 23, 2012 through January 26, 2012.

Steven Wyner, Attorney at Law, represented Student and was assisted by Paralegal Jennifer Ralph. Student's mother (Parent) attended the hearing on all days.

Constance Taylor, Attorney at Law, represented the Etiwanda Unified School District (District). Jean Martin, Ph.D., (Dr. Martin) director of special education, attended the hearing on all days.

On August 25, 2011, Student filed a Request for Due Process Hearing (complaint). On September 30, 2011, for good cause shown, OAH granted the parties' joint request to continue the due process hearing.

Oral and documentary evidence were received at the hearing. The record remained open until closing briefs were filed on February 16, 2012, at which time the matter was submitted.

## ISSUES<sup>1</sup>

1. Whether District denied Student a FAPE for the 2009-2010 school year by:
  - a) failing to identify Student's primary disability as autism; and
  - b) failing to provide appropriate instruction, services and support to address Student's unique needs in the areas of academics, behavior and social skills development.
  
2. Whether the District denied Student a FAPE for the 2010-2011 school year by:
  - a) failing to identify Student's primary disability as autism;
  - b) failing to provide appropriate instruction, services and support to address Student's unique needs in the areas of academics, behavior and social skills development; and
  - c) failing to provide Student with a Home/Hospital placement and instruction.
  
3. Whether District offered Student a FAPE for the 2011-2012 school year by:
  - a) failing to offer appropriate instruction, services and support to address Student's unique needs in the areas of academics, behavior and social skills development; and
  - b) failing to provide Student with a Home/Hospital placement and instruction.

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<sup>1</sup> The ALJ has rephrased the issues for clarity. The issues are limited to those that have been alleged in Student's complaint. Although Student's complaint alleged a procedural violation regarding Parents right to meaningfully participate in the IEP process, this procedural issue was withdrawn and the Prehearing Conference Order contains only substantive issues. (20 U.S.C. § 1415(f)(3)(B) ["the party requesting the due process hearing shall not be allowed to raise issues at the due process hearing that were not raised in the [Complaint], unless the other party agrees otherwise"]; Ed. Code, § 56502, subd. (i).)

## FACTUAL FINDINGS

### *Jurisdictional and Background Information*

1. Student is a 12-year-old young man who at all relevant times resided within the boundaries of District. Student was eligible for special education and related services at all relevant times. At the time of hearing, Student was eligible under the primary eligibility category of other autistic-like behaviors (Autism). Student was also eligible under the secondary eligibility category of specific learning disability (SLD).

2. On November 11, 2007, when Student was in the second grade at Terra Vista Elementary School (Terra Vista), District convened a Student Support Team (SST) meeting to address problems District had noticed in Student. Specifically, District identified issues concerning Student's work completion; his perseveration on words and phrases; his failure to remain on topic; his fixation on insects; his tendency to wander around the classroom during a lesson or task; his alienation of classmates; and his challenges in making friends. The SST team proposed interventions, including one-to-one instruction; quiet/separate work area; daily talks with Parent; redirection of behavior; limited assignments; and counseling support.

3. In March 2008, Student's teacher expressed concern about Student's deficits in math computation, as well as his difficulty with peer relationships. Consequently, he recommended that District assess Student to determine whether he was eligible for special education services.

4. In April 2008, School Psychologist Jennifer Bell Williams (Williams) performed assessments and reported her findings in an April 15, 2008 Psychoeducational Report. Williams, who provided testimony at hearing, is a school psychologist employed by the District since March 2008. She received a bachelor of arts in kinesthesiology and a master's degree in educational psychology and has held a credential in school psychology since spring 2007.

5. Williams performed a variety of measures to determine eligibility and an appropriate educational program for Student. Williams administered the: Naglieri Nonverbal Ability Test (NNAT); Test of Auditory Processing Skills, Third Edition, (TAPS-3); Beery-Buktenica Developmental Test of Visual-Motor Integration and Test of Visual Perception, Fifth Edition (VMI); Wide Range Achievement Test, Fourth Edition, (WRAT-4); Conners' Teacher and Parent Rating Scale, Revised; Asperger's Syndrome Diagnostic Scale, (ASDS)-Teacher, Parent. Overall, Williams found that Student had average cognitive functioning, average auditory processing, average visual perception and visual motor integration, and average speech and language functioning.

6. Based on Student's behaviors in class and his difficulty with peer relationships, Williams administered the Asperger's Syndrome Diagnostic Scale (ASDS), a behavioral rating scale used to distinguish between individuals with a high or low probability

of having Asperger's Syndrome. The ASDS was a screening test for Asperger's and not a definitive measure. Williams distributed a rating scale to Student's teacher and Parent. Student's teacher reported that Student perseverated on topics, interpreted things literally, had difficulty with peer relationships and social skills, and had a narrow range of interests. The results of the teacher's rating scale showed that Student could likely have Asperger's Syndrome. In contrast, the results of Parents' rating scale showed that Student was very unlikely to have Asperger's Syndrome. Consequently, Williams' findings on Asperger's Syndrome were inconclusive, and she reported she could not rule out Autism Spectrum Disorder (ASD).

7. Williams administered the Conners' Rating Scale (Conners') to determine if Student displayed oppositional, inattentive, and hyperactive behaviors indicative of Attention Deficit Hyperactivity Disorder (ADHD). Williams distributed rating scales to Student's teacher and Parents. Student's teacher rated his behavior in the significant range in the areas of oppositional and hyperactivity, and approaching significant in the area of attention problems. In contrast, Parents reported Student in normal limits in those areas. Consequently, Williams' findings on ADHD were inconclusive, and she reported she could not rule out ADHD.

8. Williams reported on the Woodcock-Johnson III Tests of Achievement administered by Resource Specialist Marcia Reynolds (Reynolds). Student scored within the high average range in written language, and average range in the areas of math and reading. Williams concluded that Student's processing deficit in the area of attention explained the significant discrepancy between his ability and performance. As such, she concluded that Student met the criterion for special education under the eligibility of SLD. She recommended the following supports and services: instructional materials to help focus; structured work environment to reduce distractions; development of study skills; and a behavior contract with tangible and intangible rewards. She also recommended that Parent pursue, at their own expense, an evaluation for ASD or ADHD with a pediatric neurologist or psychologist.

9. Williams also summarized the results of a Speech and Language assessment performed by District Speech and Language Pathologist Carrie White (White). Student's verbal and nonverbal abilities were evenly developed. Overall, his language skills fell within the average range.

10. Williams did not use other instruments to determine if Student was eligible as a pupil with autistic-like behaviors. Williams' assessment report failed to offer a detailed analysis of her data and an explanation for her recommendations. Nevertheless, Williams found Student eligible for special education services under the category of SLD.

*April 24, 2008 IEP*

11. On April 24, 2008, District convened an IEP team to discuss Student's eligibility for special education. Williams reviewed her report and recommendations. White

discussed speech and language therapy, and noted Student had weaknesses with pragmatic skills, difficulties with hidden messages, and challenges in perspective taking and making polite requests. Parent informed the IEP team that Student had been tested in the areas of bio-feedback and neuro-feedback, and shared that Student's therapist at the Behavioral Health Dynamics Center did not see behaviors indicative of ASD or ADD, which confirmed Parent's belief that Student was not on the autism spectrum.

12. After further discussion, the IEP team determined Student's eligibility as SLD. The team then drafted goals in math, writing, reading and speech pragmatics. District offered Student a general education class with resource specialist program (RSP) support for 30 minutes, four times per week. In addition, District offered speech and language therapy for 30 minutes, twice per week. Student's teacher agreed to give him classroom jobs to help with his relationship with his peers. Parent consented to the IEP.

*Dr. Perlman's IEE*

13. On November 26, 2008, Parent requested an independent educational evaluation (IEE) for a neuropsychological assessment, which District agreed to fund on December 3, 2008. In January 2009, Mitchel D. Perlman, Ph.D. (Dr. Perlman) performed the neuropsychological IEE and wrote a report. In preparation for the assessment, Dr. Perlman reviewed prior assessments and records, and administered cognitive/neurological instruments, as well as academic achievement tests. Student remained focused during the eight hours of testing. Dr. Perlman summarized the test results, and reported that Student performed in the average range in sequential processing; decoding and retrieving information; planning; visual spatial processing; fine-sensorimotor processing; and social perception. Student performed in the below average to average abilities range in simultaneous processing; abstract reasoning; and language processing. He showed weakness in the areas of visual-scanning/discrimination; processing speed; and attention.

14. Although Dr. Perlman reported he observed Student to exhibit features of Asperger's Disorder (Asperger's) he did not explain what features he observed. Dr. Perlman concluded that he could not confirm a diagnosis of Asperger's because Student was not in school, and Dr. Perlman was not able to observe him in the community. However, Dr. Perlman recommended that Student's program incorporate opportunities for "corrective social experiences."

15. Although he confirmed that Student's RSP services appropriately targeted math and writing, Dr. Perlman concluded that Student required additional services for issues previously identified by the SST team: to prevent alienation from Student's peers; to help Student to accept responsibility for his actions; and to work on his inattention and distractibility. Dr. Perlman recommended a one-to-one classroom aide to work primarily with Student, to improve his ability to focus, and also provide support as a social coach. Dr. Perlman wrote that it would be advantageous for the aide to be trained in applied behavioral analysis (ABA) or supervised by a behavior therapist. He also recommended supplying Parent with a copy of textbooks for pre-teaching, and that Student undergo assessments in

assistive technology and occupational therapy. Because of Student's neuropsychological features, he recommended an assessment to rule out silent seizure disorder, as its features were similar to Asperger's

*Home Hospital Instruction (HHI)*

16. On January 7, 2009, Student's Psychologist Perry Guthrie, Ph.D., (Dr. Guthrie), sent District a letter stating that Student reported having problems in his classroom, and that Student manifested major symptoms of depression and anxiety. Dr. Guthrie opined Student was not capable of handling the stress associated with being in a classroom setting, and that as a result, he recommended Student be provided HHI.

17. On January 22, 2009, District convened an IEP team meeting to discuss placing Student on HHI. Although District personnel did not observe Student to be anxious at school, based on Dr. Guthrie's letter, the team offered Student HHI for one hour, five times per week speech and language and resource support for 15 minutes per week on consultation basis. District offered HHI at a mutually agreed upon location and required documentation of Student's projected return. After extensive negotiation, Student and District agreed to HHI provided by a special education teacher one hour, five days per week, at Student's home with two District employees present, and that the parties could tape record the sessions.

18. Special Education Teacher Sonya Scott (Scott) provided Student with daily HHI from March 2009 through August 2009, for one hour each session. Scott, who provided testimony at hearing, is a special day class (SDC) teacher, and for the past eight years has been employed by the District. She received a bachelor of arts in 2004 in behavioral science from California Poly Technical Institute, and a master's degree in education from California State University at San Bernardino in 2006. She holds a special education credential and currently teaches a fourth-fifth grade SDC class at Etiwanda Colony Elementary School. Although Scott is an experienced SDC teacher, her experience providing HHI was limited to Student and one other student.

19. During the HHI session, Parent shared problems she encountered at Terra Vista, and explained the principal told a lot of lies about her and her family. Because Parent and District had a strained relationship, Scott maintained a daily log to report the subjects she taught and the time she arrived and departed Student's home. She and Parent initialed the log to confirm the accuracy of the information. According to the logs, Scott provided Student 13 weeks of instruction. However, at hearing, Scott credibly explained that she provided Student instruction prior to the period of time on the log, such that the total amount of instruction exceeded 13 weeks.

20. At hearing, Scott confirmed that on some days, Speech and Language Therapist Marilyn Olson (Olson) accompanied her to Student's home, and on other days, District aide Eileen Padilla attended. Scott worked collaboratively with Olson; she gathered

instructional materials while Olson worked on Student's language goals. Scott observed that Student was not a typical HHI student because Student was not physically disabled.

21. Scott explained working with an aide at Student's home was helpful. For example, Padilla helped her by charting and preparing lessons, while she graded Student's work. Scott focused on language arts and math and worked on his IEP goals. She supplied Parent with curriculum and homework for social studies. Scott graded Student and prepared his report card. Other teachers prepared Student's vocabulary and reading comprehension tests, and she created spelling tests.

22. During the time Scott provided HHI services to Student, District required periodic medical notes from Student's physician to confirm that Student still required HHI because of his inability to return to school. Scott observed that Student was not a typical HHI student, because he was not physically disabled, and did not appear to be traumatized or stressed. Scott explained Student's greatest academic challenge was staying focused and on task. At home, Student's ability to attend varied from day to day. Scott opined because Student enjoyed being with people, she did not believe one-to-one instruction was appropriate, but rather considered a small group setting more appropriate for Student. As such, Scott encouraged Parent to send Student back to school. Because Scott spent many hours teaching Student, her description of Student was accurate and her testimony persuasive.

23. Scott found the HHI sessions stressful. District informed her that Parent would record sessions and District directed her to record if Parent recorded. Scott never used the tape recorder and kept it in the trunk. Scott felt uncomfortable that Parent shared her frustrations with her about District, and called her frequently outside of work hours. At hearing, Scott confessed that she kept the time log because she feared Parent would challenge her hours. Although Scott reported to Kordich that providing Student HHI was stressful, Scott would not share that information with Parent because it would undermine the cordial relationship she tried to maintain with Parent. Because of the tense relationship between Student and District, Scott would decline if asked again to provide Student HHI.

*April 1, 2009 Annual IEP Team Meeting*

24. On April 1, 2009, District convened Student's annual IEP to review Student's progress on goals, and to discuss placement and services for the 2009-2010 school year. Parent and Student's attorney, Michelle Ortega, participated via telephone. The attendees included Assistant Superintendent of Etiwanda School District Sylvia Kordich (Kordich), Program Manager West End SELPA Jean Martin, Ph.D., (Dr. Martin), Principal of Terra Vista Elementary School Cecille Peace (Peace), General Education Third Grade Teacher Brandon Baker (Baker), Special Day Class Teacher/Home Hospital Teacher Sonya Scott (Scott), Terra Vista Resource Specialist Marcia Reynolds (Reynolds), Psychologist Samantha Pelliteri, Psy.D. (Dr. Pelliteri), and Speech and Language Therapists Marilyn Olson (Olson) and Nicole Medford-Ladd (Ladd).

25. Dr. Pelliteri reviewed Dr. Perlman's neuropsychological assessment results with the team. She reported that Student performed within the average range in cognitive functioning, sequential processing, learning, planning, visual-spatial processing, abstract reasoning, and language processing. Dr. Perlman found Student's deficits in the area of visual-scanning/discrimination, processing speed and attention. Dr. Perlman confirmed Student's academic skills were in the average range but math computation and written expression were in the below average range. Dr. Perlman wrote that Student's current resource program was appropriate for math and writing, but Student required additional support for social skills, not accepting responsibility for his actions, and inattention and distractibility.

26. The IEP team discussed Parent concerns about Student returning to school, his progress in math and written language, and his social emotional health. The IEP team discussed Student's academic progress and Scott shared with the IEP team that Student was doing well with HHI. Olson reported that Student was very cooperative and met his first objective on his annual goal in the area of pragmatics. Parent indicated that she was pleased with Scott's instruction and Olson's therapy. Scott shared that, at that time, Student did not require a behavior support plan, but rather a behavior goal to address his need in attending in this area. The team discussed and agreed on present levels of performance, and noted Student made progress on his four academic goals and progress on his two pragmatic goals. The team reviewed draft goals in academics and pragmatics and adopted the goals.

27. The team agreed with Scott's recommendation that a behavior goal would address Student's needs in behavior. The team also agreed that two district employees would be at Student's home during the HHI. Scott would collect data regarding Student's ability to stay on task during each session and that data would be shared with Parent. The IEP team recommended referral to WESELPA counseling staff because Parent and Student's psychologist expressed concerns about Student's emotional state. Pursuant to Dr. Perlman's recommendations, the team asked District to prepare an assessment plan for assistive technology and occupational therapy assessments.

28. The IEP team confirmed Student's continued eligibility under the category of SLD and discussed Student's placement, supports and services. For the 2009-2010 school year, the team offered: 1) home hospital instruction five days a week for one hour per school day based on District's school calendar; 2) speech and language therapy 30-minutes twice a week; 3) AT and OT assessments; and, 4) a referral to WESELPA for counseling. Parent did not provide consent at this time.

#### *August 7, 2009 Addendum IEP*

29. In August 7, 2009, District convened an IEP meeting to discuss Student's placement, and review the occupational therapy and assistive technology assessment reports. The attendees included Dr. Martin, Kordich, Scott, Olson, Assistive Technology Specialist Donna Mawhorter (Mawhorter), and Occupational Therapist Laura Passon. Passon reported to the IEP team that Student's scores showed deficits in organizational behavior and

following instructions. She recommended Student receive occupational therapy (OT) services and found Student needed extra prompting, increased time to complete tasks and verbal cues for redirection. Mawhorter reviewed the assistive technology (AT) report and reported Student was not qualified for AT services. Student requested an adaptive physical education (APE) evaluation and signed an assessment plan.

30. The team discussed placement options for Student's return to school. Parent reported that she was pleased with Scott, Olson and Padilla's instruction provided at home and the speech therapy provided by Ladd and Reynolds at Terra Vista. Parent requested placement at Perdeu Elementary (Perdeu) and District arranged a visit to Perdeu on August 10, 2009. District offered HHI specialized instruction from August 10, 2009 to November 1, 2009 at 60-minutes, five times per week; consultative occupational therapy 20-minutes, once per week; and speech and language 30 minutes, twice per week. OT and speech and language services would be delivered at home during the five hours of HHI. District continued to provide HHI with the conditions that Parent or family member be present, and if Student canceled an appointment, the time would not be made up.

31. Dr. Glen Perez (Dr. Perez) evaluated Student on August 12, 2009 to determine if Student would be able to return to school. He wrote that he would approve Student's return, if District provided a safe learning environment. Dr. Perez also recommended District pay for private psychological services, to ensure Student's smooth transition.

32. On August 15, 2009, Parent consented to the April 1, 2009 IEP for the 2009-2010 school year. However, Parent rejected language in the notes of the January 22, 2009 and April 1, 2009 IEPs, that she believed falsely portrayed their home environment.

*August 19, 2009 Addendum IEP*

33. On August 19, 2009, District convened an IEP meeting to discuss Student's transition to school. The IEP team devised a gradual plan for Student to return to a full day by mid-September. Scott shared with the team that Student was doing well with HHI.

34. Parent requested Student receive counseling services through a psychologist of her choice and that District fund placement at a private school. In a letter dated September 8, 2009 District declined both requests. District asserted that, with respect to counseling services, it contracted with non-public agencies and it had the right to choose who provided related services and the methodology. District again offered to make a referral to WESELPA Counseling. District also declined Parent's request for District to fund a private school placement, and explained that its placement offer was in the least restrictive environment. District continued to offer the same services it offered in the April 2009 IEP: 1) specialized academic instruction to be provided for 30 minutes four days per week; 2) small group language and speech services for 30 minutes twice per week; and, 3) consultative occupational therapy 20 minutes eight times a year.

### *Student Returns to School*

35. Student returned to school in August 2009. He was assigned to a Fourth Grade Class at Perdew taught by Frank McKinley (McKinley). McKinley, who provided testimony at hearing, is a general education teacher, and for the past twelve years, has been employed by the District. He holds a general education credential and a clear cross-cultural language and academic development (CLAAD) credential. He is not credentialed in special education. McKinley welcomed Student back to school and Student, Parent and McKinley dined at Johnny Rockets. McKinley helped Student successfully transition back to the classroom by supporting Student and keeping in constant contact by e-mail with Student's Parent from August through October 2009.

36. McKinley was a thoughtful, hardworking, caring teacher. He worked hard to help Student stay on task and focus on his work and charted Student's daily behavior. During Student's first week at school, Parent sent detailed e-mails to McKinley almost every day regarding her concerns about Student's behavior, attention issues, academics, and problems with homework. Conscientiously, McKinley responded by e-mail to Parent's concerns in the evening and on weekends. McKinley appreciated Student and shared with Parent that Student had a heart of gold and really wanted to please.

37. Parent appeared to be very nervous about Student's return to school and his academics. For example, between September 1, 2009 through September 2, 2009, Parent sent McKinley eight e-mails concerning Student's math workbooks, a math test and a math assignment on rounding numbers. McKinley reported that Student had problems with the routine of school, taking workbooks home, turning in some assignments, and working on math problems. However, the evidence showed that as Student became acclimated to the academic routine, he received praise from McKinley regarding adjusting to full-time school, and completing his morning work. McKinley also noted that Student had difficulty reading the literature book, because his eyes wandered away even when McKinley stood right next to him. McKinley agreed to send home lesson plans and asked Parent to e-mail him to let him know if they were helpful.

38. Parent was also concerned about Student's behavior and interaction with his classmates. McKinley indicated that Student made a friend in class and he hoped he would make more friends. However, he expressed concern about Student using the words, "I'm going to kill you," but McKinley did not write a citation concerning this incident.

39. On September 8, 2009, Student returned to school full time and participated in the All Star Academic Tutoring Program after school on Tuesday through Thursday. Parent continued to send McKinley daily e-mails, sometimes three to four times a day. They corresponded about Student's academic progress and assignments, and McKinley continued to be responsive to Parent's questions and concerns.

40. Student appeared to be successful at acclimating to the academic and social environment in McKinley's classroom. Student's Parent and teacher worked well together

supporting Student academically and emotionally and believed that Student would be successful.

*September 18, 2009 Addendum IEP*

41. On September 18, 2009, the IEP team met to review APE assessment results, to hold a 30-day placement review, and to discuss Student's transition from HHI to fulltime school program. The attendees included Parent, McKinley, Kelly Bray (administrator), Peltz, APE specialist Brant Morpew (Morpew), RSP teacher Emily Waters (Waters), and Scott. McKinley reported that Student improved with his daily routine, and was excited about learning. McKinley's biggest concern was Student's reading comprehension skills, because Student struggled with staying on task and visual tracking. Waters also expressed her concern about Student's focusing issues during his RSP pullout sessions. Parent reported that Student's transition to school full time was successful.

42. The IEP team reviewed Student's goals and because Student failed to make progress on the reading comprehension goal from the April 2009 IEP, the team modified this goal. The goal focused on Student's ability to recall major points in the text, and make/modify predictions about information. The team modified the goal to apply to a second grade text, because at grade level, Student often guessed and made statements unrelated to story.

43. The team offered amendments to the April and June IEPs, as follows: 1) Student to participate in state testing by taking the California Modified Assessment (CMA) for language arts and math; 2) HHI services discontinued; 3) referral to specialized vision services to assess Student's need for vision therapy; and, 4) RSP services would increase by 30 minutes to 60 minutes daily, four times a week, for language arts and math. On December 14, 2009, Parent consented to implementation of the September 19, 2009 addendum IEP, except for the proposal that Student participate in State testing by taking the CMA. Parent requested that District administer the California Standard Tests (CST) with accommodations. The team agreed to administer the CST.

*McKinley's Classroom after the September IEP*

44. McKinley praised Student when applicable and supported Student's success. For example, on October 9, 2009, McKinley sent Parent a report praising Student because: 1) Student raised his hand because he followed class instruction and knew the answer; 2) Student followed the reading lesson and read out loud; 3) Student passed two A/R quizzes; and, 4) Student earned a score of 19/20 on a spelling test. On October 12, 2009, Student failed to hand in an assignment that affected his grade. That day, McKinley e-mailed Parent indicating as soon as Student submitted the completed assignment, he would grade the assignment and substitute that grade for the "0." McKinley invited Parent to meet with him to map out the next few weeks of lessons. Again, on October 20, 2009, McKinley reported on Student's good progress and e-mailed Parent informing her that Student had gone to the

library, checked out two books, and scored four out of five points on a quiz on one of the books.

45. At hearing, McKinley described Student as respectful and cooperative. McKinley reported that Student's academic problems were in the areas of reading comprehension, writing, and math word problems. McKinley shared that Student was easily distracted and lacked focus. Student received one-to-one instruction from Waters in RSP, small group instruction in McKinley's classroom, and individual help from two classroom aides. McKinley worked on Student's goals and implemented Student's accommodations including modifying assignments, completing school work at home, providing extra time on exams, and retaking tests. If Student failed to make progress on an academic goal, he would give Student more one-to-one instruction.

46. At hearing, McKinley explained in October 2009, Student behaved well in class, but during unstructured time, Student began to have issues on the playground. Although Student struggled with peer relationships, he communicated well with adults. McKinley did not see Student as being autistic. McKinley worked with Student and tailored his program to meet his special needs. Specifically, McKinley created a Daily Behavior Progress Report (Daily Log), where he and Waters wrote about Student's progress. The Daily Log was sent home to Parent, who would respond back. The log helped Student's teachers communicate with Parent. McKinley shared that he also communicated with Parent by e-mail daily, sometimes three times daily, in the evening and on weekends. Despite his best efforts, Parent often questioned McKinley's strategies and professionalism.

*Emily Waters RSP Teacher*

47. Emily Waters, who provided testimony at hearing, is a resource specialist, and for the past five years has been employed by the District. She received a bachelor of arts in 2002 and a master's degree in special education from California State University at San Bernardino in 2006. She holds an education specialist credential for mild to moderate disabilities, and a CLAAD credential. She completed course work for a special education credential, but has not yet applied for the credential. Prior to her employment at the District, she was a special education teacher for the Riverside School District. Waters began to work with Student in language arts when Student returned to school full time in September 2009.

48. Waters communicated with Parent by e-mail and the Daily Log. In the Daily Log she praised Student when his work was good and reported his difficulties in concentration and focus. In November 2009, Waters shared her concern with Parent that Student hummed, made robot noises, fell on the floor, and bent over to smell the chair. Parent responded by thanking Waters for her concern, but wrote "those behaviors are normal for any active boy." Parent also pointed out that those behaviors were Student's tools to help him cope and finish his tasks. Parent further asserted that what Waters considered as deficits could, in fact, be a cultural difference, or a difference in understanding.

49. At hearing, Waters described her work with Student on his reading and writing goals. Student's reading comprehension goals in April 2009 were based on the KTEA-II. One goal required Student to distinguish the main idea and another goal required Student to recall and predict the outcome in a story. Waters helped to draft these goals and confirmed the goals were based on second and third grade standards.

50. Waters explained in her testimony that making predictions about other children's behavior was difficult for Student. She used instructional strategies such as re-teaching social skills, using visual schedules, and looking for clues in text to help Student make predictions. Waters explained Student was not able to remember rules, making it difficult for him to follow classroom procedures, but he was able to participate in class and made progress on keeping on task. She expressed concern about Student's behaviors, including his falling on the floor, making robot noises, and humming. She discussed Student's falling on the floor with the OT, because she believed that Student was sensory seeking. She believed Student demonstrated maladaptive behavior in her class. However, she shared that Student was a good boy, he needed a little guidance and his actions were not willful. Waters opined Student met his fourth grade goals in keeping on task, reading comprehension, making predictions, and solving math problems.

#### *Academic Progress*

51. On October 5, 2009, District administered exams to measure Student's progress in meeting content standards in language arts and math. Below basic ranged from 20 to 40 percent. Student scored 39 percent in language arts and 33 percent in math.

52. On October 7, 2009, Principal at Perdue Kelly Bray (Bray) wrote to Parent that she needed help with Student because he was not following directions, was not paying attention or participating, and was only interested in playing games. Bray stated that if Student was not willing to put in the effort and follow directions, she would dismiss him from the after school tutoring program, Academic All Stars. Parent replied because of Student's attention problems, he needed more support from the aides and teachers. In contrast, on October 9, 2009, Parent observed Student to be engaged in the tutoring program and Parent enjoyed learning about teaching strategies to help Student track his reading. Student remained in the program.

53. Although Student received academic support from RSP and Bray's program, Student's grades declined. Parent received a report at the September 18, 2009 addendum IEP indicating that he was doing well except for reading where he earned a "D." Parent received Student's grades in October 2009 and it appeared that Student's grade in Reading improved to "C-." However, all of his other grades declined and his total GPA was 2.7. He did earn good grades in citizenship/work habits, which required that Student follow rules; work cooperatively, and respect others. Specifically, his grade improved from a "S+" to a "G-" Student's grades before Thanksgiving plummeted to a grade of "F" in total writing; "C-" in total listening/speaking; "D" in total mathematics; and "D-" in total history/social studies.

54. In December, Parent contacted McKinley to ask how to raise Student's grade. McKinley noted that Student failed to turn in some assignments and suggested that completion of assignments would help to improve his grades. In a Teacher Assessment Protocol dated December 16, 2009, McKinley reported that Student was somewhat below grade level in writing, science and social studies, and far below basic in reading and math. Student appeared to have difficulty in processing and attention, and he was easily distracted. McKinley complimented Student on his interest in learning and neat work.

*Student's behavior after the September 18, 2009 IEP until the March 30, 2011 IEP*

55. After the September 18, 2009 Addendum IEP, Student's behavior incidents increased and his communication skills declined. Specifically, on September 25, 2009, after another student threw Student's shoe, Student grabbed that student's head and pushed it to the ground. On October 7, 2009, Student refused to do work on his assignments for Academic All Stars and stated that he only wanted to play games. On October 16, 2009, Student fought with other students. On October 27, 2009, another student ripped paper from Student's clipboard. The other student raised his fists and Student raised his hands to deflect the punch. Student was asked to write his version of incident. The evidence showed that the administration at Perdue asked all students involved in altercations to write down their version of events, because this procedure helped resolve conflict. However, Parent, who believed Student was singled out to write and report, became very defensive and requested in the future District staff not question Student or request a written statement unless Parent was present.

56. On October 29, 2009, in an e-mail, RSP teacher Waters suggested that because Student had a lot of changes over the past year, a new psychoeducational assessment would be helpful to determine if and how to address new areas of need. In response, Parent requested an IEE by a neuropsychologist. In a letter dated November 9, 2009, District rejected Parent's request and asserted that because Dr. Perlman conducted an IEE, District had a right to assess. Parent ultimately retained Sandra Loo, Ph.D (Dr. Loo) of Semel Institute for Neuroscience and Human Behavior, at her own expense, to assess Student. Dr Loo conducted an assessment and prepared a March 17, 2010 report, which is discussed below in relation to a March 30, 2010 IEP team meeting.

57. In early December 2009, McKinley informed Parent that Student failed to turn in 11 assignments, seven assignments were more than one week late, and four assignments were months late. If Student did not return his late assignments, he would not be able to participate in Fun Friday, a reward program designed to encourage students to complete their work. McKinley explained to Parent that his other students would not be able to participate in Fun Friday if they failed to complete their assignments, and he was treating Student as she requested he be treated, like all other students. Student failed to earn participation in Fun Friday. In response, Parent asserted McKinley's records were incorrect, that Student turned in all of his assignments, and that she did not consent to Student missing Fun Friday. Parent was not supportive of McKinley's efforts to work with Student and help him to take responsibility for his actions.

58. In a Teacher Assessment Protocol dated December 16, 2009, McKinley reported Student had difficulty getting along with his peers. Almost daily, Student complained about other students arguing with him and other students asserted that Student bothered them. McKinley also reported it was often true that Student argued a lot with other students; failed to finish things that he started; failed to pay attention for long periods of time; appeared confused and distracted; fidgeted; disturbed other students; failed to follow directions; did not get along with other pupils; felt others were out to get him; stared blankly; felt hurt when criticized; and failed to carry out assigned tasks.

59. In February 2010, Student's behaviors escalated and District responded by disciplining Student. Specifically, on February 10, 2010, Student missed the urinal and "peed" on the boy's restroom floor next to another student's foot. On February 11, 2010, Student hit a student and then kicked her. As a result, District gave Student a warning and Parent was notified. On February 17, 2010, Student attempted to kick another student. On February 19, 2010, Student was issued a citation for pushing a student down, and kicking him in the arm, and attempting to drag a female student by the leg on the grass. Finally, after several warnings on February 24, 2010, when Student grabbed another student by the back collars school authorities issued a citation regarding Student's behavior. Eugene Yarabino, assistant principal at Perdue called Parent, counseled Student, escorted him to the Principal, and informed Student he lost playtime. On February 25, 2010, when walking out the main gate, Student put his foot out and tripped a student. On March 5, 2010, Student was issued a citation because he pushed another student. District's proposed punishment was school suspension, but after negotiation with Student's attorney, District withdrew the suspension. On March 16, 2010, Student was cited because he told a student that he would bring a pocket knife to school to stab him. Student reported he was just joking. District called Parent and requested a meeting. At the end of the day on March 16, 2010 in P.E., Student lifted up a chunk of cement and looked like he would throw it at another student. On March 17, 2010, a student complained Student hit her in the stomach, but no action was taken against Student because he stated it was an accident and apologized.

60. In light of Student's escalating behavior, on March 24, 2010, District's attorney sent to Student's attorney a proposal for a Functional Analysis Assessment (FAA) to be performed by a District behavior intervention case manager (BICM) and a SELPA BICM. An FAA is a detailed assessment of a child's behavior, which includes, among other things, systematic observation of the occurrence of the targeted behaviors, systematic observation of immediate antecedent events associated with the behavior and the consequences of the behavior. The District proposed discussing the FAA at the upcoming March 30, 2010 annual IEP team meeting.

*The March 30, 2010 and April 2, 2010 IEP Meetings (2010-2011 school year)*

61. District convened Student's annual review IEP team meeting on March 30, 2010. The IEP team included Parents, Bray, Dr. Martin, Waters, Peltz, Parsons, School Psychologist Jennifer Williams, (Williams), McKinley, Faculty Consultant to Southern California College of Optometry (SCCO) Paula Handford (Handford), and Steven Wyner,

Student's Attorney (Wyner). Dr. Loo participated by telephone to present and discuss the Neuropsychological Assessment she performed. The IEP team confirmed that Student remained eligible for special education services under the disability category of SLD. The team discussed Student's unique needs in behavior, reading, writing, and math, his inattention, visual memory, fluency, poor progress in his reading comprehension, problem solving in math, writing multi-paragraphs that demonstrate organization and that stay on topic, his behavior problems including difficulty with peer relationships, and the need for a behavior support plan (BSP), and psychological counseling.

62. Dr. Loo reported that she found two areas of Student's inattention: tasks requiring memory and tasks requiring visual motor skills. Dr. Loo concluded Student met the criteria for an attention deficit hyperactivity disorder (ADHD) diagnosis, but due to his visual weaknesses she would not confirm that diagnosis. The District members of the IEP team discussed Dr. Loo's recommended modifications that included: additional time for tests, modified assessments, teacher prepared study notes, repetition and preteaching of material, and after school tutoring for Student's academic support. To address attention deficits, she recommended seating in front of the class, directed teaching, and breaking down assignments. District shared that it implemented many of her suggested accommodations in Student's classroom. For example, Student's teachers tested Student in a small group environment, shortened his assignments, used assistive technology, extended due dates on homework assignments, sat Student in the front of the classroom, used tangible reminders, broke down assignments, and instructed Student on social skills. District members opined that these methods assured improvement in Student's ability to attend and improve his peer relationships. District members of the IEP team again proposed that a FAA be completed and a Behavior Support Plan be developed and implemented. Parent declined the FAA and objected to District characterizing Student's behavior as assaultive.

63. The IEP team also discussed the results of an independent vision evaluation conducted by SCCO, which District funded pursuant to a November 2009 agreement. Handford shared that test results indicated that Student had deficits in the areas of visual spatial, visual analysis, and visual motor skills, resulting in oculomotor dysfunction. Handford recommended in-home and school vision therapy services.

64. On April 2, 2010, District reconvened the IEP meeting. The IEP team included Parent, Bray, Dr. Martin, Waters, Peltz, Parsons, Williams, McKinley, and Student attorney Wyner. The team discussed Student's Fusion word processor, the OT report and a revised copy of the SCCO report including goals.

65. Waters shared Student's progress towards his goals. Student made some progress on his goals in reading comprehension, math word problems, and writing. Student failed to make any progress on his behavior goal, to attend to task for 15 minutes with no more than two prompts. Student failed to make appropriate progress on the first short term objective that by June 1, 2009, Student would attend to task for five minutes with no more than four prompts as measured by teacher charted observation. The evidence showed that it was difficult for Student to attend to task even with one-to-one instruction and Student

required continuous prompting and redirection within five to 15 minutes. However, Student made progress and completed goals in reading comprehension in the areas of distinguish the main idea; reading comprehension, recall major points and make predictions; and in writing in the areas of, use knowledge of the basic rules of punctuation and capitalization.

66. Waters proposed draft goals in the area of reading comprehension, math, writing, behavior and pragmatics. Student's behavior goals addressed the areas of extinguishing rough play in unstructured and loosely structured settings, and staying on task for ten minutes with no more than four reminders. Student's two pragmatic goals also addressed Student's behavior as they focused on improving his relationships with his peers and adults.

67. One pragmatic goal was that by March 30, 2011, Student would be able to state and generalize 15 perspectives of others when presented with verbal tasks, discussion or role playing in speech therapy, in the classroom, and on the playground. The other pragmatic goal was that by March 30, 2011, Student would be able to identify and use five socially polite commands/requests with peers/adults when presented with situations that involve body space, joining a group, and conflicts in and out of class.

68. Some of this meeting focused on Student's behavior. District drafted a Behavior Support Plan (BSP). When the team began to review the draft BSP, Parent stated she wanted to consult with her specialists before providing feedback on the BSP. Parent also refused to sign the proposed FAA assessment plan, and raised concerns about the term "assaultive behaviors" included in the plan. The IEP team failed to agree to a proposal to address Student's behavior as it related to communication and peer relationships. Student's representatives asserted District was not fair to Student because staff reported petty behavior incidents.

69. At hearing, General Education Teacher Brandon Baker (Baker) confirmed Student's April 2010 IEP listed accommodations that included extra time; shorten assignments; structured environment to maximize focus in class; seat in front of classroom; visual aides for concept understanding; extra set of textbooks for home; use of timer; and reading strips to assist with tracking. Baker implemented the accommodations and graded Student on his effort to complete shortened assignments. Baker observed that Student's social skills were far below others his age, as Student's focus was narrow, which hindered acceptance by his peers. He confirmed that Student struggled with math problems and his attention was scattered. Student required heavy teacher guidance to keep him focused. In pragmatics, he worked with Student on visual cues and coached him. He suggested the team develop a behavior goal to address Student's involvement in rough play.

70. For the 2010-2011 school year, District offered Student placement in a general education class. District also offered services that focused on Student's academic and communication needs, including: 1) specialized academic instruction provided by District four days per week at 60 minutes per session in a group setting; 2) language and speech services provided by District 55 sessions per year at 30 minutes per session in a group model;

3) occupational therapy consultation services provided by District four sessions per year at 20 minutes per session in a collaborative model; 4) specialized vision services provided by a nonpublic agency (NPA) 30 sessions per year at 45 minutes per session in an individual model; and, 5) intensive individual instruction provided by District at 1,860 minutes per week in an individual model. The Intensive Individual Instruction was a temporary special needs assistant to assist with positive reinforcement and to improve Student's social skills with other students in the classroom. Parent neither consented nor responded to District's offer.

71. On April 26, 2010, District sent Student's attorney a letter requesting a response to District's offer at the March 30, 2010 and April 2, 2010 IEPs. District also proposed rewording the assessment plan and conducting a Functional Behavioral Assessment (FBA) rather than a FAA. On June 3, 2010, July 15, 2010 and July 30, 2010, District's attorney sent Student's attorney an e-mail requesting a response to District's offer of a FAPE for the 2010-2011 school year. Student's attorney failed to respond to District's offer.

72. On August 30, 2010, District sent Student's attorney a letter of prior written notice and District's offer of FAPE. Specifically, District requested a response to its offer for the 2010-2011 school year of placement in a general education class with the following services that focused on Student's academic and communication needs: 1) specialized academic instruction provided by District four days per week at 60 minutes per session in a group setting; 2) language and speech services provided by District 55 sessions per year at 30 minutes per session in a group model; 3) occupational therapy services provided by District four sessions per year at 20 minutes per session in a collaborative model; 4) specialized vision services provided by a nonpublic agency (NPA) 30 sessions per year at 45 minutes per session in an individual model; and, 5) intensive individual instruction provided by District at 1,860 minutes per week in an individual model.

#### *2010-2011 School Year*

73. Student returned to school in August 2010. On September 16, 2010, Student's attorney informed District that he was working with Parent and would respond by the end of next week to District's offer of a FAPE and prior written notice letter. The evidence showed that Student failed to respond to District's offer of a FAPE for the 2010-2011 school year. The April 2009 IEP and its Addendum remained the operative IEP.

74. On September 24, 2010, Student allegedly punched another Student in the ear, but after an investigation, District sent Parent a letter indicating it was an accident.

75. On October 25, 2010, Student was cited for urinating on the floor in the boy's restroom. On October 28, 2010, Student's attorney sent District's attorney an e-mail citing his objections to District's treatment of Student. He voiced concern about the veracity of the bathroom incident, Student's privacy, Student being bullying, and District's request for a written or oral statement from Student regarding the incident. Finally, Student's attorney indicated that a school administrator discriminated and retaliated against Student by

requiring Student to be escorted to the bathroom and by not allowing him access to the regular boys' bathroom.

76. On November 1, 2010, Student's physician recommended that Student be placed on HHI. Consequently, Student did not return to school.

*Student's Request for HHI*

77. On November 17, 2010, Student provided District with a medical note indicating that because of anxiety, depression and a stressful and hostile school environment, Student required HHI. Student's attorney and District's attorney agreed that it was not necessary to convene an IEP meeting to finalize an IEP amendment to add HHI services to Student's IEP. The District sent Student's attorney the proposed December 1, 2010 Addendum IEP.

78. The amendment proposed District would provide: 1) five hours of HHI per week; 2) the RSP teacher to consult with HHI teacher 15 minutes per month regarding modifications to school work; 3) the speech pathologist to consult with HHI teacher 15 minutes per week; 4) the occupational therapist to consult with HHI teacher 15 minutes per month; 5) goals from August 31, 2009 IEP to be implemented; 6) HHI to be provided at a mutually agreed upon location and time; 7) if teacher cancelled the HHI session, the session would be rescheduled; 8) if Student cancelled the session, it would not be rescheduled; and 9) Parent or family member would remain within view during the HHI session, but would not interrupt or disrupt instruction.

79. Although the parties agreed to the time and frequency of HHI services, they could not agree on the location. Specifically, on January 21, 2011, District agreed to provide HHI at Student's home on the condition that an instructional aide accompanied the HHI instructor, but Parent would not accept this condition.

80. On March 22, 2011, District filed a Request for a Due Process requesting OAH issue an Order establishing the District offered Student a FAPE in the March 2010 and April 2, 2010 IEPs and the December 1, 2010 IEP addendum. District did not provide HHI services.

81. At hearing, Dr. Martin provided credible testimony about the issues involved in Student's HHI. Special education and related services may be provided in the home or hospital if the IEP team recommends such instruction or services. When recommending placement for home instruction, the IEP team must have a medical report from the attending physician and surgeon or the report of the psychologist, as appropriate, stating the diagnosed condition and certifying that the severity of the condition prevents the pupil from attending a less restrictive placement. Although unusual, she explained the IEP team initially recommended that District provide HHI in a mutually agreeable place, and later agreed to provide HHI at Student's home provided an aide accompanied the instructor. Dr. Martin

explained that District was concerned about the safety of its instructor because of the volatile relationship between Parents and District.

#### *Request for Early Triennial*

82. On November 11, 2010, Student's attorney wrote to District indicating that because Student was so traumatized by the new unexplained procedures and restrictions on his access to the restroom, and Student's physician recommended Student be placed on HHI, District should provide Student with daily academic instruction at his residence by a special education teacher. In addition, Student's attorney requested District to engage and fund a NPA to provide DIS services in the home. He also requested that District move forward with Student's triennial assessments so that the IEP team could identify an appropriate educational placement based on these evaluations and data.

83. On November 30, 2011, District responded by sending Student an assessment plan to assess Student for his triennial in academic achievement; intellectual development, language/speech/communication development; psychomotor; health, vision/hearing; self-help/career/vocational abilities; and social/emotional/behaviors. The assessment plan did not include either a FBA or FAA.

#### *Student's Triennial Assessment*

84. School Psychologist Jennifer Williams (Williams), RSP teacher Brandon Baker (Baker), Speech Therapist Carla Peltz (Peltz), and Occupational Therapist Laura Passons (Passons) conducted Student's triennial assessment on April 12, 14, 19, 21 and on April 25, 2010. The triennial assessment was to determine whether there was evidence of continued disability; whether Student continued to need special education and related services; to determine Student's present levels of performance; and to determine whether there were recommendations for additions, and/or modifications to Student's program to enable him to meet his educational goals and participate in the general education curriculum. An assessment report, dated May 6, 2011, summarized the assessment results and made recommendations for Student.

85. Peltz, who conducted a speech and language assessment on April 25, 2011, provided testimony at hearing. Peltz is a speech and language pathologist employed by the District. She provided Student with speech and language services twice a week for 30 minutes, focusing on language comprehension, language expression and pragmatic skills. Peltz's speech and language assessment of Student was comprehensive. Peltz based her results on a review of records, observations, discussions with Student's teachers, Parent feedback via the Health and Developmental History, and her administration of a variety of assessment instruments. When Peltz observed Student in the speech room, he appeared comfortable, rested and relaxed. Peltz and Student established a rapport during the testing and Student utilized three breaks during the two and one-half hour of testing.

86. Peltz found Student's articulation/phonology appropriate. She found no disruptions in the smooth flow of his speech and he was easily understood by his peers and adults. Student's voice and fluency were appropriate, and within the normal range for his age and gender. Student was easily understood by his peers and adults.

87. Peltz selected assessment tools that would measure Student's oral language knowledge, articulation, and pragmatics. Specifically, Peltz administered the Oral and Written Language Scales (OWLS) to assess Student's oral language knowledge, processes, and skills, and administered the Test of Problem Solving (TOPS) to assess Student's ability to sequence, predict and make inferences.

88. Based on standardized tests and her observation of Student, Peltz concluded that Student's speech and language skills fell within the low average range in comparison to peers of similar age and development levels. Student demonstrated a disability in the area of speech and language characterized by weak problem solving skills, as well as deficits in formulating the language for situations. Consequently, Peltz concluded that Student continued to require speech and language services.

89. Williams conducted a psychoeducational assessment of Student in April 2011. As part of Student's psychoeducational assessment, Waters, the resource specialist, who provided testimony at hearing, administered the Woodcock Johnson III Tests of Achievement Form B, as well as portions of the Brigance Comprehensive Inventory of Basic Skills II in Reading, ELA, and Mathematics Form A, to assess Student's academic achievement. As an RSP teacher, Waters' duties included assessing students, teaching classes, supervising learning labs, monitoring student progress and grades, and consulting and collaborating with general education teachers. Based on her education and experience, Waters was qualified to administer the Woodcock Johnson, which she administered in accordance with the manufacturer's instructions.

90. Waters reported during the testing Student was polite, friendly and often attempted to ask questions and initiate conversations unrelated to testing. When faced with a problem he felt was difficult, he would grow restless, and would begin engaging in self-talk in a very animated way. In interpreting Student's scores, Waters cautioned that Student's inconsistent attention and focus could have skewed the results. During testing, Waters used a timer to quell Student's anxiety regarding breaks and pace.

91. Overall, Student performed in the average range with a standard score of 91 in Broad Reading. When broken down into subtests he scored 94 in Letter Word (average), 87 in Fluency (average), and 91 in Passage Comprehension (average). On the Brigance Reading Vocabulary Comprehension Grade Placement Test he correctly identified words in first through fourth grade that did not belong. However, on the Reading Comprehension – Comprehends subtest, Student answered four out of five comprehension questions on Upper Second-Grade Level passage, and three out of five correct on the Lower Third and Upper Third Grade Level passages. Student answered all questions incorrectly when he read from Fourth Grade level passages.

92. Student scored 98 in Broad Writing which fell into the average range. When broken down into subtests, he scored 115 in Spelling (high average), 85 in Fluency (low average), and 90 in writing samples (average). Student was able to successfully express his thoughts, capitalize letters at the beginning of sentences, and use commas, but was inconsistent with his ending punctuation. Student was able to write a paragraph with a topic sentence, details, and appropriate transition words in response to a prompt.

93. Student's standard score in Broad Math was 92 which fell into the average range. When broken down into subtests, he scored 97 in calculation (average), 94 in fluency (average), and 90 in Applied Problems (average). Student used paper to solve many problems and with word problems was able to extract information important to the problem. On the Grade Placement Test from the Brigance Student performed at the fourth grade level. He wrote fractions for models, completed multiplication and division facts, compared decimals, multiplied whole numbers (multi-digit) and calculated the area of figures. When asked to recall stories, Student's standard score was 64, which was significantly below average. About 40 minutes later, Student was again asked to retell the same stories and scored a 72, in the below average range. Student was also administered the Sentence Memory Subtest in the Listening portion of the Brigance. He was able to repeat sentences of different lengths up to 14 syllables.

94. Waters found that Student's oral language skills were low compared to the range of scores obtained by others at his age level. Student's academic skills were in the average range for his age. Student's fluency with academic tasks and his ability to apply academic skills were within the low average range. When compared to others at his age level, Student's standard scores were average in broad reading, brief reading, broad math, math calculation skills, brief mathematics, broad written language and brief writing. His standard score in written expression was in the low average range. Waters recommended the use of: (1) tactile and kinesthetic approaches; (2) visual supports to assist with attention; (3) a timer, graphic organizers, checklists and schedules; (4) overlays to block extra visual stimuli; (5) scheduled breaks; (6) positive praise and encouragement; and, (7) talking cards to help Student control his impulse to talk out during lessons.

95. Williams used a wide variety of measures during her assessment of Student. She reviewed Student's records including prior assessments. Specifically, she reviewed the initial psychoeducational assessment she performed in April 2008; a January 2009 IEE performed by Dr. Perlman; a March 2010 neuropsychological assessment performed by Dr. Loo ; and a January 2010 comprehensive vision exam performed by the SCCO. She also observed Student, interviewed teachers, and administered the following tests: (1) Wide Range Assessment of Memory and Learning, Second Edition; (2) Test of Auditory Processing, Third Edition (TAPS-3); (3) Beery-Buktenica Developmental Test of Visual-Motor Integration, Fifth Edition (VMI)-BEERY; (4) Wide Range Achievement Test, Fourth Edition (WRAT-4) (5) Woodcock Johnson Tests of Achievement, Third Edition (WJ-III); (6) Conners' Teaching Rating Scale, Third Edition Short Form; (7) Conners' Parent Rating Scale, Third Edition Short Form (8) Conners' Self Report Scale, Third Edition Short Form; (9) Achenbach Teacher's Report Form for Ages 6-18; (10) Achenbach Child Behavior

Checklist for Ages 6-18; (11) Achenbach Self-Report for Ages 11-18; (12) Social Responsiveness Scale , Parent Form (SRS); (13) Social Responsiveness Scale, Teacher Form (SRS); and (14) Adaptive Behavior Assessment System, Second Edition.

96. During the assessments, Williams observed that Student was friendly and polite. At the beginning of the testing sessions, Student appeared nervous, but as the testing progressed he appeared more at ease. Student engaged and initiated conversation, but guided the conversation to topics of self-interest such as snakes, animals and planets. During the testing process he displayed a euthymic (normal, neither elated nor depressed) affect with congruent mood. At times during the testing, Student required redirection while other times he was able to independently redirect his attention.

97. Williams administered the WRAML2 to assess Student's ability to learn and memorize information by providing a collection of relevant memory measures useful in predicting school success. The General Memory Index is a combination of verbal and visual tasks that require an individual to store and retrieve recently learned information. Student performed at the borderline range in General Memory Index (SS 79, 8th percentile).

98. The Verbal Memory Index measures an individual's ability to retain auditory information. Student demonstrated average ability in this Index, which was comprised of subtests in Story Memory (SS 9, 37th percentile) and Verbal Learning (SS 8, 5th percentile).

99. Visual Memory is an individual's ability to retain both meaningful (pictorial) and minimally related, complex, rote information that has been presented visually. Picture Memory (SS 11, 63d percentile) and Design Memory (SS 3, 1st percentile) subtests comprised the Visual Memory Index. Student demonstrated significant difficulties remembering complex visual information when presented in isolation. However, he performed significantly better when given a stimulus containing supporting information which offered a context for the presented information. Overall, Student obtained a Visual Memory score in the low average range (SS 82, 12th percentile).

100. The Attention/Concentration Index is designed to measure an individual's ability to store and retrieve recently learned information. The Finger Windows (SS 4, 2d percentile) and Number Letter (SS 9, 37th percentile) subtests comprised the Attention/Concentration Index. Student demonstrated a significant weakness in replicating visual patterns on the Finger Windows subtest. However, on the Number Letter subtest, he demonstrated average skills at repeating verbal lists. Overall, Student obtained an Attention/Concentration score in the borderline range (SS 79, 8th percentile)

101. Student performed in the borderline range in the Working Memory Index (SS 73, 4th percentile). Working memory is an individual's ability to temporarily retain verbal and visual information and manipulate it to produce a result. The Verbal Working Memory (SS 6, 4th percentile) and Symbolic Working Memory (SS 4, 2d percentile) subtests comprised the Working Memory Index. Williams concluded that a significant discrepancy existed between Student's Verbal Memory Index and Working Memory. When compared to

his ability for immediate verbal recall, Student presented with a deficit in his working memory.

102. Student performed in the average range in the Verbal Recognition Index (SS 91, 27th percentile). This Index measures an individual's ability to recognize specific verbal information presented (approximately 15-30 minutes earlier). On the Story Recognition subset, Student scored in the 37th percentile (SS 9). On the Verbal Learning Recognition subset, Student scored in the 25th percentile (SS 8).

103. Student performed in the borderline range in the Visual Recognition Index (SS 71, 3d percentile). This Index measures an individual's ability to recognize specific visual information presented (approximately 15-30 minutes earlier). On the Design Recognition subset, Student scored in the 9th percentile (SS 6). On the Picture Memory Recognition subset, Student scored in the 5th percentile (SS 5). Although Student performed significantly better on the Picture Memory subtest than on the Design Memory subtest, he performed comparably when asked to later recognize information from the two subtests.

104. The General Recognition Index is a measure of an individual's ability to recognize specific verbal and visual information that was presented earlier and is comprised of the Verbal Recognition Index and the Visual Recognition Index. Overall, Student performed in the borderline range on the General Recognition Index (SS 78, 7th percentile). Because of the discrepancy between Student's verbal and visual recognition, Williams obtained a more accurate measure of Student's ability to recognize previously presented information by looking at his individual scores.

105. Finally, Student performed in the average range in Story Memory Recall (SS 10, 50th percentile) and Verbal Learning Recall (SS 8, 25th percentile). These subtests measured Student's ability to verbally recall, without cues, previously presented stories on the Story Memory subtest, as well as a list of words from the Verbal Learning Recall.

106. Williams administered the TAPS-3, to assess Student's auditory and phonological processing. Student's general Auditory Processing Ability fell in the low average range. He demonstrated average overall abilities in basic phonological skills and low average skills when retaining or remembering auditory material. Student demonstrated borderline skills overall when interpreting auditory material. On the Auditory Reasoning subtest, Student's score in linguistic processing was in the average range. On the Auditory Comprehension subtest, Student demonstrated extremely low skills in understanding spoken information. However, Williams cautioned that Student's score on this subtest was inconsistent with his average score in auditory reasoning, which was a similar test that required higher level thinking. She observed Student's difficulty in attending to tasks while she administered the Auditory Comprehension subtest.

107. Williams administered the Beery-Buktenica Developmental Test of Visual Motor Integration- Sixth Edition (VMI-6) to assess his visual motor processing. Student demonstrated average abilities in the Visual Perception subtest, which measured Student's

ability to discriminate one visual stimulus from another (SS 107, 68th percentile). Visual motor integration is the ability to visually perceive an object and reproduce it with fine motor output. Student performed in the average range in the visual motor integration (SS 97, 42d percentile) subtest. Williams also administered the Motor Coordination subtest to further isolate this skill, where he scored in the average range on this subtest (SS 93, 32d percentile). Because Student performed in the average range on these assessments, Williams concluded Student did not have visual motor integration or motor processing deficits.

108. As measured by the WRAT-4, Student's Reading Composite (SS 99, 47th percentile) consisting of the Word Reading (SS 101, 53d percentile) and Sentence Comprehension (SS 98, 47th percentile) subsets fell within the average range. In Spelling, Student performed in the high average range (SS 115, 84th percentile). Student's performance on the Math Computation subtest fell in the low average range.

109. Williams provided Parents with rating scales from the Adaptive Behavior Assessment System, Second Edition (ABAS-II) scale, to measure Student's adaptive skills. The ABAS-II measures: (1) conceptual skills (e.g., language, reading and writing, money concepts, and self-directions); (2) social skills (e.g., interpersonal relationships, responsibility, self-esteem, gullibility, following rules, obeying laws, and avoiding victimization); (3) practical skills including basic activities of living (e.g., eating, mobility, toileting and dressing) and instrumental activities of daily living (i.e., meal preparation, housekeeping, transportation, taking medication, money management and telephone use). From measuring these skills, an assessor develops a General Adaptive Composite (GAC). A GAC score was not calculated because Student's raters skipped or left blank multiple items and therefore a scaled/composite score could not be calculated. As rated by Parents, Student's overall Social Composite score fell within the borderline range (SS 78), with his leisure skills in the borderline range (SS 5), and his social skills in the average range (SS 8). As rated by Parents, in the areas of Communication (SS 7), Functional Academics (SS 6), and Self-Care (SS 6), Student's scores fell in the below average range. Parents failed to answer some questions but commented that Student loved being around people and having friends. Parents also explained that they were teaching Student how to talk to others and share his interests. Finally, Parents advised that Student wanted to please others and make them happy.

110. Williams administered the Conner's Rating Scale-Third Edition (Conners 3) to assess Student's attention and learning problems, which is a screening for ADHD. Williams provided the Conners 3 scales to two observers from two settings, Baker, who was Student's teacher from August 2010 through October 28, 2010 when Student attended Perdue Elementary School, and Parent. In addition, Student completed the Conners Self-Report. Williams analyzed Parent responses and found the areas of Inattention, Hyperactivity/Impulsivity, Learning Problems/Executive Functioning, and Peer Relations fell within the significant range. The area of Defiance/Aggression fell within normal limits. Williams analyzed Baker's responses and found the areas of Inattention, Hyperactivity/Impulsivity, Learning Problems/Executive Functioning, Defiance/Aggression and Peer Relations fell within the significant range. Williams scored Student's responses and

found the areas of Hyperactivity/Impulsivity fell within the significant range. The areas of Inattention, Learning Problems/Executive Functioning, Defiance/Aggression and Peer Relations fell within normal limits. Based on the information from Student, Parent, teacher rating scales and observations in class and at home, Williams concluded Student exhibited processing deficits in attention. Her analysis was thorough and supported by the standardized assessments, and input from Student, Student's Parent and teacher.

111. Williams also focused on Student's social-emotional functioning. She interviewed Baker who only knew Student from August 2010 until October 28, 2010, when Student stopped attending school. However, Baker's perception of Student was consistent with Student's records and other teacher reports. Specifically, Student presented as immature with social skills far below others his age. Although Student appeared to seek social interaction, he inappropriately interacted with his peers and at times attempted to initiate play through unwelcomed physical contact. Student's interests and conversation focused on a narrow array of subjects. Because Student's attention span was short, and his organizational skills were poor, Williams concluded Student would benefit from one to one attention to complete academic tasks. From a review of records, Williams found Student reacted physically when he believed he was threatened by another student. Student's discipline record documented 33 behavioral violations since November 2007 with two violations during 2010-2011 school year. The behaviors included becoming physical with others; throwing items; demonstrating inappropriate behavior in the restroom; and engaging in horseplay. Although Parent disputed Student's discipline record, Williams and Student's teachers expressed concern about Student's fighting with other students.

112. In contrast, Parent described Student as trying to please others and make them happy. In Parent's opinion, Student was bullied and would respond physically in self defense. Parent shared with Williams that Student frequently sought contact with his peers and was highly social; sometimes cried or appeared to be sad because of an incident at school; "never to sometimes" was aggressive towards other children and only acted in self-defense; never content to play alone; never appeared to be in his own world; sometimes enjoyed the company of others but was shy or reserved; never anxious or resistant when asked to transition; "never to sometimes" failed to comply with rules; and apologized when he forgot to complete a chore. Parent reported that because of his school environment, Student experienced nightmares, depression, and anxiety. Parent voiced her concern about Student's lack of focus and ability to complete school tasks. Student received private counseling services to address his school related concerns.

113. The Achenbach Behavior Rating Scales included 112 items clustered into areas of Affective Problems, Attention Deficit/Hyperactivity Problems, Oppositional Defiant Problems, and Conduct Problems. Parents, Baker and Student completed rating scales. Baker rated Student in the Clinically Significant range in four areas. Whereas, Student scored in the Borderline Significant range in Anxiety Problems, and within normal limits in

the area of Somatic Problems.<sup>2</sup> In contrast to Baker, Parents only rated Student within the Clinically Significant range in one area, Somatic Problems. Parents rated Student in borderline significant range in the areas of Affective Problems, Anxiety Problems, and Attention Deficit/Hyperactivity. Parents rated Student within the normal range in the areas of Oppositional Defiant and Conduct Problems.

114. Student completed a Youth Self-Report and scored within normal limits all areas, with the exception of Anxiety Problems, where he fell in the clinically significant range. Student shared that he was concerned because he was treated unfairly at school, which made him sad. Student reported that he felt he got along better than average with his Parents and sister, and average with other children. He shared that he engaged in activities with friends outside of school more than three times a week.

115. Williams administered the Social Responsiveness Scale (SRS), a behavioral rating scale that measures various dimensions of interpersonal behavior, communication, and repetitive/stereotypic behavior that are characteristic of autism spectrum disorders. SRS Total T-Scores of 59 or less are considered within the normal range, and represents students not affected by autism spectrum. Total T-Scores between 60-75 indicate mild to moderate characteristics consistent with “a high functioning” autism spectrum condition, while scores of 76 and higher are considered to be in the severe range and are strongly associated with clinical diagnosis of autism spectrum disorder. A SRS rating scale completed by Parent indicated that Student fell within the mild to moderate range (T-Score 63). Parent shared that Student often thought or talked about the same subject, often thought too literally, had trouble getting his mind off something once he started thinking about it, had a narrow array of interest, got teased a lot, and stared off into space. As rated by Baker, Student’s behaviors associated with Autism Spectrum Disorder fell within the severe range (T-Score 84).

116. Williams prepared a written report. In her report, Williams analyzed Student’s history, teacher comments, assessments, and observations, and summarized her findings. She provided a thorough analysis and concluded that Student continued to meet the criteria for SLD eligibility. She explained that Student was qualified in 2008 as SLD because there was a discrepancy between his cognitive ability and academic achievement. Student’s performance in the areas of visual perception, visual-motor integration, motor coordination and verbal memory fell within the average range. Williams noted deficits in the areas of visual processing (visual memory and visual recognition) working memory, and attention. At the time of the most recent assessment, as measured by the WRAML and the WJ-III Student performed in the average range in reading, within the low average to average range in math, and within the average to high average range overall in written language. When she reviewed his classroom performance she noted that Student performed far below his peers and below his expected ability. Thus, she concluded because Student exhibited a severe discrepancy between his cognitive ability and academic achievement, he would continue to remain eligible for special education services as a Student with a Specific Learning

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<sup>2</sup> Williams noted that Baker’s knowledge of Student was limited to August 2010 through October 28, 2010.

Disability. Williams' finding that Student met eligibility for special education in the category of SLD was supported by the evidence.

117. Williams also evaluated Student's eligibility as a student with autistic-like behaviors. She found Student's SRS ratings reported by Parents fell within the mild to moderate range; and Student's SRS ratings reported by Baker's fell within the moderate to severe range of Autism Spectrum Disorder. However, she "deferred" Student's qualification under the category of autistic-like behaviors, because Student had not been attending school or participating in any community social organizations, and, as such, Williams was not able to observe Student in these settings. This conclusion was consistent with Dr. Perlman's finding that Student must be observed in the community before to find Asperger's Syndrome.

118. In her report, Williams methodically analyzed if Student met the criteria for ED eligibility and found that Student did not meet the criteria. Because Parent reported that Student made friends outside of school and Student engaged appropriately with adults, this demonstrated his ability to build and maintain satisfactory interpersonal relationships. Williams reviewed Student's Assertive Discipline Record that reported multiple instances of Student acting out physically towards other students (kicking, talking, and pushing). Because Parent disputed the accuracy of this record and asserted that Student acted in self-defense, Williams found that Student did not exhibit inappropriate behavior or feelings under normal circumstances. However, Student's therapist indicated that Student exhibited anxiety to a marked degree (unable to attend school) and for a long period of time. Parent reported that Student exhibited symptoms of anxiety to a marked degree and for a long period of time. An Achenbach rating scale completed by Baker and Parent indicated that Student fell within the borderline significant range in the area of anxiety. Thus, Williams concluded that Student developed physical symptoms or fears associated with school problems. However, Williams found during his assessments, Student was polite, friendly and talkative, and did not present as sad, withdrawn or depressed. In light of the results of Williams' observations and Student's assessments, Williams' finding that Student did not meet eligibility for special education in the category of ED was supported by the evidence.

119. Williams' assessment report made the following recommendations for Student, all of which were either performed or could be performed, in the general education classroom: (1) Student remain eligible for special education services; (2) emphasize a multisensory approach to academic instruction; (3) improve study skills by utilizing peer tutoring, selecting highly interesting instructional materials, and breaking down complex and new information into small segments; (4) break directions and sequential information into smaller, shorter segments; (5) highlight or underline important words or phrases in Student's assignments that require reading; (6) reduce visual stimuli by covering the entire page except the activity; and (7) monitor Student's academic, social-emotional, and psychological development. Williams did not recommend psychological services, counseling, or strategies to address Student's behavior.

*May 6, 2011 and May 19, 2011 Triennial IEP Meetings*

120. On May 6, 2011, District convened Student's triennial review to discuss assessments, and Student's transition to middle school. The IEP team included Parent, Bray, Dr. Martin, Etiwanda Intermediate School Administrator Kelly Mauricio (Mauricio), Baker, Etiwanda Intermediate School Teacher Megan Carter (Carter), Peltz, Waters, Etiwanda Intermediate School Specialized Academic Instructor Angela Richardson (Richardson), Passons, Williams, Wyner, Paralegal Jennifer Ralph (Ralph) and Attorney for District Constance Taylor (Taylor). The IEP team confirmed that Student remained eligible for special education services under SLD, but also found Student eligible under the category of autistic-like behaviors. Specifically, Williams reported potential areas of Student's eligibility that included SLD, ED and autistic-like behaviors. The IEP team then determined that Student was eligible for special education services under the categories of autistic-like behaviors as a primary eligibility and SLD as a secondary eligibility.

121. The team discussed Student's unique needs in reading, writing, and mathematics. The team also noted Student's lack of educational progress made in his general education curriculum with RSP, his behavior problems including difficulty with peer relationships, his continued need for a BSP, and his need for ongoing counseling.

122. The IEP team discussed the psychoeducational assessment. Waters explained that Student's standard scores were average in broad reading, brief reading, broad mathematics, math calculation, broad written language, and brief writing. His standard score in written expression was low average. Student's standard scores were below average in reading comprehension; oral language; word problems; and problem solving. When asked how Student scored in reading, writing and math, Waters reported that Student functioned below average in reading comprehension, average in reading decoding, above average in spelling, inconsistent/below average in oral language, below average in word problems, below average in problem solving, average in math fluency, and average in math calculation.

123. Baker presented Student's progress in class while he attended Perdew. Student demonstrated strength in memory skills, spelling and handwriting. Student's areas of need included reading, math and science comprehension; maintaining friendships; and interacting with other students. His class work was inconsistent, as some days it was average or better and other days it was below average. Baker explained that he sent Student's work to Parent and provided the team with a grade report and work completion summary regarding work Student completed at home. When Student was in his class, Baker ensured Student's participation in classroom activities and games.

124. The IEP team reviewed Student's progress on his seven previous goals in the areas of pragmatics, behavior, reading comprehension, math problems and writing. District reported that although student met his goal in pragmatics to identify 25 perspectives of others as of April 30, 2010, Student regressed as of May 2011. District also reported that Student met his goal in pragmatics to identify and demonstrate 25 direct, socially polite commands as of April 30, 2010, and continued to meet this goal through May 2011, based on observations

in a testing situation. District reported that Student failed to meet his behavior goal to attend to task for 15 minutes with no more than two prompts.

125. Student regressed on his reading comprehension goal that Student would identify the main idea four out of five trials. District reported that Student failed to meet his math word problems goal. However, Student met his goal in reading comprehension, when given a narrative test at grade level. Student could recall major points and make predictions, and a writing goal when given a sentence to write Student will correctly use capital letters and ending punctuation. However, Student's goals are from the April 2009 IEP, because Student failed to consent to any goals after that date. According to RSP teacher Waters, Student made some progress on his fifth grade goals in reading comprehension and math word problems. She shared that Parent's refusal to consent to new goals for the 2010-2011 school year and Student not attending school after October 28, 2010, limited Student's progress on his fifth grade goals.

126. At the May 6, 2011 IEP, Peltz, who provided speech therapy to Student, reported that Student met both pragmatic goals when in a small group, structured setting. In the group setting, she used some "situations" as a teaching moment. At hearing, Peltz gave examples of Student's progress in pragmatics. Student demonstrated more independence in using his skills, and was able to answer problem solving questions, and understand others' perspectives. Because of Student's progress in the small group setting, Peltz provided fewer verbal and visual cues and was able to reduce her interventions between Student and others. During the past nine to 10 years at Perdew, she provided speech and language services to 10 to 15 students identified within the autism spectrum. She opined that Student made progress until April 2010, and would continue to make progress if he continued to receive this service.

127. Parent shared her concern that District failed to provide Student with HHI since November 2010. Parent asserted District's condition that an instructional aide accompany Student's home hospital instructor was unacceptable. Parent argued District failed to properly identify Student's eligibility and to provide appropriate services to meet Student's social/emotional needs. For example, she stated District disciplined Student because of his behavior, which was a manifestation of his disability. Because District's actions caused Student's anxiety, he was not able to attend school and improve his social skills.

128. The IEP team discussed placement and the continuum of services. General education was considered with an instructional assistant, pull out specialized instruction in language arts and math, and support in social emotional development. The team described the assistant as a one-to-one aide who would be trained to provide both academic and behavior support. However, Parent commented that Student would not be comfortable with an aide sitting next to him. Etiwanda Intermediate School (Etiwanda) Administrator Kelly Mauricio described the classroom size in general education, resource and special day classes at the intermediate school. Parent expressed concerns regarding Student's attention in a large classroom. The team discussed Leroy Haynes Educational Center, a non public school (NPS) option and adjourned for Parent to observe the intermediate school and the NPS classrooms.

129. District reconvened the IEP on May 19, 2011. Bray, Mauricio, Dr. Martin, Baker, Carter, Waters, Richardson, Williams, Estrada, and Taylor attended in person. Parent, Wyner and Ralph attended via telephone. The team discussed placement. Parent reported that she visited the NPS, but was not able to visit the classroom specific to students with Asperger's. She opined that the small group structure with a low student to teacher ratio would benefit Student, but the class had first to sixth graders and the age span would not help Student's social or emotional growth. Parent also indicated that Student would benefit from attending a resource cluster classroom at the Etiwanda.

130. However, Parent declined a second visit to the NPS and asked about the collaborative classes at the intermediate school. RSP teacher Angela Richardson (Richardson) explained that the class typically ranged from 24 to 29 students and were taught by one general education and one special education teacher.

131. After careful consideration and input from the entire IEP team, District's offer of placement and services for the 2011-2012 school year included placement in a general education class, as well as services that focused on Student's academic, behavior and communication needs: 1) specialized academic instruction provided by District five days per week at 180 minutes per session in a group setting; 2) language and speech services provided by District two days a week at 30 minutes per session in a group model; 3) a behavior support plan with a behavior goal; 4) placement at Etiwanda Intermediate School with collaborative resource support from a one-to-one aide throughout the school day; 5) an updated vision exam from SCCO; 6) a referral to the WESELPA counseling staff; and 7) a psychoeducational IEE.

132. The IEP team also offered transition plan for middle school. Specifically, the team offered one day of transition service where Student, on August 1, 2011 from 9:00 a.m. to noon, would attend Camp Etiwanda. Camp Etiwanda was a morning program that included touring the campus, meeting the teachers, receiving class schedule and PE locker assignment, purchasing PE clothes, and looking at course books.

*District's Proposed Program for the 2011-2012 School Year*

133. Angela Richardson (Richardson), who provided testimony at hearing, is an RSP teacher, and has been employed by the District since the fall 1999. As an RSP teacher at Etiwanda Intermediate School, she attended the May 6, 2011 and May 19, 2011 IEP meetings and described Student's proposed program. She received a bachelor of arts in 1995 in sociology, and a master's degree in special education from California State University at San Bernardino. She has held a mild to moderate credential since 1999, and a CLAAD and academic development credential since 2007, and an autism certificate since 2011. Her duties as a RSP teacher include assessing students, developing IEPs, collaborating with teachers and attending IEP meetings. She was an experienced special education teacher and knowledgeable about the Etiwanda program.

134. At hearing, Richardson described Student's proposed placement. Student would have a typical six and a one-half hour school day, which would start in Student's homeroom with approximately 24 other students. Student would then go to Richardson's special education language arts class, which would have a one to 10 teacher to student ratio, and a curriculum modified for Student and other pupils eligible under the categories of SLD or OHI. She believed Student would fit well with her other students and receive an educational benefit. Next, Student would attend a general education math class, and then social studies and science class each with two teachers and about 24 students, some with special needs. Student's schedule would also include a general education physical education and an elective class. Because she reviewed Student's psychoeducational assessment and participated in discussions at the two May 2011 IEP meetings, she believed she knew enough about Student to opine that District's offer of placement and services for the 2011-2012 year was appropriate and would meet Student's unique needs.

135. Parent criticized Richardson's special education training, knowledge of Student, and experience with behavior goals and techniques. She attended an online course to study for her special education credential requiring only 12 units, with no opportunity to work with her professors during her classroom observations. Prior to attending Student's IEP, Richardson failed to review Student's psychoeducational assessment, including assessments in speech and language, occupational therapy and health assessment. She did not meet Student personally and did not participate in the discussion about changing Student's eligibility category.

136. At hearing, Richardson testified training in behavior intervention was part of the autism program curriculum that she studied. Although she drafted BSPs, the last time she drafted one was in November 2010, and noted that a BSP was a growing document that could be revised by the IEP team. If Student returned to school, she would be one of the people implementing Student's BSP, and using positive reinforcement, such as verbal praise and prompts. Richardson explained that while working on a student's behavior, she found social stories effective on teaching how to enter a classroom, greet, and ask a peer to play. She confirmed that an effective BSP included a schedule of positive reinforcements, and opined that the proposed BSP was well designed, and contained a positive reinforcement schedule. In reviewing the proposed BSP, Richardson stated that although the plan failed to include the speech and language therapist as a reporter, the therapist would be an integral part of the behavior team.

137. Richardson reported that she had some training and experience using ABA. She attended a one to two day ABA training sponsored by the West End SELPA. She worked with a behavior specialist and used ABA techniques with students. However, she did not know who would implement and supervise an ABA program if offered by the District.

*Student's experts*

*Dr. Betty Joe Freeman*

138. Student hired Betty Joe Freeman, Ph.D (Dr. Freeman) to perform diagnostic assessments and to propose recommendations for interventions for Student. Dr. Freeman was also asked to address issues and concerns noted by Parent concerning Student in the area of peer relationships, maintaining friends, inattentiveness, difficulty following directions, school environment, and depression related to school issues and .

139. Dr. Freeman, who provided testimony at hearing, received her bachelor of arts from Mercer University in Macon, Georgia in 1966. She received a master's of art in psychology in 1968, and a doctorate in psychology in 1969 from Southern Illinois University in Carbondale, Illinois. From September 1973 until June 2003, she was an Assistant Associate and Professor in residence at University of California Los Angeles (UCLA), School of Medicine, and Department of Psychiatry & Biobehavioral Sciences. Currently, Dr. Freeman serves as a Professor Emeritus at UCLA, works in private practice and consults with school districts. Since October 1976, she has held a license in psychology from the State of California. From 1970 to the present, she delivered more than 200 lectures and authored more than 100 articles on childhood autism. She has been honored by numerous associations and school districts for her work on childhood autism. From 1991 until 2009, she served as consultant to more than 40 school districts. She has testified equally as an expert for school districts and for students. With all of her experience and training, Dr. Freeman qualified as an expert in childhood autism.

140. On June 28, 2011, Dr. Freeman evaluated Student and prepared a Psychological Assessment Report. She based her findings on the assessments she administered, Dr. Perlman's and Dr. Loo's assessment reports, Student input, Parent input, and a review of records. Freeman did not observe Student at home or in class, and did not speak to any of Student's teachers or service providers. She administered the following assessments: Autism Diagnostic Observation Schedule-Module 3 (ADOS-3); Social Language Development Test-Elementary; Adaptive Behavior Assessment System II (ABAS II); Social Skills Improvement Scale (SSIS); Social Responsiveness Scale (SRS); and, Behavior Rating Inventory of Executive Functioning (BRIEF).

141. Dr. Freeman administered the ADOS -3 to measure social communication and social behavior in students who presented with fluent speech. Based on the participant's social interaction, scores were derived to determine whether there were diagnostic indicators for Autism Spectrum Disorder. In the area of language and communication, Student responded with two to three word phrases even though he had good vocabulary and was capable of speaking in longer sentences. She found that Student's speech had little tone and affect; his reciprocal conversation was limited; he was unable to sustain a conversation and elaborate on his responses; and his use of gestures was limited to demonstration tasks. In the area of reciprocal social interaction, Student failed to use eye contact and his facial expression never changed. Student failed to exhibit any imagination or spontaneous

creativity. However, Student did not exhibit unusual sensory interests, complex hand or finger mannerisms, or any tantrums, aggression, or compulsive behaviors.

142. Dr. Freeman found that Student had substantial deficits in verbal and nonverbal communication; significant impairments in reciprocal social interaction; limited age-appropriate imagination or creativity; and limited interests.

143. Dr. Freeman administered the Social Language Development Test-Elementary to measure social language skills, including nonverbal communication. Student scored in the first percentile in making inferences and negotiating conflicts with peers. He scored in the 16th percentile in interpreting solutions and in the 14th percentile in supporting friends diplomatically. Dr. Freeman found his responses very concrete and literal, and concluded Student had significant language and social deficits.

144. Dr. Freeman administered the ABAS-II to measure Student's adaptive behavior and related skills through the critical insight of parents, teachers, and adults. Parent completed the measure to assess Student's daily functioning in nine specific adaptive areas in the home setting. Student scored in the extremely low range (SS 70, 2d percentile) in Conceptual Domain, encompassing communication, functional academics and self-direction. Dr. Freeman found that Student found it difficult to understand and organize the world around him. Student scored in the borderline range (SS 13, 7th percentile) in the Social Domain, encompassing leisure and social activities. Dr. Freeman found Parent's responses difficult to interpret because of Student's difficulty in maintaining friendships. Student scored in the below average range (SS 30, 21st percentile) in the Practical Domain encompassing community use, home living, health and safety, and self-care. Dr. Freeman found that although Student functioned on an average level in most of these areas, he needed supervision and support in the community and in the self-care area. Dr. Freeman concluded Student's ability to use skills on a day-to-day basis was significantly impaired in many areas.

145. Dr. Freeman administered the SSiS to evaluate Student's social skills, problem behaviors and academic competence. Teacher, parent and student forms helped to provide a comprehensive picture across school, home and community settings. Parent rated Student's social skills below average (SS 87, 18th percentile), particularly in the areas of communication, cooperation and engagement. Parent rated Student's problem behaviors in the average range (SS, 49th percentile).

146. Dr. Freeman administered the SRS (Parent Form) to assess Student's social skills deficits. This scale was designed to aid in diagnosis and treatment planning and to measure the severity of autism spectrum symptoms. In social awareness, Student scored in the normal range; in social cognition, in the mild range; in social communication, in the mild range; in social motivation, in the mild range; and in autistic mannerisms, in the mild-moderate range. Dr. Freeman found Student exhibited mild to moderate delays and deficits in social responsiveness (SS 63) and noted that subscale scores were useful in designing and evaluating treatment programs. She cautioned that when rated in this context by an adult,

Student's scores/functioning would appear to be less severe than if rated only in situations with peers.

147. Dr. Freeman administered the BRIEF to assess Student's executive functioning skills at school and at home, and to get an understanding of Student's everyday behavior associated with problem solving and social functioning. Generally, BRIEF questionnaires are completed by the child's parents and teachers, and measure eight fundamental aspects of executive functioning in two domains: The Behavioral Regulation Index and the Metacognition Index. Parent completed the rating scale, which revealed a few areas of concern. Parent described Student as having difficulty keeping information in mind for completing tasks and activities. Otherwise, Parent reported Student had no difficulty organizing himself and monitoring his own behavior.

148. Dr. Freeman concluded that based on a review of Student's developmental history, cognitive evaluation, and adaptive level of functioning, ADOS, behavioral observations, previous reports and Parent's report, Student met criteria for a diagnosis of Autistic Disorder. The diagnostic measures administered to Student were conclusive for both a medical and educational diagnosis. In sum, Dr. Freeman found that Student exhibited deficits in the following areas: verbal and nonverbal communication skills; social interaction; imagination or creativity; and language processing. Dr. Freeman believed that because Student was not properly diagnosed in the past, Student's delays in social adaptation had not been addressed in natural social environments such as school. Appropriate support and facilitation of positive social interaction and small group learning would benefit social skills development, as well as academic skills. Dr. Freeman used a wide variety of instruments. Her education and experience in childhood autism made her very well qualified to administer the evaluations. Her report was thorough and persuasive.

149. Dr. Freeman reported that, generally, the problem with autistic children is not that they do not acquire skills, but often they are not motivated to use skills consistently across multiple environments. Specific studies she reviewed reported that with intensive ABA programs supervised by well-trained staff for approximately two to three years, many children improve and do not appear autistic as they become older. The number of hours required for each child is entirely individual.

150. She concluded that Student required specific interventions that included ABA services from providers familiar with the unique abilities of children with Autistic Disorder Syndrome, particularly in the areas of communication and social adaptation. Providers must work together to establish consistent goals and expectations across environments to facilitate Student's growth and development.

151. She recommended the following interventions: 1) ABA utilized to increase Student's communication, appropriate behavior, and social skills, and should include one-to-one teaching with gradual reduction into a group setting; 2) the NPA to perform a behavioral assessment to ascertain Student's specific areas of need and to determine an appropriate behavioral program and level of services; 3) the NPA to perform a functional analysis of

behavior that focuses on ecological variables; 4) the NPA to develop a positive behavior support plan to optimize Student's functioning across environments and to identify structured activities for his participation in regular education classes; 5) when Student returned to a classroom, he would require a one-to-one aide to facilitate positive social interactions; 6) Student's IEP must include services in the areas of communication and social skills; 7) services must include a full school day of developmentally appropriate structured activities and one-to-one teaching in a full year program (no more than two weeks without intervention); 8) the program should have a social skills component, and a BSP focused on increasing Student's positive and successful interactions with peers and adults; 9) highly structured classes with a small student to teacher ratio for areas of weakness, while continuing independent class attendance in areas of strength; and, 10) weekly small group speech and language services focusing on language pragmatics and taught by a therapist familiar with the communication needs of students with ASD.

152. Dr. Freeman opined Student required a minimum of 40 hours a week of intensive ABA program at home, in the community and at school and also social and emotional services. However, Dr. Freeman admitted she was not able to estimate the time necessary for the proposed ABA home program, and she failed to describe the social and emotional services. She recommended that the NPA determine the length of the home program after it completed Student's assessments. In conjunction with the home program, she recommended HHI taught by an instructor experienced with ASD students, and noted that a transition plan must be developed to enable Student to return to a general education class with RSP services.

153. At hearing, Dr. Freeman was critical of District. She opined during the 2007-2008 school year, Student exhibited disruptive and aggressive behavior and inappropriate communication with his peers, typical of children with ASD. She believed District ignored Dr. Perlman's recommendation that Student's program focus on services appropriate for a Student with Asperger's. Because District failed to identify Student, it failed to provide Student with appropriate services. District failed to develop a behavior plan to address his inappropriate behaviors and teach replacement behaviors. Dr. Freeman noted that between 2007 through 2010, District's records show Student participated in 33 incidents of inappropriate behavior. Yet, District failed to perform an FBA, and advised that FAAs were not appropriate for students with autism. She concluded, because District failed to address Student's deficits in behavior and communication, his behavior and anxiety increased.

154. Dr. Freeman's criticism of District fell into three categories: (1) District failed to properly assess Student in 2008; (2) District failed to follow through on Perlman's recommendations; and, (3) District failed to perform an FBA and an FAA was inappropriate for a student with autism.

155. In reviewing Student's 2008 assessment, Dr. Freeman criticized District's failure to perform further assessments when Student's scores on the ASDS, a screening device for autism, indicated it was likely Student was on the spectrum.<sup>3</sup>

156. Dr. Freeman also criticized Student's pragmatic goals implemented during the 2009-2010 school year, as well as the ones proposed for the 2010-2011 and 2011-2012 school years. Although she testified that Student's April 2009 goal to state 25 perspectives of others when present with visual stimuli, and discussion and role playing in the speech therapy room was an appropriate goal, she believed the goal should have been written to apply to multiple environments. Dr. Freeman also criticized Student's progress on the April 2009 goal to identify and demonstrate 25 direct, socially polite commands and requests in speech therapy room and classroom. Dr. Freeman concluded that Student failed to make progress on this goal because, when she observed him, Student unable to perform these tasks. However, a pragmatic goal is practiced in a group, in a classroom or in the community, observation of Student at home would not be determinative of a student's ability to perform on a pragmatic goal. Dr. Freeman failed to address that Student had not attended school since October 2010 when she assessed him.

157. Regarding District's proposed behavior goals for 2011-2012 school year, Dr. Freeman criticized District's rough play goal proposed for the 2011 school year that Student would use pretaught social language/skills to initiate interactions with peers. She cautioned that in order to pre-teach skills, District should have performed a behavioral assessment. Regarding the two goals to increase Student's ability to attend, Dr. Freeman again criticized District's failure to perform a behavioral assessment to determine the triggers. She disparaged the two attention goals because District used the same goals in 2009, but lowered the number of trials Student needed to make progress.

158. Dr. Freeman's knowledge of autism and credentials are impeccable, however Dr. Freeman evaluated Student in June 2011 after the May 2011 IEP. Dr. Freeman's report was not given to the IEP team to review and determine if the program proposed would meet the Student's needs. Dr. Freeman failed to observe Student in school or in the community, or gather any information from Student's teachers. However, Dr. Freeman thoroughly reviewed Student's records, spent 5 hours testing Student, and she observed Student in his home after more than eight months after Student left school. Although her testimony was persuasive, her testing comprehensive, in light of her failure to observe Student at school and in the community, and the limited time she spent with Student, her recommendations for Student's program must be viewed with caution.

159. Dr. Freeman reviewed Student's Discipline Record from December 2007 through October 2009. She opined that District responded inappropriately to Student's behaviors, including biting a student's finger, poking a student with a corn dog stick, punching a student who tried to retrieve his basketball, trouble settling down and pushing a

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<sup>3</sup> District's failure to assess Student in 2008 is not within the statute of limitations and is not at issue.

student. In response to these behaviors, District punished Student by calling Parent, sending him home early, serving detention, and losing ability to participate in “Fun Friday” activities. Dr. Freeman opined that District failed to demonstrate an understanding that Student’s behavior was a product of his disability, and asserted that an appropriate response would have been to develop a positive behavior plan and/or assign a behavioral aide to help Student.

160. Finally, Dr. Freeman opined that in the last three years, Student made no progress in behavior. She based her opinion on comparing Student’s behaviors observed and reported in the 2008 and 2011 psychoeducational assessments. Student continued to whistle and hum, and appeared distracted, restless and inappropriately responded to questions.

*Dr. Ronald Burton Leaf*

161. Student hired Ronald Burton Leaf, Ph.D. (Dr. Leaf) to propose recommendations for interventions for Student. Dr. Leaf was not asked to prepare a written report. Dr. Leaf, who provided testimony at hearing, received his bachelor of arts in political science from UCLA in 1975. He received a master’s of art in behavior modification from Southern Illinois, University of Carbondale in 1977 and a master’s of art in psychology from UCLA in 1979, and a doctorate in psychology from UCLA in 1983. From September 1979 through 1980, when he was a graduate student, he taught at UCLA while working with O. Ivar Lovaas, Ph.D. From 1983 to 1984, he was a lecturer in the Department of Psychology at UCLA. From 2003 to present, he was an adjunct professor of Behavioral Analysis Department at Cloud State. He worked as a behavior Specialist for the Department of Developmental Services and presently serves as the director of the Behavior Therapy and Learning Center. From 1978 to 2009, he delivered more than 30 lectures on behavior therapy. From 1979 to present, he served as a consultant to more than 20 school districts. He has testified equally as an expert for school districts and students. With all of his experience and training, Dr. Leaf qualified as an expert in ABA.

162. Dr. Leaf reviewed Dr. Freeman’s report and agreed with her analysis. Dr. Leaf criticized District’s approach to working on Student’s behavior, the goals District developed in behavior and pragmatics, and District’s proposed BSP. Dr. Leaf asserted a good BSP is based on a behavior assessment. Dr. Leaf described that a good behavior plan begins with good information, extensive data collection and the creation of schedules. The most important aspect of a behavior plan is to train aides, teachers and parents to use the behavior plan.

163. Dr. Leaf described that an appropriate plan for Student would focus on coping skills and communication skills, as well as powerful reinforcers and schedules. He recommended that ABA would be the best approach for Student. He opined that District would not have enough training to help Student transition from home to school. He recommended three agencies that would have the correct technique and the expertise to create a plan and train staff: Great Strides in St. Louis and locally Behavior Therapy Center (BTC) in Encino, California, and IABA in Los Angeles.

164. Based on Dr. Leaf's experience he recommended a program for Student that included 40 hours a week of ABA. Dr. Leaf testified that generally for a program to be successful 40 hours of ABA a week is recommended. Some research indicated that a 20 hour program can also be successful with some students.

165. The evidence showed that Dr. Leaf's knowledge of ABA was extensive but it also showed that his familiarity with Student was not. Dr. Leaf admitted he spent only 10 minutes with Student; conducted no assessments; interviewed only Parent; reviewed only some documents provided by Student; failed to observe Student in the community or at school; and failed to talk to any of Student's teachers or service providers. His testimony was not persuasive.

#### *Compensatory Education*

166. Student relied on Dr. Freeman's thorough assessment and recommendations to support his request for compensatory education. Dr. Freeman concluded Student required intensive behavior therapy and educational support for him to return to a full time classroom. She recommended before he returns, District must fund an intensive ABA program in home and community for a minimum of 40 hours a week and social and emotional services. As compensatory education she recommended District fund a qualified NPA to assess Student, to make programmatic recommendations and to provide Student with compensatory behavior services. Because socially Student functions at a five-to-six year old level, she also recommended behavioral services at home, at school and in the community.

167. Although Dr. Freeman conducted assessments, she admitted she was not able to estimate the time necessary for the proposed ABA home program, and she failed to describe the social and emotional services. She recommended that the NPA that performed Student's evaluation determine the length of the home program after it completed Student's assessments.

### LEGAL CONCLUSIONS

1. The petitioner in a special education due process hearing has the burden to prove his or her contentions at the hearing. As the petitioning party, Student has the burden of persuasion on all issues. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].)

#### *Issue One: Offer of FAPE for the 2009-2010 School Year*

2. Student contends that District failed to provide him with a FAPE from August 25, 2009 through the end of the 2009-2010 school year by failing to identify his primary disability as autism. (Issue 1(a)) Specifically, Student argues that District's failure to make him eligible for special education services under the category of autistic-like behaviors, as opposed to specific learning disability (SLD), ultimately resulted in the development of an

educational program that was inadequate to address his unique needs. Student further contends District failed to provide him with appropriate instruction, services and support during the 2009-2010 school year to address his unique needs in academics, behavior, and social skills development. (Issue 1(b))

3. District contends that Student was not denied a FAPE because District found Student eligible for special education services as a student with SLD. District was not required to classify Student by his disability, but was required to provide Student with services to address his unique needs. District asserts it provided Student with appropriate instruction, services, and support during the 2009-2010 school year to address his unique needs in academics, behavior, and social skills.

#### *Applicable Law*

4. California special education law and the IDEA provide that children with disabilities have the right to a FAPE that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and independent living. (20 U.S.C. §1400(d); Ed. Code, §56000.) FAPE consists of special education and related services that are available to the child at no charge to the parent or guardian, meet the standards of the State educational agency, and conform to the student's individual education program. (20 U.S.C. § 1401(9).) "Special education" is defined as "specially designed instruction at no cost to the parents, to meet the unique needs of a child with a disability...." (20 U.S.C. § 1401(29).) California law also defines special education as instruction designed to meet the unique needs of individuals with exceptional needs coupled with related services as needed to enable the student to benefit fully from instruction. (Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26).) In California, related services are called designated instruction and services (DIS), which must be provided if they may be required to assist the child in benefiting from special education. (Ed. Code, § 56363, subd. (a).)

5. In order to be eligible for special education services, a student must have one or more specific disabilities. (20 U.S.C. § 1401(3)(A); 34 C.F.R. § 300.7(a)(1) (2006)<sup>4</sup>; Ed. Code, § 56026, subd. (a); Cal. Code Regs., tit., 5, § 3030.) For purposes of special education eligibility, the term "child with a disability" means a child with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, require instruction, services, or both, which cannot be provided with modification of the regular school program. (20 U.S.C. §1402(3)(A)(ii); 34 C.F.R. §300.7(a).) Similarly, California law defines an "individual with exceptional needs" as a student who is identified by an IEP team as "a child with a disability" pursuant to title 20 United States Code section 1402(3)(A)(ii), and who

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<sup>4</sup> All subsequent references to the Code of Federal Regulations are to the 2006 edition.

requires special education because of his or her disability. (Ed. Code, §56026, subd. (a), (b).) California Code of Regulations, title 5, section 3030 includes a list of conditions, referred to in the regulation as impairments that may qualify a pupil as an individual with exceptional needs and thereby entitle the pupil to special education if required by “the degree of the pupil’s impairment.”

6. Consistent with federal law, California law provides that a child who exhibits any combination of the following autistic-like behaviors is eligible for special education services: an inability to use oral language for appropriate communication; a history of extreme withdrawal or relating to people inappropriately and continued impairment in social interaction from infancy through early childhood; an obsession to maintain sameness; extreme preoccupation with objects or inappropriate use of objects, or both; extreme resistance to controls; displays peculiar motor mannerisms and motility patterns; and self-stimulating, ritualistic behavior. (Cal. Code Regs., tit. 5, § 3030, subd. (g).)

7. A specific learning disability means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or perform mathematical calculations. The term "specific learning disability" includes conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. The term does not include a learning problem that is primarily the result of visual, hearing, or motor disabilities, of mental retardation or emotional disturbance, or of environmental, cultural, or economic disadvantage. (20 U.S.C. 1401(30); Ed. Code, § 56337, subd. (a).)

8. For purposes of a determining a specific learning disability: (a) basic psychological processes include attention, visual processing, auditory processing, sensory motor skills, cognitive abilities including association, conceptualization and expression; (b) intellectual ability includes both acquired learning and learning potential and shall be determined by a systematic assessment of intellectual functioning; (c) the level of achievement includes the pupil's level of competence in materials and subject matter explicitly taught in school and shall be measured by standardized achievement tests; (d) the decision as to whether or not a severe discrepancy exists shall be made by the IEP team, including assessment personnel in accordance with Education Code Section 56341(d), which takes into account all relevant material which is available on the pupil; and (e) the discrepancy shall not be primarily the result of limited school experience or poor school attendance. (Cal. Code Regs., tit. 5, § 3030, subd. (j).) Thus, the law avoids total reliance on a mathematical calculation by stating the calculation indicates a severe discrepancy only when the discrepancy is corroborated by other assessment data, which may include other tests, scales, instruments, observations, and work samples, as appropriate. (*Hood v. Encinitas Union Sch. Dist.*, *supra*, 486 F.3d at pgs. 1105-1106.)

9. A child is not required to be classified by his or her disability so long as each child who has a disability listed in paragraph (3) of section 1401 of Title 20 of the United States Code and who, by reason of this disability, needs special education and related

services as an individual with exceptional needs is found eligible for special education services. A disabled child's IEP must be tailored to the unique educational needs of that particular child and who, by reason of disability needs special education, and related services and is regarded as a child with a disability. (*Heather v. State of Wisconsin* (1997) 125 F.3d 1045, 1055.) The term "unique educational needs" is to be broadly construed and includes the student's academic, social, emotional, communicative, physical and vocational needs. (*Seattle Sch. Dist. No 1 v. B.S.*, (1996) 82 F. 3d 1493, 1500.)

10. A properly crafted IEP addresses a student's individual needs regardless of his or her eligibility category. (20 U.S.C. § 1412(a)(3)(B); see *Fort Osage R-1 School Dist. v. Sims* (8th Cir. 2011) 641 F.3d 996, 1004 (category "substantively immaterial"); *Heather S. v. Wisconsin* (7th Cir. 1997) 125 F.3d 1045, 1055; *Hailey M. v. Matayoshi* (D. Hawaii, Sept. 11, 2011 (10-00733) 2011 WL 3957206, p. 3). "The purpose of categorizing disabled students is to try to meet their educational needs; it is not an end to itself." (*Pohorecki v. Anthony Wayne Local School Dist.*, 637 F.Supp.2d 547, 557 (N.D. Ohio 2009).

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

12. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (See *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer of educational services and/or placement must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. (*Ibid.*) An IEP is evaluated in light of the information available to the IEP team 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 *Fuhrman v. East Hanover Bd. of Education* (3d Cir. 1993) 93 F.2d 1031, 1041.) Whether a student was denied a FAPE must be evaluated in terms of what was objectively reasonable at the time the IEP was developed. (*Ibid.*)

13. No one test exists for measuring the adequacy of educational benefits conferred under an IEP. (*Rowley, supra*, 458 U.S. at pp. 202, 203 fn. 25.) A student may

derive educational benefit under *Rowley* if some of his goals and objectives are not fully met, or if he makes no progress toward some of them, as long as he makes progress toward others. A student's failure to perform at grade level is not necessarily indicative of a denial of a FAPE, as long as the student is making progress commensurate with his abilities. (*Walczak v. Florida Union Free School District* (2nd Cir. 1998) 142 F.3d 119, 130; *E.S. v. Independent School Dist., No. 196* (8th Cir. 1998) 135 F.3d 566, 569; *In re Conklin* (4th Cir. 1991) 946 F.2d 306, 313; *El Paso Indep. School Dist. v. Robert W.* (W.D.Tex. 1995) 898 F.Supp.442, 449-450.)

14. School districts are also required to provide each special education student with a program in the least restrictive environment. In order to provide the least restrictive environment, school districts must ensure, to the maximum extent appropriate, that children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature and the severity of the disability of the child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56031; 34 C.F.R. § 300.114(a).)

15. To determine whether a special education student could be satisfactorily educated in a regular education environment, the Ninth Circuit Court of Appeals has balanced the following factors: (1) "the educational benefits of placement full-time in a regular class," (2) "the non-academic benefits of such placement," (3) "the effect [the student] had on the teacher and children in the regular class," and (4) "the costs of mainstreaming [the student]." (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Daniel R.R. v. State Board of Ed.* (5th Cir. 1989) 874 F.2d 1036, 1948-1050]; see also *Clyde K. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 35 F.3d 1396, 1401-1402 [applying *Rachel H.* factors to determine that self-contained placement outside of a general education environment was the least restrictive environment for an aggressive and disruptive student with attention deficit hyperactivity disorder and Tourette's Syndrome.].) If it is determined that a child cannot be educated in a general education environment, then the least restrictive environment analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R. v. State Board of Ed., supra.*, 874 F.2d at p. 1050.)

16. An IEP is a written document for each child with a disability that includes: a statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general education curriculum; and a statement of measurable annual goals, including academic and functional goals, designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum, and meet each of the child's other educational needs that result from the child's disability. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. §§ 300.320.) When appropriate, the IEP should include short-term objectives that are based on the child's present levels of academic

achievement and functional performance, a description of how the child's progress toward meeting the annual goals will be measured, when periodic reports of the child's progress will be issued to the parent, and a statement of the special education and related services to be provided to the child. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. §§ 300.320.) The IEP must also contain a statement of how the child's goals will be measured. (20 U.S.C. § 1414(d)(1)(A)(iii); Ed. Code, § 56345, subd. (a)(3).) An IEP must include a statement of the special education and related services, based on peer-reviewed research to the extent practicable that will be provided to the student. (20 U.S.C. § 1414(d)(1)(A)(i)(IV); 34 C.F.R. § 300.320(a)(4); Ed. Code, § 56345, subd. (a)(4).) The IEP must include a projected start date for services and modifications, as well as the anticipated frequency, location, and duration of services and modifications. (20 U.S.C. § 1414(d)(1)(A)(i)(VII); 34 C.F.R. § 300.320(a)(7); Ed. Code § 56345, subd. (a)(7).)

17. In the case of a child whose behavior impedes his or her learning or that of others, the IEP team must consider, when appropriate, "strategies, including positive behavioral interventions, strategies, and supports to address that behavior." (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324; Ed. Code, § 56341.1, subd. (b)(1).) California law defines behavioral interventions as the "systematic implementation of procedures that result in lasting positive changes in the individual's behavior," including the "design, implementation, and evaluation of individual or group instructional and environmental modifications . . . designed to provide the individual with greater access to a variety of community settings, social contacts and public events; and ensure the individual's right to placement in the least restrictive environment as outlined in the individual's IEP." (Cal. Code Regs., tit. 5, § 3001, subd. (d).) An IEP that does not appropriately address behaviors that impede a child's learning denies a student a FAPE. (*Neosho R-V School Dist. v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028-1029.)

18. When a child's behavior "impedes the child's learning or that of others," a school district must "consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior." (20 U.S.C. § 1414(d)(3)(B)(i).) An FAA is a detailed assessment of a child's behavior, which includes, among other things, systematic observation of the occurrence of the targeted behaviors, systematic observation of immediate antecedent events associated with the behavior and the consequences of the behavior. (Cal. Code Regs., tit. 5, § 3052, subd. (b)(1).)

19. In developing the IEP, the IEP team must consider the strengths of the child, the concerns of the parents for enhancing the child's education, the result of the most recent evaluation of the child, and the academic, developmental, and functional needs of the child. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. §§ 300.324 (a).)

20. A student must permit the local educational agency to conduct the necessary and appropriate assessments if student intends to avail himself of the benefits afforded under the IDEA. (*Wesley Andress v. Cleveland Independent School District* (5th Cir. 1995) 64 F.3d 176, 178; *S.F. v. Camdenton R-III School District* (8th Cir. 2006) 439 F.3d 773; *see also* 20 U.S.C. § 1414 (a)(1)(D)(ii)(II); 34 C.F.R. § 300.505 (a) (1) (ii).) Until student's parents

waive all claims under IDEA, they must comply with the reasonable and necessary assessment requests of the District (*Dubois v. Connecticut State Board of Education*, (2nd Cir. 1983), 727 F.2d 44, 49.) To provide information to the IEP team, a school district is required to conduct a reevaluation of each child at least once every three years, unless the parent and the local educational agency agree that a reevaluation is unnecessary. (34 C.F.R. 300.303(b)(1); Ed. Code, § 56381, subd. (a)(2).) A school district is required to assess a child in all areas of suspected disability. (Ed. Code, § 56381, subd. (b).)

21. Parental consent for an assessment is generally required before a school district can assess a student. (20 U.S.C. § 1414(a)(1)(B)(i); Ed. Code, § 56321, subd. (a)(2).) A school district can overcome a lack of parental consent for an initial assessment if it prevails at a due process hearing regarding the need to conduct the assessment. (20 U.S.C. §§ 1414(a)(1)(D)(ii)(I) & 1415(b)(6)(A); *Schaffer, supra*, 546 U.S. at pp. 52-53 [school districts may seek a due process hearing “if parents refuse to allow their child to be evaluated.”]; Ed. Code, §§ 56501, subd. (a)(3), 56506, subd. (e), 56321, subd. (c).)

*Analysis of Issue 1(a): Eligibility under Autistic-Like Behaviors During 2009-2010*

22. Here, Student, who at all relevant times had been found eligible for special education under the category of SLD, failed to establish that District denied him a FAPE by not determining his primary disability as autistic like behaviors. Case law provides that school districts are not required to label a student with a particular disability for special education services, so long as he has a disability listed under the IDEA and is found eligible, and has an IEP tailored to his particular unique needs. (*Heather, supra*, 125 F.3d at p.1055.) In the instant matter, the evidence shows that District created a program to address his unique needs. Specifically, as discussed in more detail below in the analysis of Issue 1(b) (Legal Conclusions 24-28.), District provided services to address Student’s unique needs in academics, behavior and social skills.

23. Although Student contends that his services were driven by his eligibility of SLD and that District should have found Student eligible as a student with autistic-like behaviors in 2008, the evidence does not support this contention. First, as an initial matter, any claims referencing issues prior to August 25, 2009 are not within the two-year statute of limitations for this matter. Second, at the time of the development of the April 1, 2009 IEP, and the amended IEP of September 18, 2009, the operative IEPs were for the 2009-2010 school year, and as discussed in more detail below, District offered Student related services that addressed issues beyond his SLD, such as behavior services, and services to address his social skills. Student mainly supported this contention with facts that occurred after the development of the September 18, 2009 IEP to demonstrate his position that it was not appropriate. However, given the snapshot rule set forth in *Adams*, requiring IEPs to be developed based on information available to the IEP team at the time, and not in hindsight, facts developed after the September 18, 2009 cannot be considered as part of this analysis. (See *Adams, supra*, 195 F.3d at p. 1149; *Fuhrman, supra*, 93 F.2d at p. 1041.) For the foregoing reasons, Student has failed to meet his burden that District denied Student a FAPE

by not identifying his primary eligibility category as autism or autistic- like behaviors. (Factual Findings 1-43; Legal Conclusions 1-23.)

*Issue 1(b): Instruction, Services and Support in Academics, Behavior, and Social Skills*

24. Student contends that Student's IEP failed to address Student's unique needs in academics, behavior, and social skills development during the 2009-2010 school year. However, the evidence does not support this position. In the area of academics, Student offered no credible evidence demonstrating that he required more support in academics than that offered in the September 18, 2009 IEP, namely 60 minutes of RSP services four times a week in language arts and math. The evidence established that from March 9, 2009 through August 19, 2009, Student received instruction through Scott, his HHI instructor. When Student returned to school on August 20, 2009, and after Student had been in school for 30 days, the IEP team on September 18, 2009 received a teacher report that Student was doing well, and Parent was happy with Student's progress. The evidence also showed that the IEP team focused on long-standing academic concerns, such as Student's staying on task and visual tracking, and agreed to increase his RSP services from 30 minutes to 60 minutes per session. District also offered a vision therapy assessment to address Student's visual tracking, reviewed his goals, and discussed a new goal to address Reading Comprehension.

25. Although Student also contends District did not provide him with sufficient academic support because he failed to perform at grade level, case authority provides that 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, supra*, 142 F.3d at p. 130.) Student failed to establish that he had not made progress commensurate with his abilities. In fact, at the time of the September 18, 2009 IEP, the evidence shows that Student made progress on all of his academic goals, with the exception of reading comprehension, which the team modified at the September 18, 2009 IEP meeting.

26. In the area of behavior and social skills, Student has failed to establish that District failed to offer appropriate services and supports. The evidence showed that District reasonably and appropriately developed a behavior goal after Student's HHI instructor, Scott, who was an experienced SDC teacher with eight years of service with District, and who had worked daily with Student on a one-on-one basis for approximately four weeks, advised the team at the April 1, 2009 IEP that Student's behavior could be addressed in a goal. Specifically, the team developed a behavior goal to address Student's attending to task, and agreed to implement it at the April 2009 IEP, and again at the September 18, 2009 addendum IEP meeting. In addition, District offered small group speech and language services to address Student's pragmatics for 30 minutes twice a week, and developed two pragmatic goals to address Student's social skills. In fact, the evidence showed that Student was exceeding his benchmarks on some of his pragmatic goals. District also offered to refer Student to the WESELPA for counseling, due to his anxiety at school, but Parents declined that service and instead requested District fund a psychologist of her choice. However, District appropriately declined Parent's request, as it was not required to offer Student related

service providers preferred by Parent in order to offer a FAPE. Student offered no credible evidence demonstrating that these services and supports were insufficient or inappropriate.

27. Finally, Student contends District failed to address his escalating behavior for the 2009-2010 school year, and should have provided Student with ABA services, instead of punishing Student by calling his mother, requiring him to serve detention, and losing privileges. Student asserts that his discipline record for the 2009-2010 school year, shows behavior that warrants ABA services. However, the evidence fails to show his behaviors at the time of the September 18, 2009 IEP, warranted ABA services. Rather, the discipline record shows incidents that occurred either a year before the IEP team meeting in October 2008 (poked student with corndog and stuck tongue out spit came out) or in February 2010, long after the IEP was developed (9 incidents, hitting, kicking, rough play). The only other evidence of a discipline incident showed in October of 2009 when Student pushed another student and refused to do his work, behaviors which by themselves did not demonstrate he required ABA services. Student provided no evidence that during the time period at issue, District was on notice of facts that would have required District to offer ABA services in order to provide a FAPE. The evidence shows that between October and November 2009, he had only engaged in a few incidents, and District had offered to conduct a psychoeducational assessment in October to address his areas of need, to which Parent declined. Student failed to persuasively establish that the methods District used to address Student's behavioral issues (e.g., calling parent, detention, etc.) were insufficient or inappropriate at the time.

28. In sum, for the 2009-2010 school year, the evidence showed that District's offer addressed Student's unique needs in academics, behavior and social skills, and was reasonably calculated to provide Student with some educational benefit. (Factual Findings 1-43; Legal Conclusions 1-28.)

*Issue Two: FAPE for the 2010-2011 school*

29. Student contends that District failed to provide him with a FAPE for the 2010-2011 school year by failing to identify Student's primary disability as autism. (Issue 2(a)) Student argues that District's failure to make him eligible for special education services under the category of autistic-like behaviors, as opposed to SLD, ultimately resulted in the development of an educational program that was inadequate to address his unique needs. Student also contends District failed to offer and provide Student with appropriate instruction, services and support to address his unique needs in academics, behavior, and social skills during the 2010-2011 school year. (Issue 2(b)) Finally, Student contends District's failure to provide an HHI placement denied Student a FAPE. (Issue 2 (c))

30. District contends that Student was not denied a FAPE because District found Student eligible for special education services as a student with SLD. District was not required to classify Student by his disability, but was required to provide Student with services to address his unique needs. District asserts that it provided Student with appropriate instruction, services, and support to address Student's unique needs in academics, behavior, and social skills during the 2010-2011 school year. Finally, District

asserts that it did not deny Student a FAPE because it agreed to provide HHI, however, HHI could not be implemented because Parent refused to agree to the reasonable condition of a District aide accompanying the instructor.

*Applicable Law*

31. Legal Conclusions 1, 4 through 21 are incorporated by reference.

32. As long as a school district provides a FAPE, methodology is left to the district's discretion. (*Rowley, supra*, 458 U.S. at p. 208.) Parents generally have no right to compel an assignment of particular teachers or other educational personnel to implement the IEP. These decisions are normally within the discretion of the school district. (*Moreno Valley Unified School District* (OAH 2009) 109 LRP 50610, citing *Letter to Hall*, 21 IDELR 58 (OSEP 1994), and *Rowley, supra*, 458 U.S. at pp. 207-208.)

*Issue 2(a): Student's Eligibility under Autistic-Like Behaviors*

33. As discussed above in Legal Conclusions 1 through 23, Student's argument ignores that District was not required to label Student with a particular disability for special education services as long as he had a disability listed under the IDEA, was found eligible, and received services to meet his or her unique needs. A properly crafted IEP addresses a student's individual needs regardless of his eligibility category. District found Student eligible for special education services as a student with SLD. District's duty was to create a program to address his unique needs in the area of academics, behavior and social skills, which, as discussed below, it did. Thus, because the evidence showed that regardless of eligibility category, Student was offered a program that addressed his unique needs, Student has failed to meet his burden that District denied Student a FAPE by not identifying his primary eligibility category as autism or autistic-like behaviors. (Factual Findings 1-72; Legal Conclusions 1-23, 29-30, and 33.)

*Issue 2(b): Instruction, Services and Support in Academics, Behavior, and Social Skills*

34. Student contends District denied him a FAPE by failing to offer him appropriate instruction, services and support to address his unique needs in academics, behavior, and social skills. As discussed in more detail below, Student failed to meet his burden of proof as to District's offer of supports and services concerning his academic needs. In addition, Student failed to present credible and persuasive evidence that District denied him a FAPE by not providing him with appropriate instructional support and services to meet his behavior and social skills needs.

35. The evidence showed as the 2009-2010 school year progressed, District personnel were particularly concerned about Student's ability to attend to his work and behaviors. At Parent's own expense, Student opted to proceed with a neuropsychological assessment conducted by Dr. Loo at UCLA, who wrote a report, and presented her findings

at Student's annual IEP on March 30, 2010 to determine placement and services for the 2010-2011 school year.<sup>5</sup> The evidence showed that by the time of the March 30, 2010 IEP, which was reconvened on April 2, 2010, Student's deficits in attention, behavior, and social skills had increased from the previous school year, and his ability to communicate with peers had declined.

36. In the area of academics, Dr. Loo found Student's deficits in visual motor integration and memory skills, particularly in encoding of visual or complex information. Despite, Student's argument that District knew or should have known Student was on the autism spectrum, the evidence showed that Dr. Loo found Student to have ADHD without any discussion of autism. In fact, from the evidence presented, Dr. Loo recommended modifications and accommodations, similar to those offered by District at the March 30, 2010 IEP. Specifically, Dr. Loo recommended modifications that included additional time for tests, modified assessments, teacher prepared study notes, repetition and preteaching of material, and after school tutoring for Student's academic support. To address attention deficits, she recommended seating in front of the class, directed teaching, and breaking down assignments. Consistent with the information known at the time and the input of Student's own assessor, District's offer addressed Student's academic needs, as follows: RSP four days per week at 60 minutes per session; and specialized vision services by a nonpublic agency (NPA) in an individual model to work on Student's attention and focus. District also offered the following modifications and accommodations to address Student's academic needs: additional time for tests; modified assessments; repetition and preteaching of material; after school tutoring; seating in front of the class; directed teaching, and breaking down assignments. Thus, Student cannot meet his burden of proof when the evidence established that District's offer in academics fully comported with Dr. Loo's recommendations. As such, Student failed to establish that District denied Student a FAPE at the time by not offering appropriate supports and services to address Student's academic needs. (Factual Findings 1-76; Legal Conclusions 1, 4-18, 29-36.)

37. In the area of behavior, Student also failed to establish that District failed to offer appropriate services and supports to address his behavioral needs. Although the evidence demonstrated that after the September 18, 2009 IEP, Student's behavioral issues increased, Student failed to show that Student's behavior warranted ABA services. Specifically, Student refused work on some assignments in after school tutoring; failed to hand in some home work assignments; fought with some students; and pushed and shoved and raised his hands at a student who ripped Student's paper. Student's teachers confirmed Student had difficulty getting along with peers and significant problems with attention and concentration. Almost daily, Student complained about other students arguing with him and other students asserted that Student bothered them. The evidence also showed that Student argued a lot with other students; failed to finish things he started; failed to pay attention for long periods of time; appeared confused and distracted; fidgeted; disturbed other students;

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<sup>5</sup> Although evidence was presented at hearing about Dr. Loo's report, Student withdrew the report from evidence.

failed to follow directions; did not get along with other pupils; felt others were out to get him; felt hurt when criticized; and failed to carry out assigned tasks.

38. Student argues the testimony of his experts support Student's need for ABA services for the 2010-2011 school year. However, the evidence does not support this position, and Student presented no credible demonstrating that Student required ABA services. Student's main evidence on this point came from Dr. Freeman. Dr. Freeman's knowledge of autism and credentials are impeccable, however Dr. Freeman evaluated Student in June 2011 more than a year after the IEP for the 2010-2011 school year. Dr. Freeman's report was not given to the IEP team to review and determine if the program proposed would meet the Student's needs. Dr. Freeman failed to observe Student in school or in the community, or gather any information from Student's teachers that would support a conclusion that Student's IEP at the time was not reasonably calculated to provide him with some educational benefit. Although Dr. Freeman reviewed Student's records and spent five hours testing Student, she observed Student in his home more than eight months after Student left school in October 2010.

39. Student's evidence from Dr. Leaf also did not support a conclusion that the District's offer was not reasonably calculated to provide some educational benefit at the time it was made. The evidence shows that Dr. Leaf's knowledge of ABA was extensive but it also shows that he was not familiar with Student. Dr. Leaf admitted: he spent only 10 minutes with Student; conducted no assessments; interviewed only Parent; reviewed only some documents provided by Student; failed to observe Student in the community or at school; and failed to talk to any of Student's teachers or service providers. His testimony was not persuasive.

40. Student claims that District failed to provide Student with services to address his behavior and social skills. However, the evidence showed that prior to the March and April 2010 IEP meetings, Student failed to agree to any behavior assessments so that District would be able to evaluate Student's behavior needs. Waters provided credible testimony that on October 29, 2009, she offered Student a new psychoeducational assessment to determine if and how to address new areas of need, because Student had not attended school from January 2009 through July 2009. In response, Parent requested an IEE by a neuropsychologist. The evidence showed that Student refused to agree to District assessments and opted for an IEE by Dr. Loo whose report focused on ADHD and made no conclusions regarding autism or the need for a specific methodology of behavior intervention services.

41. The evidence showed again in March 2010, concerned about Student's escalating behaviors, District proposed an FAA to create a schedule of targeted behaviors and find the immediate antecedent events associated with Student's behavior. The evidence showed that Parent unreasonably refused to sign it because of the semantics of "assaultive" behavior given Parent's perception that Student only physically interacted with other children in self defense. The evidence further demonstrated that at the April 2010 IEP, District proposed a BSP, but Parent and Student's attorney refused to discuss it until they

consulted with their experts. Again, District cannot be faulted when it appropriately offered a BSP, but Student failed to respond, discuss, accept or reject District's proposed BSP. On April 26, 2010, District proposed to revise the FAA assessment plan language or to offer a Student a FBA. Again, the evidence showed that Student unreasonably failed to respond to District's proposal, and District was unable to assess Student's behavior.

42. Student argues that District presented a BSP at the March/April 2010 IEPs and that BSP was inadequate. The evidence showed that both Dr. Freeman and Dr. Leaf criticized District's proposed BSP, because it was not based on assessments and District failed to collect data. However, Student failed to give District a reasonable opportunity to assess Student to create a BSP. In regards to Student's failure to consent to a FAA or FBA, a parent who does not allow a school district a reasonable opportunity to evaluate their child, because of their failure to cooperate, may forfeit their claim under IDEA for reimbursement. (See *Wesley, supra*, 64 F.3d at p.178.) Here, the evidence established that Student failed to give the District a reasonable opportunity to evaluate Student. Accordingly, given the information District had at the time, its offer of placement and services was reasonably calculated to provide Student with some educational benefit.

43. Student argues that if Parent knew Student was autistic, Parent would have consented to the FAA. However, Student failed to produce any evidence, including Parent's testimony, to show if Parent knew she would have provided consent to an FAA. Ironically, Student's experts recommend Student assessments, including a FAA, to develop data to create a BSP. More importantly, Student's argument highlights the reasonableness of District's offer at the time because the information they had received from Dr. Loo's report did not suggest that Student's underlying unique needs were the result of an autism spectrum disorder, rather than SLD and attention problems.

44. 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. For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer of educational services and/or placement must be designed to meet the student's unique needs, and be reasonably calculated to provide the pupil with some educational benefit. (*Adams, supra*, 195 F. 3d at 1149.) District offered placement in a general education class and intensive individual instruction provided by District at 1,860 minutes (31 hours) per week in an individual model. At the IEP, District described the intensive individual instruction as a temporary special needs assistant to assist with positive reinforcement and to improve Student's social skills as well as other students in the classroom.

45. The evidence supports District's offer of placement and services, and Student presented no credible evidence demonstrating that District's proposed placement was inappropriate. Overall, a determination of whether a district has placed a pupil in the least restrictive environment involves the analysis of four factors: (1) the educational benefits to the child of placement full time in a regular class; (2) the non-academic benefits to the child of such placement; (3) the effect the disabled child will have on the teacher and children in

the regular class; and (4) the costs of mainstreaming the child. (See *Rachel H.*, *supra*, 14 F.3d at p.1404.) Regarding the first factor, the parties presented evidence concerning the dynamics of a general education program with RSP. The evidence clearly established through the credible testimony of Waters, as well as notes included in the IEP, and Student's experts, that because of his average cognitive abilities he required a general education classroom and Student required specialized instruction through the RSP program. Given those factors and Student's needs, it is reasonable to conclude that Student would receive educational benefit in a general education setting.

46. Regarding the second *Rachel H.* factor, Student could receive a non-academic benefit of interacting with his peers, giving Student more opportunity to practice his socialization skills. The third factor, specifically the effect Student's full time presence would have on the teacher and children in the regular class, also shows an offer of general education with supports was appropriate. The evidence showed that Student's behaviors were not significant, and the testimony of McKinley and Baker confirmed they were not required to focus a significant amount of time and resources on Student's behavior in class. Consequently, Student's presence would not result in him taking significant attention away from the other students in the class.

47. Finally, regarding the fourth *Rachel H.* factor, neither party introduced any evidence demonstrating the costs associated with educating Student in a general education setting versus a special education setting. Weighing the above factors, the evidence shows that the benefits to Student of a general education placement with RSP are academic and social, and a general education placement for academic classes would be appropriate. District offered Student an appropriate placement with RSP in light of the continuum of options. Student failed to offer any evidence supporting another placement.

48. Student argues that District's offer for the 2010-2011 school year failed to offer him a FAPE because District's offer of intensive individual instruction failed to provide Student with the type of behavior intervention he required. However, Student failed to provide evidence that District's offer would not meet his unique needs. The evidence demonstrated at the time the IEP team was aware of Dr. Perlman's recommendation that District provide Student with a one-to-one aide to assist Student with his unique needs in attention and social communication. District's offer of intensive individual instruction provided by District at 1,860 minutes (31 hours) per week of individual aide support to assist with positive reinforcement and to improve Student's social skills, was based on the information known at the time and was intended to address Student's needs in behavior and social skills. Because the aide would also work with other students as well, the evidence demonstrated that this methodology would address Student's communication skills and improve his relationship with peers.

49. Student argues that the only effective methodology is ABA. However, as long as a school district provides a FAPE, methodology is left to the district's discretion. (*Rowley*, *supra*, 458 U.S. at p. 208.) The evidence demonstrated that at the time District's offer

provided Student a FAPE through intensive individual instruction, not ABA. Student's argument that only an ABA program would have provided a FAPE was not persuasive.

50. Student challenges District's proposed behavioral goal and services. He argues he needed a more intensive behavior program because he made no progress on his behavior goal. The evidence showed Student failed to meet his April 2009 behavior goal regarding Student attending to task for 15 minutes with no more than two prompts. However, the evidence showed that District's offer of intensive individual instruction would also assist Student to meet this goal.

51. In addition, the evidence showed that the proposed IEP included social skills services and the District offered to increase speech and language pragmatics to 55 sessions at 30 minutes per session. As to his goals, Student argues that Student failed to make meaningful progress on his two pragmatic goals: identify and state 25 multiple perspectives; and to identify and use 25 socially correct commands and requests. In fact, the 2010 IEP team's proposed multiple perspectives goal and socially correct commands goal showed Student regressed, making continued reinforcement of these goals appropriate. In 2010, Student was to identify only 15 perspectives and identify 15 socially correct commands. However, Peltz credibly testified that had Student remained in his general education placement, he would have met his goals in pragmatics.

52. The District correctly asserts that its offer of placement and services for the 2010-2011 school year met Student's unique needs as it was based on accurate information it had at the time. Thus, Student failed to demonstrate by a preponderance of the evidence that District's offer of services and supports in the area of behavior and social skills failed to address Student's unique needs and provide Student a FAPE. (Factual Findings 1-76; 138-167; Legal Conclusions 1, 4-18, 29-52.)

*Issue 2 (c): HHI Placement*

53. Finally, Student contends District's failure to provide an HHI placement denied Student a FAPE. Student argues that District was obligated to provide HHI services in Student's home and could not insist on a non-credentialed employee attending HHI sessions in Parent's home.

54. District asserts that it did not deny Student a FAPE because it agreed to provide HHI; however, HHI could not be implemented because Parent refused to agree to the reasonable condition of a District aide accompanying the instructor.

*Applicable Law*

55. Legal Conclusions 1, 4 through 21 and 32 are incorporated by reference.

56. Related services must be provided if they may be required to assist the child in benefiting from special education. (Ed. Code, § 56363, subd. (a).) An educational agency

satisfies the FAPE standard by providing adequate related services such that the child can take advantage of educational opportunities. (*Park v. Anaheim Union High School* (9th Cir. 2006) 464 F.3d 1025, 1033.) Related services may include counseling and guidance services, and psychological services other than assessment. (Ed. Code § 56363, subd. (b)(9) and (10).)

57. The continuum of program options includes, but is not limited to, regular education, resource specialist programs, designated instruction and services, special classes, nonpublic, nonsectarian schools, state special schools, specially designed instruction in settings other than classrooms, itinerant instruction in settings other than classrooms, and instruction using telecommunication instruction in the home or instructions in hospitals or institutions. (Ed. Code, § 56361.)

58. HHI services are part of the continuum of special education placements and programs that each SELPA must make available to pupils who receive special education. (34 C.F.R. § 300.115(b)(1); see also Ed. Code, §§ 56360, 56361.) Special education and related services may be provided in the home or hospital if the IEP team recommends such instruction or services. (Cal. Code Regs., tit. 5, § 3051.4, subd. (a).) For pupils with disabilities who have a medical condition “such as those related to surgery, accidents, short-term illness or medical treatment for a chronic illness,” the IEP team must review, and, if appropriate, revise the IEP “whenever there is a significant change in the pupil’s current medical condition.” (Cal. Code Regs., tit. 5, § 3051.4, subd. (c).) When recommending placement for home instruction, the IEP team must have a “medical report from the attending physician and surgeon or the report of the psychologist, as appropriate, stating the diagnosed condition and certifying that the severity of the condition prevents the pupil from attending a less restrictive placement.” (Cal. Code Regs., tit. 5, § 3051.4, subd. (d).)

### *Analysis*

59. As discussed above in Legal Conclusions 41 through 48, at the time of the March and April 2010 IEPs, District's offer of placement was a general education class with RSP support of 240 minutes a week was the LRE. However, during the 2010-2011 school year circumstances changed. On October 28, 2010, Student left school for medical reasons and again requested HHI. Specifically, Student presented credible evidence District was informed, as of November of 2010, that Student would not be able to attend school. Specifically, Dr. Perez, Dr. Wilson and Parent all informed District that because of anxiety, depression and a stressful school environment Student required HHI. Although HHI is one of the most restrictive environments, the evidence showed that at the time, District’s December 2010 offer of HHI placement was appropriate.

60. Student argues that District’s offer of HHI was unreasonable and contrary to law, because District would not provide HHI in Student’s home unless the instructor was accompanied by an aide. Student failed to provide case or statutory authority to support his contention. In fact, the evidence showed that the condition was reasonable, given the fact that Parent had agreed to the condition when Scott delivered HHI previously. Parents

generally have no right to compel the District to assign or not assign a particular employee or employees to implement an IEP. These decisions are normally within the discretion of the school district. As long as a school district provides a FAPE, methodology is left to the district's discretion. (*Rowley, supra*, 458 U.S. at p. 207-208.) In fact, the evidence established that an aide was helpful to Scott and would be helpful to a new HHI instructor. As such, Student failed to establish that District denied him a FAPE because it offered HHI to be delivered by a credentialed teacher who was accompanied by an aide.

61. Student also argues that District imposed this condition arbitrarily. However, the evidence established that District's concern about the safety of its HHI instructor was within its discretion and was reasonable. Student also asserts that Student was entitled to a credentialed special education instructor and District refused to give Student this information. The evidence showed that until Student agreed to HHI, it was not going to hire the instructor and could not inform Student about the credentials, such that Student's criticism of District's offer on this basis fails.

62. Student further argues that District never intended to deliver HHI, because of the many requirements and "hoops" District made Student jump through. Student's argument is not supported by the evidence. HHI is one of the most restrictive placements on the continuum of placements. The IDEA requires an IEP team to consider the LRE in its placement decisions and to offer the most restrictive placement like HHI if no other placements on the continuum would be appropriate and if supported by a medical note indicating the severity of the condition. (Cal.Code Regs., tit. 5, § 3051.4, subd. (d).) The evidence established that District's request for medical reports and dates was required by state law and was reasonable in light of the IDEA's strong preference for inclusion in general education to the maximum extent possible.

63. In sum, the evidence established that District did not deny Student a FAPE because it offered HHI in his home and Student chose not to accept District's offer. The offer was reasonable, particularly because HHI had been implemented for Student with a teacher and an aide in the past. Student failed to establish that District denied him a FAPE by failing to offer HHI placement for the 2010-2011 school year. (Factual Findings 1- 81; Legal Conclusions 1, 4 -21, 41-63.)

#### *Issue Three: FAPE for the 2011-2012 School Year*

64. Student contends that District denied him a FAPE for the 2011-2012 school year by failing to offer services to address his unique needs in academics, behavior, and social skills, and by failing to provide Student with Home/Hospital placement and instruction.

65. District disagrees and contends that it offered Student a program to address his unique needs in academics, behavior, and social skills for the 2011-2012 school year. District further contends that its offer of placement in a general education class with support, offered Student FAPE in the LRE.

*Applicable Law*

66. Legal Conclusions 1, 4 through 21, 32, and 56 through 58 are incorporated by reference.

*Issue 3(a): Instruction, Services and Support in Academics, Behavior, and Social Skills*

67. Student contends District denied him a FAPE by failing to offer him appropriate instruction, services and support to address his unique needs in academics, behavior, and social skills. As discussed in more detail below, Student failed to meet his burden of demonstrating by a preponderance of the evidence that District's offer of supports and services were insufficient under the *Rowley* standard to address Student's behavior and social skills needs.

68. As an initial matter, as of the time of the May 2011 IEP team meetings, the most recent information District had was from Williams' early triennial assessments, which, as discussed above, had been properly conducted and identified Student's unique needs. Although Student continued to work on goals from the April 2009 IEP, regressed on his reading comprehension goal and failed to meet his goal in math problems, the persuasive testimony of Richardson was that District's offer of 180 minutes five days a week of RSP and one-to-one aide would provide Student an academic program to meet his needs in light of what was known from the latest assessments and Student's history in District placements. Student's teacher Baker persuasively testified that Student would benefit from placement in a general education classroom with a one-to-one aide and RSP. Their testimony was persuasive as to Student's academic program. Student failed to provide persuasive testimony that the offer to address Student's academics in the May of 2011 IEP's was not reasonably calculated to provide him with some educational benefit.

69. Student argues that District's offer at the May 2011 IEP meeting of services in behavior and social skills would not meet his unique needs. Student failed to produce persuasive evidence that District's proposed program was not reasonably calculated to at the time to meet Student's unique needs in behavior and social skills.

70. At the time of the assessments and IEP team meeting, Student had been out of school and not receiving instruction based on Parent's unreasonable refusal to implement HHI instruction. Given that Student was not in school at the time, the offer of aide services and a BSP, which could be adjusted if Student exhibited behavior problems upon his return to school, was reasonable at the time. Richardson's testimony was persuasive that Student's BSP would meet Student's needs. At the time of Students May 2011 IEP, the information the team had was the BSP as designed would be effective in targeting Student's behavior. Again, as discussed above in Legal Conclusions 40 through 43, Student failed to agree to District's offer of a FBA, FAA or any formal behavior evaluation so that District would be able to incorporate a schedule of behaviors into the BSP and have empirical information to improve the plan. More importantly, because behavior is a function of environment,

determining the effectiveness of the BSP required Student to attend school in his general education placement. Thus, the BSP met the definition of “reasonably calculated” to provide educational benefit of the time it was drafted.

71. Regarding social skills, District offered small group speech and language, at one hour per week, to work on social pragmatics. In addition, District offered counseling services. At the time of Student’s May 2011, triennial IEP the evidence showed that District continued to offer Student a program that was designed to meet Student’s needs in behavior and social skills. District continued to offer Student more services: a full time one-to-one aide to work on academics and on behavior; a BSP; a behavior goal; 60 minutes per week of language and speech to work on his pragmatics in a group model; a referral to the WESELPA; and, a psychoeducational IEE. The totality of these services were reasonably calculated to meet Student’s behavior and social skills needs in light of what was know at the time.

72. Although persuasive and credible in some respects, the testimony of Dr. Freeman and Dr. Leaf did not demonstrate that District denied Student a FAPE in its May of 2011 offer of placement and services for the 2011-2012 school year. Significantly, neither Dr. Freeman’s nor Dr. Leaf’s report were provided to the IEP team at any time, and were generated after the District made its offer. The IEP team at the time of their decision did not have the reports and were not able to discuss the new information and proposed program. Because an IEP must be evaluated in light of the information available to the IEP team at the time it was developed, Dr. Freeman and Dr. Leaf’s reports do not prove that District failed to offer Student a FAPE at the time the offer was made. (*Adams, supra*, 195 F.3d at p. 1149.) In light of what the IEP team knew at the time of the IEP, District’s offer for the 2011-2012 school year was objectively reasonable, and District offered Student a FAPE, behavior and social skills services to meet his unique. (*Ibid.*)

73. In sum, Student failed to demonstrate by a preponderance of the evidence that District’s offer for the 2011-2012 school year of services and supports in the areas of academics, behavior and social skills failed to address Student’s unique needs and provide Student a FAPE. (Factual Findings 1-167, Legal Conclusions 1, 4-21, 32-73.)

*Issue 3 (b): Provide Student Home/Hospital placement and instruction*

74. Finally, Student contends that District’s failure to offer Student HHI services for the 2011-2012 school year was a denial of FAPE because he was unable to attend school due to a medical condition.

75. 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 and what the IEP team knew at the time of the IEP. (*Adams, supra*, 195 F.3d at p. 1149.) As discussed above in Legal Conclusions 41 through 48, when a District considers HHI placement and instruction it has to consider the continuum of placements. Student failed to present persuasive evidence

to demonstrate that District's failure to offer Student HHI for the 2011-2012 school year, resulted in a denial of a FAPE.

76. As discussed above in Legal Conclusion 62, HHI is one of the most restrictive placements on the continuum of placements and District is required to offer Student placement in the LRE. Although special education and related services may be provided in the home or hospital, an IEP team must recommend such instruction or services. When recommending placement for home instruction the IEP team must have a medical report of the psychologist, stating the diagnosed condition and certifying that the severity of the condition prevents the pupil from attending a less restrictive placement. Here, by the May of 2011 IEPs, the evidence showed that Student failed to provide District with a note from a physician stating that Student continue to require HHI. The District's offer of a full time aide, counseling, and speech and language therapy focusing on pragmatics were all targeted toward providing Student a FAPE in the general education environment. Absent a doctor's note, and given Student's history of being able to benefit from instruction in a general education environment, District appropriately did not offer HHI as a placement. Thus, Student's request for HHI was properly denied.

77. In sum, Student failed to meet his burden of demonstrating he was denied a FAPE for the 2011-2012 school year because District did not offer appropriate services to address his unique needs in academics, behavior, and social skills, or by failing to offer Student HHI. (Factual Findings 1-167; Legal Conclusions 1, 4-21, 32-77.)

#### ORDER

All of Student's 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, District prevailed on all issues.

RIGHT TO APPEAL THIS DECISION

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

DATED: March 14, 2012.

\_\_\_\_\_/s/\_\_\_\_\_  
CLARA L. SLIFKIN  
Administrative Law Judge  
Office of Administrative Hearings