

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENT ON BEHALF OF STUDENT,

v.

DUBLIN UNIFIED SCHOOL DISTRICT.

OAH CASE NO. 2012010475

**DECISION**

Administrative Law Judge (ALJ) Peter Paul Castillo, Office of Administrative Hearings (OAH), State of California, heard this matter in Dublin, California, on November 13 – 16, 2012.

Attorney Brett Smith Allen represented Student. Student's Parents were present during the entire hearing. Student did not attend the hearing.

Attorney Jan E. Tomsy represented the Dublin Unified School District (District). Angelica Thomas, Director of Special Education, attended all portions of the hearing.

Student filed a request for a due process hearing (complaint) on January 18, 2012. On August 13, 2012, OAH granted Student's motion to amend the complaint and set hearing dates based on the parties' request if Student timely filed the second amended complaint, which Student did on August 17, 2012. On August 20, 2012, OAH sent a new scheduling order with the parties' requested dates and the hearing commenced as scheduled. At the parties' request, the ALJ continued the matter to allow the parties to submit written closing argument by December 14, 2012. The parties submitted their closing briefs on December 14, and the matter was submitted for decision.<sup>1</sup>

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<sup>1</sup> The closing briefs have been marked as exhibits. Student's brief has been marked as Exhibit S-33, and District's brief has been marked as Exhibit D-22.

## ISSUES<sup>2</sup>

*Issue 1:* From October 10, 2010 through September 21, 2011, did the District deny Student a free appropriate public education (FAPE) by failing to provide Student comprehensive assessments in the areas of:

- a) Neuropsychological functioning;
- b) Autism;
- c) Psychoeducation;
- d) Behavioral functioning;
- e) Speech and language?
- f) Occupational therapy (OT); and
- g) Assistive technology (AT)?

*Issue 2:* At the October 28, 2010 and November 4, 2010 individualized educational program (IEP) team meetings, did the District commit procedural violations that prevented Parents from meaningfully participating in Student's educational decision-making process, which denied Student a FAPE, by:

- a) Predetermining its IEP offers; and
- b) Failing to provide baseline data for Student's annual goals leading to failure to develop appropriate goals for Student?

*Issue 3:* Did the District's October 28, 2010 IEP deny Student a FAPE by failing to:

- a) Offer goals to address his anxiety and behavioral needs;
- b) Provide behavior and counseling services; and
- c) Provide Student with appropriate services to address all of his speech and language needs?

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<sup>2</sup> The issues were framed in the November 6, 2012 Order Following Prehearing Conference, and further clarified at hearing. The ALJ has reorganized the issues for this Decision for the sake of clarity.

*Issue 4:* At the April 22, 2011 IEP team meeting, did the District commit procedural violations that prevented Parents from meaningfully participating in Student's educational decision-making process, which denied Student a FAPE, by not having an authorized representative attend the April 22, 2011 IEP team meeting?

*Issue 5:* At the April 22, 2011 and May 25, 2011 IEP team meetings, did the District commit procedural violations that prevented Parents from meaningfully participating in Student's educational decision-making process, which denied Student a FAPE, by:

- a) Predetermining its IEP offers;
- b) Failing to provide baseline data for Student's annual goals leading to failure to develop appropriate goals for Student; and
- c) Failing to consider Dr. Diane Kusters' neuropsychological assessment report?

*Issue 6:* Did the District's April 22, 2011 and May 25, 2011 IEP's deny Student a FAPE by failing to:

- a) Offer goals to address his anxiety and behavioral needs;
- b) Provide behavior and counseling services; and
- c) Provide Student with appropriate services to address all of his speech and language needs; and
- d) Implement the recommendations of Dr. Diane Kusters?

*Issue 7:* From October 10, 2010 through September 21, 2011, did the District deny Student a FAPE by failing to implement the accommodations listed in his IEP's, such as reducing his workloads by modifying school projects, and using short concise directions for him?

#### REQUESTED REMEDIES

Student requests reimbursement of \$22,179.54 for the costs of educational services, including Dr. Kusters' neuropsychological assessment and private school tuition, and for payment of Student's tuition for the 2013-2014 school year as compensatory education.

## CONTENTIONS OF THE PARTIES

Student contends that the District failed to assess him in all areas of suspected disability, including autism, speech and language, OT, AT, and behavioral functioning. Additionally, Student asserts that the District needed to conduct a neuropsychological assessment because its psychoeducational assessment was inadequate to discover the possible neurological causes of Student's educational disabilities. The District also did not consider Dr. Kusters' neuropsychological assessment and her recommendations. In part due to the District's failure to adequately assess Student and not considering Dr. Kusters' neuropsychological assessment, the District developed inadequate goals and behavioral and speech and language services to meet his unique needs. Additionally, the District predetermined its IEP offers, failed to include appropriate baseline information in Student's goals and did not implement Student's IEP accommodations. Finally, to meet Student's unique needs in middle school he required placement in a special day class (SDC) and not a predominately general education placement.

The District asserts that it assessed Student in all areas of suspected and developed IEP's that were reasonably calculated to permit Student to make meaningful educational progress, as evidenced by the progress he made during fifth grade. Further, Student did not have the attention, emotional and behavioral problems that were as severe as he contends, and the District did provide appropriate goals and services in his IEP's. Additionally, the District considered Dr. Kusters' assessment, and parental input, and did not make changes to Student's IEP because Dr. Kusters' recommendations mirrored what the District had already implemented. Finally, the District contends that it implemented Student's IEP's and these IEP's contained accurate baseline information for it to develop appropriate goals.

## FACTUAL FINDINGS

### *Jurisdiction and Factual Background*

1. Student is a 12-year-old boy who resides with Parents within the District's geographical boundaries and is in the seventh grade for the 2012-2013 school year (SY). The District found Student eligible for special education services in 2005 under the category of speech or language impairment, and he began to receive special education services. Specific learning disability was added as a secondary eligibility category in January 2009. Student's primary special education eligibility was changed to specific learning disability in the October 28, 2010 IEP, with speech or language impairment as a secondary eligibility category. For all times relevant in this matter, Student attended a District elementary school for fifth grade, SY 2010-2011, and then was unilaterally placed at a parochial school for sixth grade, where he currently attends and receives speech and language services from the District through an individual services plan.

*October 10, 2010 through November 4, 2010*

2. On April 15, 2010, the parties reached a memorandum of understanding (MOU) that specified the services the District would provide Student through his next annual IEP team meeting, October 9, 2010.<sup>3</sup> The MOU modified Student's March 11, 2010 IEP, to provide speech and language one time a week, individual, for 30 minutes, and resource specialist program (RSP) services, two times a week, pull-out for 40 minutes a session and one push-in session for 30 minutes a week.<sup>4</sup> The District was to also provide AT services, eight times a year, 60 minutes per session, and through the end of the school year OT services, once a week individual for 30 minutes and 60 minutes collaboration. The MOU modified Student's goals for comprehension strategies and summarizing.

3. Parents and the District scheduled the IEP team meeting for October 9, 2010, and the District conducted psychoeducational, OT, AT, academic and speech and language assessments prior to this IEP team meeting. The parties did not hold the IEP team meeting on October 9, 2010, because Student's fifth grade teacher, Pamela Luhmann, was at an outdoor science camp with her class.<sup>5</sup> The District provided Student the goals and accommodations set forth in the March 11, 2010 IEP and MOU until the rescheduled IEP team meeting was held on October 28, 2010, and Parents consented to the District's proposed IEP on November 4, 2010 (October 28, 2010 IEP). Therefore, for the period of October 10, 2010 through November 4, 2010, the District provided Student with a FAPE because it implemented the MOU, which modified Student's IEP of March 11, 2010.

*October 28, 2010 IEP Team Meeting*

4. The October 28, 2010 IEP, provided Student with one group speech and language session a week for 45 minutes; pull-out group RSP services three times a week for 30 minutes a session; pull-out individual RSP services four times a week for 20 minutes a session; and 10 hours a year for AT support in Student's classroom. The IEP goals were in the area of speech and language, fine motor skills, reading, writing and executive functioning. The IEP contained numerous accommodations, such as, breaking down

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<sup>3</sup> The MOU is only discussed to set forth Student's educational program during the times relevant in this matter, and is not considered as an admission by either party as to any other facts or legal conclusions.

<sup>4</sup> Pull-out services mean the RSP services were to be provided to Student in a location other than his general education classrooms, while push-in is in his general education classrooms.

<sup>5</sup> Ms. Luhmann has taught for the District for 20 years. She has a master's degree in special education and a learning handicapped teaching credential, but during SY 2010-2011 was a general education teacher.

directions and assignments into smaller pieces, checking for understanding, giving Student extra time to respond orally, and providing a checklist at the end of the day of what Student needed to complete as to pending assignments and homework.

#### *District Assessments*

5. A school district is obligated to assess a student in all areas related to the student's suspected disability. Student asserts that the District failed to assess him in all areas of suspected disability as the District did not assess as to whether he was autistic. Additionally, Student contends that the District's psychoeducational, OT, AT, academic and speech and language assessments were not sufficiently comprehensive and that the District needed to conduct to a neuropsychological assessment. The District contends that it conducted a thorough assessment in all areas of suspected disability and that autism was not a suspected area of disability.

6. At the start of SY 2010-2011, the District developed an assessment plan for Student's triennial assessment, to which Parents signed their consent. The District provided Parents copies of the assessment reports in time to prepare for the originally scheduled October 9, 2010 IEP team meeting.

#### *Psychoeducational Assessment*

7. District school psychologist, Gary Yabrove, Ph.D., conducted the psychoeducational assessment. Dr. Yabrove has a bachelor's degree in psychology, and a masters and Ph.D. in educational psychology. Dr. Yabrove has been a school psychologist since 1988, and has worked for the District since 2004, focusing on preschool and elementary school students. Dr. Yabrove has been a lecturer at the University of California, Berkeley since 1993 in the school psychology program, teaching assessments and supervising interns. Dr. Yabrove has conducted over 750 assessments. Dr. Yabrove first met Student in third grade.

8. Dr. Yabrove assessed Student over five days in September and October 2010. For the assessment, Dr. Yabrove reviewed Student's educational records, spoke to Parents, Student and his teachers, and observed Student twice in the classroom. Dr. Yabrove administered the Wechsler Intelligence Scale for Children – Fourth Edition (WISC-IV), NEPSY-II: Developmental Neuropsychological Assessment,<sup>6</sup> Test of Auditory Processing Skills – Third Edition (TAPS-III), Beery Test of Visual Motor Integration (VMI), and Behavior Assessment System for Children – Second Edition (BASC-II). There is no dispute that Dr. Yabrove is qualified to administer and interpret these assessment tools, that he properly administered these tools and that the results are accurate.

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<sup>6</sup> NEPSY is not an acronym.

9. Student's last psychoeducational assessment in October 2008 by Dr. Yabrove found that he had average intelligence with significant weakness in auditory comprehension, and difficulty processing and retaining lengthy auditory information. As a result, Student required visual supports to retain and process lengthy auditory information. Student's academic testing was at grade level in reading and writing and above grade level in math. The OT assessment found improvement with motor planning skills and handwriting. The speech and language assessment indicated continued weakness with listening comprehension and verbal reasoning. Parents obtained a private central auditory processing assessment soon after these 2008 assessments, which indicated Student had difficulty with auditory focusing, screening out extraneous information and processing multiple pieces of information.

10. When Dr. Yabrove conducted the 2010 assessment, he knew that Student's therapist, a licensed clinical social worker, had diagnosed him with an anxiety disorder and that he began taking medication in April 2010 to remediate his anxiety, depression and obsessive-compulsive tendencies. Dr. Yabrove spoke to Student's therapist, who conveyed that he believed that the source of the anxiety was primarily due to the home environment. By the end of fourth grade, SY 2009-2010, Student had met grade level standards in all areas. The fourth grade teacher found Student to be reliable and that he demonstrated appropriate behaviors.

11. However, as Student began the fifth grade, in the fall of 2010, his teacher Ms. Luhmann reported increased anxiousness with writing assignments that would lead him to shut down and have problems getting started. Student required individual assistance to get started on writing assignments, review material before taking a test, and he needed someone to check in with him to ensure that he understood the assignment. Ms. Luhmann reported on one occasion that she attempted to work with him to provide extra help and he became very upset and took a while to calm down. In group settings, Student could keep himself composed.

12. Parents reported to Dr. Yabrove their concerns about his auditory and reading comprehension, and his ability to complete writing assignments. Parents discussed Student's anxiousness and obsessive behaviors and reported that he had become increasingly frustrated with school, especially with writing assignments, and burst into tears when he felt that he could not complete an assignment.<sup>7</sup>

13. During in-class observations by Dr. Yabrove, Student was attentive to the instruction. He did not participate during the class discussion, but did appropriately ask a clarifying question. Additionally, during an in-class writing assignment, Ms. Luhmann had to prompt Student to begin as he sat at his desk with his head on the table. After the prompt,

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<sup>7</sup> Mother is a licensed speech and language pathologist and previously worked for the District for several years before becoming a private speech and language pathologist. She is familiar with the assessment and IEP process based her education and experience.

Student completed the assignment. Student told Dr. Yabrove that writing his social studies reports were the most difficult classwork, but that nothing else was too difficult. Student acknowledged that he was a worrier and this occurred more at home. As to the testing Dr. Yabrove administered, Student showed great effort and attention, and persisted in completing test items even after the expired time.<sup>8</sup> Student's auditory comprehension deficits were evident during the testing. Student performed better on responding to concrete information questions versus detailed abstract verbal questions.

14. On the WISC-IV, Student demonstrated average intelligence. However, his sub-test scores varied greatly between areas that measured his ability with visual reasoning, a strength, and verbal reasoning and comprehension, deficit areas. However, even with these deficits, Student's verbal comprehension was in the low average range. In contrast, Student demonstrated an extreme strength with his working memory being in the high average range. As in the 2008 assessment, Student's verbal reason was best with concrete questions and he often missed easier questions while answering correctly more difficulty ones. Dr. Yabrove noted that this was sometimes seen with children with emotional issues.

15. Based on Parent's concerns as to Student's executive functioning and language comprehension, Dr. Yabrove administered NEPSY-II subtests in these areas. Neuropsychologists seeking to examine executive functioning commonly use the NEPSY-II. Student displayed weakness in the narrative memory subtest that tests participants on longer pieces of verbal information as he was in the ninth percentile. Student demonstrated problems with initiating behavior and generating new ideas and strategies, caused in part by his anxiousness in the animal sorting subtest, being again in the ninth percentile. The comprehension of information subtest required Student to comprehend and follow a sequence of instructions, in which he was also in the ninth percentile. In contrast, Student displayed great attention to task and inhibitory control with average and above-average standard scores respectively.

16. Despite Student's auditory processing deficits, he was in the average range on the two TAPS-III subtests Dr. Yabrove administered. The contrast in scores on the NEPSY-II and TAPS-III is explained by the tests themselves because with the Auditory Comprehension subtest had Student recall information from shorter passages than those in the NEPSY-II. On the Auditory Reasoning subtest, while passages were longer than the Auditory Comprehension passages, Student extracted the meaning of the passage, but had difficulty recalling particular details. This is consistent with Student's inability to recall specific details in a longer passage, but ability to infer the correct meaning due to his reasoning strengths.

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<sup>8</sup> Student did not present any evidence that Dr. Yabrove scored Student's completed answers that occurred after time expired.

17. The VMI assesses visual and fine motor skills based on developmental progression and impacts a Student's ability to copy from the board and handwriting. Student's score was in the low-average range as he had difficulty in integrating the designs and distorting figures.

18. The BASC-II uses a questionnaire with a series of questions designed to assist in determining areas of concern as to a student's emotional, social and behavioral well-being. Parents and Ms. Luhmann each completed a questionnaire, with Parents' form focusing on concerns at home and Ms. Luhmann's at school. The difference in the responses is striking as Parents noted clinically significant or at risk levels as to adaptive skills, hyperactivity, somatization, atypicality and attention problems, while Ms. Luhmann only noted Student's adaptive skills in the at-risk range. The results on the BASC-II corresponded to Student's therapist's statement to Dr. Yabrove that Student's behavioral problems were more due to issues in Student's home than in school. Despite Parents' stated concern about Student's anxiety, both Parents' and Ms. Luhmann's responses rated Student's anxiety as normal.

#### *Academic Testing*

19. Student's RSP teacher, Trisha Hahn, administered the academic testing. Ms. Hahn first met Student in second grade while providing general education reading support to his class, which focused on decoding skills. Ms. Hahn was Student's RSP teacher in fourth and fifth grade. Ms. Hahn's assessment consisted of informal and formal testing tools that she was qualified to administer.

20. For the formal testing, Ms. Hahn administered the Wechsler Individual Achievement Test – Second Edition (WIAT-III). Student's weakest subtests, reading comprehension and essay composition, were in the average range with both having a 91 standard score. However, Student's overall reading and writing composite scores were both slightly above the median as Student showed strength in the other subtests that comprised the composite score. In the math portion of the WIAT-II, Student's ability was above average.

21. The informal reading assessments involved District reading materials and questions. Student did best on multiple choice questions versus questions in which he had to write a response. Not surprisingly, Student did best on concrete questions and had trouble with questions that required inferences and how and why questions. Student did best when he would go back to the reading material to find an answer compared to answering straight from memory.

#### *Speech and Language Assessment*

22. District's speech and language therapist, Angela Sharp, assessed Student in October 2010. Ms. Sharp first assessed Student in October 2004 for his initial special education eligibility assessment. Ms. Sharp provided services to Student from kindergarten through December of SY 2010-2011 when Parents requested that another speech and language therapist serve Student. Ms. Sharp has been a speech and language therapist for the

District for 33 years, primarily working with preschool and elementary school-age students. No dispute exists as to Ms. Sharp's qualifications to conduct the October 2010 assessment.

23. For the assessment, Ms. Sharp reviewed the prior District assessments in 2004, 2005, 2006, 2007 and 2008, along with the February 2010 private assessment by Sarah Spencer. The District's 2008 assessment showed that Student had strengths in vocabulary, word associations, syntax, pragmatic judgment and identifying the main idea of a passage. Student demonstrated weaknesses in verbal reasoning, ability to recall details in orally presented information and ability to explain figurative language and verbal absurdities. Ms. Sharp had reviewed the private central auditory processing assessment, and she was aware of the anxiety diagnosis.

24. In developing the assessment plan, the IEP team, including Parents, agreed that extensive testing was not needed in the area of speech and language because of the recent assessments, consistency of deficits in these assessments, and Parents' request that the assessment focus on Student's verbal reasoning and problem solving. Based on this discussion and prior assessment information, Ms. Sharp selected the Test of Problem Solving, Elementary – Third Edition (TOPS-III), Comprehensive Assessment of Speech and Language, Inference Subtest (CASL), and the Word Test 2 – Elementary: Semantic Absurdities, Definition and Flexible Word Use (Word Test).

25. The TOPS-III showed significant weakness in Student's ability to solve problems and express his reasoning skills as in only one of the six subtests did he have an average score, the problem-solving subtest. Student's overall TOPS-III score placed him in the fifth percentile, with significant weakness in answering negative questions, making inferences and sequencing. Ms. Sharp noted that a pattern of Student's errors fell in three areas. The first pattern involved inadequate verbal response as Student did not clearly and completely formulate his answer. The second pattern involved not paying attention to detail in a picture or question. The last pattern was Student giving responses that evidenced vague, nonspecific or incomplete thinking. This was consistent with Dr. Yabrove's finding that while Student could properly tell you the meaning of a verbal or written passage, he still missed specific details.

26. On the CASL subtests, Student displayed weakness in all five subtests as to non-literal language, inferences, understanding the difference between literal and figurative language, paragraph comprehension and pragmatic judgment. There was little difference in Student's scores, which ranged from standard scores of 86 to 92. The scores again were consistent with Student's known weaknesses in understanding inferences and non-literal meaning of words and phrases.

27. On the Word Test, Student's weakness was flexible word use when words have multiple meanings as his standard score decreased from 94 in 2008 to 79 in 2010. As to word definitions, his score remained static in the lower average range, and his ability to understand semantic absurdities and ability to correct an absurd statement increased from 69

to 100. Although Student understood that words have multiple meanings, he had difficulty expressing the nuances in the different meanings.

28. Based on her experience in working with Student and the assessment results, Ms. Sharp corroborated Dr. Yabrove's findings that Student had difficulty when presented with novel information or situations. However, when given background knowledge and with practice and prompting, Student's performance improved. Student did best with concrete information and struggled with abstract information as he had trouble comprehending and using high-order language, even though his vocabulary and grammar skills were average. Student's responses, while often correct, lacked specificity in detail and context.

#### *AT Assessment and OT*

29. Occupational therapist Gina Wilburn conducted the AT assessment. Ms. Wilburn has been an occupational therapist for 28 years, the last eight with the District, and has an AT and alternative augmented communication (AAC) certificates. Ms. Wilburn provided OT to Student from kindergarten to the end of fourth grade. Ms. Wilburn worked with Student on handwriting, coordination, motor planning, sensory issues, and bilateral control.<sup>9</sup> Ms. Wilburn provided AT services to Student beginning in the fourth grade.

30. Student was proficient with computers and using the keyboard, although he typed looking at the keys instead of touch-typing. He had started using typing software to improve these skills. To help organize his thoughts for writing assignments, Student used a computer program successfully and enjoyed using it. The AT assessment did not discuss other AT or AAC software or devices that Student should use.

31. The District did not conduct an OT assessment because, pursuant to the MOU OT services ended at the end of fourth grade. No record exists that Parents requested an OT assessment for Student's triennial assessment.

#### *Sensory Integration Assessment*

32. Ms. Wilburn conducted a comprehensive assessment as to Student's possible sensory integration deficits based on Dr. Kosters' recommendation presented at the April 22, 2011 IEP team meeting and presented her assessment at the May 25, 2011 IEP team meeting. Ms. Wilburn observed Student and administered standardized and non-standardized tests as to fine and gross motor skills, ability to process visual and other sensory information, motor planning, balance, and posture. The results of this assessment found that Student did have sensory integration deficits, and that his visual performance had improved from prior assessments as Student was now wearing glasses. Ms. Wilburn's offer to Parents to develop

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<sup>9</sup> This is ability to follow an item as it moves from one side and passed the mid-line to the other side, such as following a ball thrown towards a person that moves from left to right.

a sensory integration diet for them to use at home did not mean that Student required this diet at school, because Ms. Wilburn only made the offer to assist Parents with concerns they had at home. Finally, Student did not have an occupational therapist testify to provide contradictory evidence. Therefore, Student failed to establish that the District needed to assess him sooner for suspected sensory integration deficits and that the District subsequently needed to provide him with any goals or services for sensory integration deficits.

*Assessing in All Areas of Suspected Disability*

33. Student contends that the District failed to assess him in all areas of suspected disability. He relies on the testimony of Dr. Kusters, who conducted her private assessment in February and March 2011, several months after the October 28, 2010 IEP team meeting. Student contends that the information in her report demonstrated that the District failed to assess Student in all areas of suspected disability for the October 28, 2010 IEP team meeting and beyond. Student additionally contends that the District was aware of information in Dr. Kusters' report as to his anxiety and behavioral problems as of the October 28, 2010 IEP team meeting.

34. Dr. Kusters has a Ph.D. in clinical psychology and a licensed clinical psychologist since 1981. From 1981 through 1998, Dr. Kusters worked at Kaiser and has been in private practice since 1998, focusing on conducting neuropsychological assessments. Her assessment of Student consisted of a document review, including Dr. Yabrove's recent assessment, speaking to Parents, Student and Ms. Luhmann, and observing Student for approximately 45 minutes to an hour in the classroom and playground. Dr. Kusters criticized the District's assessment for failing to assess Student as to autistic-like behaviors, behavior problems, OT and speech and language. Additionally, Dr. Kusters found fault with Dr. Yabrove's assessment for failing to pick up signs that Student had attention deficit hyperactivity disorder (ADHD).

35. As to autistic-like behaviors, Dr. Kusters opined that the District needed to assess Student in this area of suspected disability because his deficits were consistent with autism with perseverative hand flapping, pragmatic language delays, fine motor and sensory integration deficits, cognitive inflexibility, and hyper-focus on certain tasks. However, Dr. Yabrove was convincing that as of the October 28, 2010 IEP team meeting, and through SY 2010-2011, Student did not display deficits that would warrant assessing him in the area of autism through an instrument such as the Autism Diagnostic Observation Schedule (ADOS). Additionally, Parents' previously obtained private neuropsychological evaluation in 2009 by another assessor did not diagnose Student with autism.<sup>10</sup>

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<sup>10</sup> Parents never provided the District with a copy of the 2009 private neuropsychological evaluation conducted by Kaiser.

36. When he was assessed by the District in the fall of 2010, Student demonstrated the ability to appropriately verbally communicate with his peers and District personnel. While Student had pragmatic language deficits, he still could communicate and play with his classmates in and out of class, and participate in group class activities. Student was friendly to District personnel who worked with him and had no history of extreme withdrawal or inappropriately interacting with his classmates. Although Student had obsessive behaviors, his teachers could easily redirect him, and he did not get upset when prompted to a new task. While Student had fine motor deficits, Student's printing was legible and able to perform fine motor tasks. Finally, the only perseverative conduct Student and Dr. Kusters brought forth was Student hand flapping when excited during basketball because he wanted the ball thrown towards him. This is not persuasive evidence of perseverative conduct.

37. Additionally, if Dr. Kusters believed that an area of suspected disability was autism, she did not explain why she did not administer the ADOS, which is relatively easy to administer and which Dr. Kusters should be qualified to administer based on her education and experience. Dr. Kusters did test Student for Asperger's Syndrome with the Asperger Syndrome Diagnostic Scale, which Mother completed. This score indicated Asperger's was likely, but Dr. Kusters stated in her report that a diagnosis of Asperger's was not a good diagnostic fit due to the absence of a significant social deficit. Additionally, Parents obtained a private neuropsychological assessment in November 2010, which Parents never provided to the District nor mentioned in Dr. Kusters' assessment, which did not give a diagnosis of autism. Furthermore, while Student received a diagnosis of high functioning autism in December 2011, none of those assessors testified that the District should have assessed Student as to autism. Therefore, Student did not establish that the District needed to assess Student for autism during the time period at issue.

38. As to Student's behavioral functioning, specifically anxiety and ADHD, Dr. Kusters was aware of his anxiety diagnosis and did examine this as part of her assessment. However, Dr. Kusters' did not diagnose Student as having an anxiety disorder, but instead diagnosed Student with ADHD, predominately inattentive type, mixed receptive-expressive language disorder, a learning disorder not otherwise specified, and a sensory integration disorder. Dr. Kusters' report did not provide any new information as to Student's behavioral functioning that was not included in Dr. Yabrove's report or known to the District based on its interaction with Student, or information provided by Parents.

39. As to ADHD, concern is raised as to how Dr. Kusters' picked and chose the information in her own and Dr. Yabrove's assessment to diagnose Student with ADHD. Dr. Kusters glossed over information from the BASC-II in Dr. Yabrove's assessment and the Behavior Rating Inventory of Executive Functioning she administered by downplaying information in Ms. Luhmann's questionnaire that Student did not demonstrate attention deficits in class. Also, Mother's score on the Brown Attention Deficit Disorder Scales conducted by Dr. Kusters did not demonstrate attention deficit problems. Further, Dr. Kusters' did not adequately explain why Student's inattention could not simply be the result of his auditory processing disorder that the District acknowledged Student has. Finally, Dr. Kusters did not give empirical support that she could pick amongst the various

test scores to diagnosis Student with ADHD. Therefore, Dr. Kusters failed to establish that the District needed to assess Student for ADHD to determine his behavioral functioning.

40. Regarding the need for assessing Student as to neuropsychological and psychoeducational functions, Student did not establish the difference between these types of functions. Dr. Kusters' opinion that the District needed to have a neuropsychological assessment performed was based on the District's failure to adequately assess Student for executive functioning deficits. However, Dr. Kusters' assessment of Student's executive functioning deficits did not bring forth any information that the District did not already possess through prior assessments and classroom observations by his general and special education teachers.

41. The District was already aware of Student's cognitive inflexibility, his need for instructions and directions to be concrete and broken into small chunks, a central auditory processing deficit, his visual learning strengths, and his difficulty understanding inferences. Dr. Yabrove was convincing when he testified that the District was already implementing the recommendations Dr. Kusters presented, and that her assessment presented no real new information regarding Student's unique needs, and that no further executive functioning assessment by the District was needed.

42. Regarding speech and language, Student did not present direct evidence that the District failed to adequately assess Student in the area of expressive, receptive or pragmatic language. Although Dr. Kusters diagnosed Student with mixed receptive-expressive language disorder, her assessment did not note the need for any further speech and language assessment. Additionally, Dr. Kusters' assessment did not present any new information as to Student's speech and language deficits that were not seen in either Ms. Sharp's and Ms. Spencer's assessments, or the private central auditory processing assessment. Further, Student did not establish that Dr. Kusters was qualified to provide expert testimony as any purported inadequacy in Ms. Sharp's assessment. Mother, who is qualified to provide such testimony, did not provide such testimony. Finally, Ms. Spencer did not testify. Therefore, Student did not establish that the District failed to assess Student in all areas of suspected disability regarding his speech and language deficits.

43. As to AT, Dr. Kusters noted that Student needed AT services and the use of software, like Inspiration that he was presently using, but did not recommend another further AT assessment, and Student did not present other evidence to prove this contention. Regarding OT, Dr. Kusters did recommend a sensory integration assessment, which the District conducted and presented at the May 25, 2011 IEP team meeting, even though she recognized that she is not qualified to conduct such an assessment. As discussed above in Factual Finding 32, the OT assessment that focused on sensory integration deficits did not support Student's contention that the District needed to conduct this assessment as part of the October 2010 triennial assessment.

44. It is undisputed that Student presents a unique profile with his cognitive strengths coupled with his executive functioning, central auditory and speech and language

deficits. Because of Student's unique profile, the District conducted extensive assessments in all areas of suspected disability. Accordingly, the Student did not establish that the District failed to assess Student in all areas of suspected disability.

### *Predetermination*

45. Under the Individuals with Disabilities Education Act (IDEA), parents of a child with a disability must have an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. A district must fairly and honestly consider the views of parents expressed in an IEP team meeting, including information from private assessors. While school officials may discuss a child's programming in advance of the IEP team meeting, they may not arrive at an IEP team meeting with a "take it or leave it" attitude, having already decided on the program to be offered. A district that predetermines the child's program and does not consider the parents' requests with an open mind has denied the parents' right to participate in the IEP process.

46. Student asserted that the District predetermined its October 28, 2010 IEP offer at this and all other IEP team meetings during the relevant period in this matter, and did not fully consider information presented by Parents and private assessors. The District asserted that it never predetermined its IEP offer and considered information from Parents and private assessors, which led to changing portions of the IEP based on this information.

47. While the District came to IEP team meeting with proposed goals, services and educational placement, the District did not predetermine its offer or prevent Parents from meaningfully participating in the decision-making process. The District provided copies of its assessments in early October 2010, and Parents had ample time to review these assessments by the October 28, 2010 IEP team meeting. Parents were active participants in the IEP team as to the assessment presentation and discussion as to Student's goals. In fact, the District recessed the IEP team to permit Parents to draft proposed goals and revise District proposed goals. The District discussed the proposed changes at the November 4, 2010 IEP team meeting, incorporating most of the changes Parents requested, including adding a reading comprehension and an executive functioning goal. In fact, Mother complimented the District after the November 4, 2010 IEP team meeting as to the cooperative nature of the IEP process.

48. There was little discussion at the IEP team meetings as to the services and placement, because of the parties' focus on Student's goals. The District did make changes in the RSP services from those specified the MOU by adding 20 minutes a session, four times a week of individual service, along with providing group pullout RSP, three times a week for 30 minutes a session. Regarding Student's placement, the consensus was that Ms. Luhmann's class was appropriate to meet Student's unique needs. Therefore, Student did not establish that the District predetermined its October 28, 2010 IEP offer and shut Parents out of the IEP decision-making process.

### *Baseline Information for Goals*

49. Student contends that the baseline information on the goal pages in the October 28, 2010 IEP was inadequate because a person who might read any of Student's goals would not understand the interrelationship between the goal and the stated baseline. The District contended that the baseline information was accurate and understandable.

50. Susan Mead, who was the District's special education coordinator under Ms. Thomas during most times relevant in this matter, opined that the District's baseline information would not give a person who read the goal enough information to properly implement the goal because the reader would not know Student's level of performance or how the information was obtained. Additionally, the baseline information was so vague that the reader would not know exactly what skill or deficit that the goal was designed to address.

51. However, Ms. Mead's focus on the baseline information ignored complete information as to Student's baseline performance existed in the IEP, the assessment reports, and the present levels of performance reported in the notes of the October 28 and November 4, 2010 IEP, contained in the IEP. Student did not establish that the information as to his present levels of performance in other portions of the IEP was not accurate. Additionally, Ms. Mead failed to demonstrate how a reader of any of Student's goals would not understand how to implement the goal and determine whether Student met the goal because of the perceived inaccurate or incomplete baseline information. Ms. Hahn, Ms. Sharp and Ms. Luhmann were more convincing in explaining how they or any other educator working with Student could understand the baseline information as it related to the goal and successfully implement the goal.<sup>11</sup> Finally, Student did not establish how the baseline information prevented Parents from meaningfully participating in Student's educational decision-making process because the information was in other parts of the IEP. Nor did Student demonstrate that this purported lack of baseline information denied him educational benefit. Therefore, Student failed to establish that the baseline information included with Student's goals denied him a FAPE.

### *Anxiety and Behavioral Needs*

52. A school district provides a FAPE to a student if its program or placement is designed to address the student's unique educational needs, and reasonably calculated to provide meaningful educational benefit in the least restrictive environment. Student asserts that the District's offer at an IEP team meeting held October 28, 2010, failed to address his anxiety, behavioral, and speech and language needs, especially due to its failure to adequately assess him. As to all of Student's goals, Student contended that the baseline information was inadequate to support the development of each goal. The District asserted

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<sup>11</sup> While Ms. Mead and Mother are friends, the credibility findings as to Ms. Mead are made based on her testimony and lack of factual or legal support for her contentions.

that its October 28, 2010 IEP, was reasonable calculated to meet Student's anxiety, behavioral and speech and language needs.

53. Student claims that the October 28, 2010 IEP failed to address his unique anxiety and behavioral needs by not including goals or services to address these deficits. Additionally, because his anxiety was caused in part by reading comprehension and writing deficits, and because he became anxious and sometimes broke down if he could not start or complete an assignment, the District needed additional services to address these deficits. The District counters that although Student did have anxiety issues at school, it addressed this need through the accommodations designed to reduce his performance anxiety discussed below. Additionally, the District's instruction and goals met Student's needs regarding reading comprehension and written expression. Finally, the District contends that Student did not establish the need for any additional executive functioning goals.

54. The October 28, 2010 IEP did not contain any specific goals to reduce Student's anxiety, such as Student learning coping skills to handle his frustration, instead of crying or tuning out, nor were counseling services suggested. The Parents did not suggest any anxiety goals as part of their proposed goals, or request counseling services. In addition, the District did not propose specific goals and services to address Student's anxiety because Ms. Hahn correctly noted at the IEP team meeting that the best way to reduce Student's anxiety was to make him comfortable in his learning environment.

55. The District accomplished this in part through the accommodations, which were discussed at the IEP team meeting with changes made accordingly. Because of Student's problems with cursive writing, he could print his assignments. The District agreed to break down instructions into smaller, concise chunks, reduce his workload, give him extra time to respond orally, give him additional time on tests, and checking to ensure that Student understood directions and test questions. Additionally, Ms. Luhmann would break down assignments for class projects, like book reports, and modify the assignments because completing projects, especially written ones, was a great source of Student's anxiety.

56. Student's critique about the accommodations was not as to their adequacy to reduce Student's anxiety but, as will be discussed later in Factual Findings 73 through 77, whether the District implemented the agreed upon accommodations. Student did not present evidence that as of the October 28, 2010 and November 4, 2010 IEP team meetings, the agreed upon accommodations were not adequate.

57. As to the goals in the October 28, 2010 IEP, Student presented little evidence that the goals were not adequate to address his reading and writing deficits. The District did not dispute that Student became anxious and frustrated when he had difficulty with his reading and writing assignments. The goals addressed Student's deficits as to not being able to clearly and completely summarize the material he read orally and in writing, reading comprehension in all subjects, and organizing and editing his written work. Student did not require a handwriting goal as he had met his previous goal for cursive writing, and as an accommodation the District permitted Student to print his assignments. Student did not

demonstrate that the goals that the District developed with Parents were not reasonably calculated to permit Student to make meaningful educational progress.

58. Regarding anxiety or behavioral goals that the District failed to include in the October 28, 2010 IEP, Student did not set forth any specific needed goals. Rather, Student argued that the failure to propose any goal denied Student a FAPE. While Student had one crying episode during the first part of SY 2010-2011 that Dr. Yabrove discussed in his assessment, Student did not establish that this episode was reflective of anxiety or behavioral incidents that occurred with such frequency that they prevented Student from accessing the curriculum. This single incident lasted approximately 30 minutes, as Student was upset about a writing assignment because he believed that he had to write in cursive, which was difficult for him, even though Ms. Luhmann had previously told him that he could print. Student did not disturb the class as he cried quietly while the rest of the class continued with the assignment. Eventually, Ms. Luhmann was able to comfort Student and he continued with the assignment. Although Student missed instruction, the episode was not so serious and repetitive as to require goals to address this type of situation in the future.

59. Regarding behavioral goals related to ADHD, as noted above, Student failed to establish that ADHD existed that affected his school performance. Also, any inattention Dr. Kosters observed could be remedied through general education strategies and the existing classroom accommodations Ms. Luhmann used to get Student back on task, such as giving him preferential seating and checking for understanding. Ms. Luhmann and Ms. Hahn were convincing that Student was making meaningful educational progress as of the October 28, 2010 IEP team meeting without the need for any goals specifically designed for anxiety or behavior. Therefore, Student failed to establish that the District denied him a FAPE by failing to have anxiety or behavioral goals in his IEP.

#### *Counseling Services*

60. Regarding any additional services, like counseling, Student failed to present direct evidence that he required counseling or other services, such as additional RSP time, to address his anxiety and behavioral needs as of the October 28, 2010 IEP. The District personnel involved in Student's education worked collaboratively and created a nurturing environment for him, including being sensitive to his emotional needs. The fact that Student only had one crying episode as of the October 28, 2010 IEP team meeting did not create a need for counseling or other services.

61. Additionally, even if Student was having problems at home with projects, which led to behavioral episodes at home, Ms. Luhmann was convincing that this did not impact his educational progress and grades, which included homework. Ms. Hahn was convincing that the RSP time she spent with Student allowed him work on his academic areas of weakness and allowed him to get organized for the next day of instruction. Accordingly, Student did not establish that the District needed to provide him with additional services to meet his anxiety and behavioral needs.

### *Speech and Language Services*

62. Student asserted that the District needed to offer more speech and language services to address his expressive, receptive and pragmatic language needs. However, Student did not have an expert testify to contradict the service level recommendation made by Ms. Sharp that the IEP team adopted. The IEP team included Mother who is licensed speech and language therapist. Mother did not provide an expert opinion, nor did Ms. Spencer testify that the District did not implement her assessment recommendations. Finally, Dr. Kusters was not qualified to give an opinion as to adequacy of speech and language services. Accordingly, Student failed to establish that the District's speech and language services in the October 28, 2010 IEP did not provide Student a FAPE.

### *April 22, 2011 IEP Team Meeting*

#### *Authorize Representative Attendance*

63. Student contends that at the April 22, 2012 IEP team meeting, the District failed to consider information presented in the private assessment of Dr. Kusters and did not have a District representative attend the IEP team meeting who was authorized to make changes to the IEP. The District asserts that it did consider information presented by Dr. Kusters' assessment, but that the District had already implemented many of her recommendations and that other recommendations in her report were not supported by the evidence. Additionally, the District had an authorized representative attend the IEP team meeting who could authorize changes to the IEP.

64. The Parents and District met on April 22, 2011, to review Dr. Kusters' assessment. Regarding whether an authorized representative attended the April 22, 2012 IEP team meeting, Ms. Thomas could not attend the meeting, so she had Ms. Mead attend. One of Ms. Mead's duties as the District's Special Education Coordinator was ensuring the District's compliance with the IDEA. Ms. Thomas and Ms. Mead met regularly during SY 2010-2011 to discuss upcoming IEP team meetings, staff training and general discussions about students. During one of these meetings, Ms. Thomas and Ms. Mead discussed Student's upcoming IEP team meeting and that Ms. Mead would be the District's administrative representative because Ms. Thomas would not be able to attend.

65. Although Ms. Mead testified that Ms. Thomas instructed her that she did not have the authority to make any changes to Student's IEP based on information in Dr. Kusters' assessment, she was not credible in this regard. The notes of Ms. Thomas' and Ms. Mead's regular meetings indicate that Ms. Thomas delegated significant authority to Ms. Mead regarding the development of students' educational programs. Ms. Mead could not provide a credible explanation as to why Ms. Thomas would delegate significant authority, but not the authority to make changes to Student's IEP based on information presented in Dr. Kusters' assessment. Although there had been previous tension between Parents and the District that led to the earlier MOU, that tension had eased with the October 28, 2010 IEP, and there was little indication that problems between Parents and the

District would flare up when the IEP team met on April 22, 2011. Ms. Thomas was more credible when she testified that she placed no decision-making limitations on Ms. Mead for the April 22, 2011 IEP team meeting, based on the authority she had delegated to Ms. Mead and expectation that Parents and District could amicably make changes to Student's IEP based on any new information, as occurred with the October 28, 2010 IEP. Accordingly, Student did not establish that the District failed to have authorized representative attend the April 22, 2011 IEP team meeting.

*Not Considering or Implementing Report Recommendations and Predetermination*

66. Student contends that the District needed to change his October 28, 2010 IEP, to implement the report recommendations made by Dr. Kusters. Student asserted that the District did not implement Dr. Kusters' recommendation because Ms. Thomas, who could not attend the April 22, 2011 IEP team meeting, gave instructions that no changes were to be made to the IEP in her absence. The District asserted that it did not make changes to Student's IEP because Dr. Kusters' assessment did not provide information on Student that the District did not already know and that it had not predetermined not to make changes to Student's IEP prior to the IEP team meeting.

67. Dr. Kusters' report contained 23 recommendations. The District received Dr. Kusters' report in advance of the April 22, 2011 IEP team meeting, and Ms. Mead and Dr. Yabrove reviewed the report in depth before the meeting. Also attending this IEP team meeting were Ms. Hahn, Ms. Luhmann and Ms. Wilburn, who also had received copies of the report before the meeting.

68. Two of the recommendations did not involve District obligations, such as Parents considering medication for Student's ADHD and a therapy group at Kaiser for his anxiety. The District agreed at the IEP team meeting to conduct an OT assessment that focused on Student's sensory processing deficits, which Dr. Kusters recommended. For the remaining recommendations, Dr. Yabrove correctly noted that the District had already implemented most of the recommendations, especially since Dr. Kusters' assessment findings, other than the ADHD and autism assessment recommendation, mirrored information that the District had from its prior assessments and from working with Student.

69. The District had implemented Dr. Kusters' recommendation for direct instruction of Student by someone knowledgeable about processing disorders during RSP services. She recommended that the District continue with its present speech and language service, along with the AT services and classroom FM system Ms. Luhmann used to address Student's auditory processing. The District already pre-taught novel academic material and provided repetition, and had appropriate goals and services to address Student's reading issues. Ms. Luhmann made needed modifications to class and homework, and provided multi-modal instruction. Student was working on keyboarding skills and at the time could complete his written work successfully by printing.

70. The District had implemented the recommended accommodations to break the instruction into smaller chunks and ensured that Student understood what he was expected to accomplish. Further, his workload was reduced, if needed, and he was given extra time for tests. Note taking was not a particular need in fifth grade, and Ms. Hahn ensured that Student had all his assignments and homework when she helped Student with his organizational skills at the end of the school day. The District also worked with Student on self-advocacy.

71. The recommendation that the District did not agree to at the April 22, 2011 IEP team meeting, was Dr. Kusters' recommendation that the District provide Student with the Lindamood-Bell (LMB) Visualizing and Verbalizing reading program because of his processing deficits. On May 11, 2011, the District denied Parents' request for the LMB program because Student had made meaningful educational progress with the District's existing reading program. Ms. Hahn and Ms. Luhmann were convincing as to Student's reading progress based on his progress towards meeting his goals, his academic performance, and their classroom observations. The reading program they used allowed Student to make meaningful educational progress. Student's request for LMB involves a question of which reading methodology the District should use, and in matters regarding educational methodology, the selection is left to the District so long as the District provides an appropriate education.

72. Student did not establish that the District failed to consider Dr. Kusters' report nor come into the IEP team meeting with a closed mind because Dr. Kusters' report was consistent with information the District already possessed. Further, the District had already implemented nearly all of her recommendations. In areas where the District disagreed with Dr. Kusters, like her ADHD diagnosis, the need to conduct an autism assessment, and Student's need for a LMB program, the evidence did not support Dr. Kusters' conclusions. The fact that the District disagreed with Dr. Kusters does not mean that the District did not consider information in her report. Therefore, Student did not establish that the District failed to consider Dr. Kusters' report at the April 22, 2011 IEP team nor predetermine its IEP offer and that failure to implement her recommendations denied Student a FAPE.

*Failure of IEP to Address Student's Anxiety, Behavioral, Speech and Language and Counseling Needs*

73. As discussed above as to whether the District considered Dr. Kusters' assessment at the April 22, 2011 IEP team meeting, including her recommendations, Dr. Kusters' assessment presented little new information that the District did not already possess that would warrant the District making changes to the October 25, 2010 IEP. Additionally, as discussed further below as to the May 25, 2011 IEP, Dr. Kusters' assessment did not require any changes to Student's IEP while in fifth grade to provide him a FAPE.

### *IEP Implementation*

74. To provide a FAPE a district must deliver special education and related services in conformity with a Student's IEP. A failure to deliver services promised in an IEP is a denial of FAPE if the failure is material, meaning that the services delivered fall significantly short of the services required by the IEP. The materiality standard does not require that the student suffer demonstrable educational harm in order to prevail.

75. Student asserts that the District failed to implement the accommodations in the October 28, 2012 IEP because Student's teacher failed to appropriately modify his work and did not give him appropriate directions, especially on projects. He claims that the purported failure to follow through on the accommodations caused Student to have anxiety problems and behavioral episodes, such as crying in class or becoming frustrated at home. The District countered that classwork modifications were done based on the particular assignment and how Student progressed on the project.

76. The District does not dispute that the accommodations in the October 28, 2010 IEP, required it to modify Student's take-home projects and in-class work. Student's challenge was primarily whether Ms. Luhmann modified Student's take home projects and assisted Student in getting started in these projects because of the stress it placed on Student that led to anxiety in school and at home.

77. Ms. Luhmann was convincing that she implemented the IEP accommodations, such as breaking down classroom instruction, giving more time for tests and allowing Student to complete assignments in print. Ms. Luhmann was cognizant of Student's difficulty in starting class or homework, especially if it involved writing, and worked with him when he had trouble starting. Ms. Luhmann also explained why she did not modify Student's projects before assigning them; she wanted to see the difficulties Student was having with the work, if any, and then work with him directly, instead of just modifying the assignment without knowing if Student was having trouble completing the assignment. Ms. Luhmann explained that she asked Mother to allow Student to stay after school so she could work with him directly on project completion, but Mother denied the request.

78. Even assuming that the District failed to fully implement the October 28, 2010 accommodations, Student did not demonstrate that did not make meaningful educational progress or that the District's failure to implement was material. Dr. Kusters' assessment and Mother's testimony did not establish that Student failed to make meaningful educational progress during his fifth grade school year. The information provided by Ms. Luhmann and Ms. Hahn refuted this contention. Additionally, any purported failure by Ms. Luhmann to implement Student's IEP accommodations was not a material failure because Ms. Luhmann worked to determine the modifications Student required after assigning the work to find out the changes or further assistance Student required. Therefore, Student failed to establish that the District failed to implement the accommodations in his October 22, 2010 IEP.

*May 25, 2011 IEP Team Meeting*

79. Parents and the District met on May 25, 2011 to discuss Student's transition to middle school for the next school year and any changes that might be required for his IEP. Between the April 22, 2011 IEP team meeting and the May 25, 2011 IEP team meeting, Ms. Wilburn had completed an OT assessment on sensory processing issues.

80. For the beginning of Student's sixth grade school year, SY 2011-2012, until the next scheduled annual IEP team meeting in October 2011, the District proposed modifying Student's October 28, 2010 IEP to include an RSP elective period, and for two class periods a combined general education history and reading support class with only 20 students. The remainder of Student's three periods would be general education science, math and physical education.

*Predetermination*

81. Student asserted that the District IEP team members met before the May 25, 2011 IEP team meeting, and agreed upon an IEP to offer Parents, and they would not make any changes to it. However, the fact that the District IEP team members met before meeting does not automatically mean that the District predetermined its IEP offer. The District team members met before the IEP team meeting to discuss Student's educational progress, his unique needs, and how best to plan for his success in middle school. Based on this information, the District developed a draft IEP to start the discussion at the meeting.

82. Student did not establish that the District came to the IEP team meeting with a closed mind. Dr. Yabrove was convincing that the discussions before the IEP team meeting were for planning purposes to obtain current levels of performance and that Ms. Thomas, who attended the IEP team meeting, did not instruct the District attendees not to offer any changes to the proposed IEP. Additionally, Ms. Thomas was credible in that she did not instruct the other IEP team members that the proposed IEP was the only offer the District was going to make, and not to consider any other information Parents provided.

83. Although the IEP team meeting of May 25, 2011, was contentious, the District IEP team members did listen and consider information provided by Parents, including their request for a SDC. The District had attempted to locate a SDC that might meet Student's needs for Parents to observe. The District did not have such a SDC, and possible placements through the local special education local planning area in other school districts were already full. The District then attempted to create a unique offer with additional RSP support, but Parents refused to consider any option other than their own SDC request.<sup>12</sup>

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<sup>12</sup> Student attempted to argue that the District's IEP offer of additional RSP support was not discussed at the May 25, 2011 IEP team meeting, even though it is written on the May 25, 2011 IEP that Student would receive an additional RSP period in middle school. However, Student did not allege in the second amended complaint that the District

84. While the District met before the IEP team meeting, brought to the meeting a draft IEP, and then did not accede to Parents' demands does not necessitate a finding that the District predetermined its IEP offer. The District attempted to find a SDC for Parents to observe, but none was available. The District IEP team members considered information presented by Parents and changed the IEP to offer additional RSP support in middle school. Finally, Student did not prove that Ms. Thomas limited the other District team members from suggesting possible changes to the draft IEP. Accordingly, Student did not establish that the District came into the IEP team meeting with a predetermined IEP offer.

*District's May 25, 2011 IEP Offer*

85. Student contends that the District's May 25, 2011 IEP offer, was not reasonably calculated to provide him with meaningful educational progress because it failed address his anxiety and behavioral needs on a larger middle school campus. Specifically, Student claims that he required placement in a SDC instead of the predominately general education placement the District offered to meet this unique needs. Additionally, Student alleges that he required counseling services and the LMB reading program Dr. Koster's recommended.

86. The District argues that its educational offer addressed Student's unique needs as it continued the successful program he already had, modified to take into consideration the differences he would face in middle school. The District created a new educational program, tailored specifically for his needs, with RSP support and two periods of reading support during his six class periods.

*Baseline Information in Goals*

87. The District did not propose any additional goals for Student at the May 25, 2011 IEP team meeting. Student did not present any additional evidence that the baseline information in the goals was so inadequate now as to challenge those continuing goals from the October 28, 2010 IEP. Therefore, for the same reasons set forth in Factual Findings 49 through 51, the District's goals contained adequate baseline information.

*Anxiety and Behavioral Goals*

88. As with the October 28, 2010 IEP, Student contended that the District's May 25, 2011 IEP needed to include goals to address Student's anxiety and behavioral needs. As noted above regarding counseling services, Student's anxiety and behavioral issues at school were not so significant as to require specific anxiety or behavior goals for Student to make meaningful educational progress. Student did not establish that he failed to make meaningful progress on all of his October 28, 2010 IEP goals. Ms. Luhmann, Ms. Hahn and

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committed a procedural violation by failing to discuss its RSP offer for middle school at the IEP team meeting. (20 U.S.C. §1415(c)(2)(E)(i).)

Laurie Pappas, the District speech and language therapist then serving Student, were all convincing that Student had made substantial progress on his annual goals as of May 25, 2011, and Student did not introduce sufficient evidence to prove otherwise.

89. For middle school, Dr. Yabrove noted the difference in environments in which school personnel at an elementary school can focus more on a student's needs than can be done in middle school. The difference can be explained in part by the fact that in elementary school a student who is mainstreamed, like Student, has a primary teacher responsible for the IEP implementation, and responsible for only about 30 students, while a middle school general education teacher may have five classes a day of 30 or more students in a class.

90. To address these concerns at the May 25, 2011 IEP team meeting, a middle school RSP teacher from Wells Middle School attended, while the RSP teacher from Fallon Middle School could not attend. However, Ms. Thomas spoke to both RSP teachers and was familiar with both middle school programs. They provided information about the RSP class and Read 180 program, discussed below. The addition of the daily RSP class would provide Student with a home base because the RSP teacher could check-in with Student to see how he was doing during the course of the school day.

91. Although questions existed as to whether Student's existing accommodations, goals, and services would provide him with the supportive environment he needed in middle school to address his anxiety and behavioral needs, Student did not establish that the District needed to include specific goals to address these needs. Dr. Kusters' assessment was not adequate to establish that Student required additional goals to address his anxiety and behavior needs. Additionally, Dr. Kusters' interactions with Student and his Parents were not adequate for her to give an expert opinion as to Student's anxiety and behavioral needs at school versus issues at home that Student's therapist discussed with Dr. Yabrove. While Mother explained the anxiety and behavioral issues Student had at school and home, and her concerns for her son at middle school, the appropriate testimony as to whether Student needed additional goals in this area would be from a therapist who had worked with Student.

92. While it is not disputed that Student has needs related to his anxiety and behavior, Student did not establish that his deficits were so significant so as to require additional IEP goals in middle school for him to access the curriculum and make meaningful educational progress. Accordingly, Student failed to prove that the May 25, 2011 IEP, denied him a FAPE because it did not specific include anxiety and behavioral goals.

#### *Counseling Services*

93. The District did not propose to provide Student with any counseling services for middle school. The District did not believe that Student required counseling services because his anxiety and behavioral issues were not as serious as Parents contended. Student attempted to demonstrate his need for added services through the crying incident discussed in Factual Findings 58 and 60, with another incident involving Ms. Hahn, and Student's problems at home when doing homework and not wanting to go to school.

94. As to the two school incidents, neither were that serious, nor did they significantly affect Student's ability to access the school curriculum. The second incident occurred in Ms. Hahn's class at the end of the school day when Ms. Hahn worked with Student on organizational skills. Student became upset when he realized that he had forgotten that his class had free time and he wanted to be outside with his classmates. Ms. Hahn handled the situation appropriately by having Student finish up his work quickly and then released him to be with his class. Additionally, Ms. Hahn's replacement while she was on maternity leave during the middle of fifth grade, Mary Morehead, did not experience any similar incident.

95. Although Student does have anxiety issues that cause him to have problems starting disliked tasks, like writing assignments, two emotional outbursts during the school year do not establish a need for Student to have counseling services for elementary school or middle school. In fact, Dr. Kusters did not diagnosis Student with an anxiety disorder despite the prior diagnosis from his therapist. Student did not demonstrate that he did not make meaningful educational progress during fifth grade due to an absence of counseling services. While the academic tasks in middle school would become more difficult, along with Student having several teachers during the six periods, his prior behavior at elementary school did not require the District to offer counseling services for middle school.

96. As to Student's issues at home related to completing schoolwork, Mother was convincing as to the increasing frustration Student experienced and how upset he would get. Mother audio recorded one of the incidents for Ms. Luhmann when Student did not want to go to school, and from listening to the recording Ms. Luhmann could tell how upset Student was and how it related to school. However, what Student did not demonstrate was whether the behavioral issues that Student experienced at home were the result of difficulties relating to school, or interpersonal issues at home as described by his therapist to Dr. Yabrove. In fact, Dr. Kusters' assessment failed to address this issue as she failed to analyze adequately concerns about interpersonal issues at home and how much this contributed to Student's problems at home.

97. The level of anxiety that Student experienced at school was successfully addressed through the accommodations to address the schoolwork difficulties, plus the goals designed to improve his reading and writing deficits that caused him anxiety. Additionally, having an experienced group of teachers and personnel work and support Student reduced his anxiety level so he did not require counseling. Finally, Student did not demonstrate that his behavioral issues at home were primarily caused by school-related difficulties. Therefore, Student did not demonstrate that he required counseling services in the May 25, 2011 IEP.

#### *Meeting Student's Needs on a Middle School Campus*

98. Student contended that to meet his anxiety, behavioral and academic needs he required a placement in an SDC for middle school because of the smaller class size, additional behavioral and academic supports provided and less social pressure. The District contended that Student did not require a SDC because his needs could be met while he

attended primarily general education classes with needed support from special education staff at the middle school.

99. As noted above, Student did not require any additional goals or services to address his anxiety and behavioral needs to make meaningful educational progress at middle school for sixth grade. Because Student did not require additional goals or services, Student's contention that he required an SDC placement to address his anxiety and behavioral needs is not plausible. Dr. Kusters' assessment did not mandate Student's placement in an SDC, and her recommendations already implemented by the District, could be implemented in the District's proposed middle school placement to meet these needs.

100. Student also contended that he required an SDC placement to meet his academic needs due to his significant reading, writing and auditory processing deficits. As noted in the discussion related to Student's goals in the October 28, 2010 IEP, his deficits in these areas were not as significant as Student contended. Additionally, Student was making meaningful progress on his goals during fifth grade, which undercuts his contention that he required an SDC placement to make meaningful educational progress in middle school.

101. Additionally to address Student's reading deficits without resorting to an SDC placement, the District offered a two-period class of 20 students that combined instruction on history and also addressed Student's reading deficit. Because history involves reading for comprehension for students to understand the meaning of events that they read about, working on reading skills during history is reasonable. The methodology that the District chose to work on student's reading skills, including comprehension, was the Read 180 program. The District's Read 180 and history program is a general education class for students who have reading deficits, including reading comprehension.

102. Dr. Kusters challenged the District's use of Read 180 to meet Student's unique reading deficits, stating that Read 180 is not an approved reading intervention for reading comprehension. However, Dr. Yabrove was more convincing that Read 180 is approved by the California Department of Education to address reading deficits that Student possessed. Further, Read 180 is a research-based reading curriculum and has been in use in California for over 10 years, and has been updated and revised over those 10 years. The core components of the Read 180 program are whole group instruction, small group instruction, computer/audio interaction and independent reading. Read 180 is a structured program, which can be tailored to meet individual student needs.<sup>13</sup> Accordingly, Student did not establish that Read 180 would not meet his unique needs as to reading deficits.

103. Student did not establish that the District's proposed middle school placement that consisted of five general education classes and one special education class

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<sup>13</sup> A school district's use of Read 180 as an appropriate methodology to address reading deficits was upheld in *Student v. Alhambra Unified School District* (October 21, 2010) Cal.Ofc.Admin.Hrngs. Case No. 2010050866, pp. 17-18.

was not reasonably calculated to permit him to make meaningful educational progress. Student's anxiety and behavioral deficits were not so severe that the District could not meet them through its May 25, 2011 offer. Additionally, Student's academic deficits, especially his reading and writing needs, did not require the intensive help of an SDC. Therefore, Student failed to prove that the District's middle school placement offer was not adequate to meet his unique needs.

### *Speech and Language Services*

104. The District did not propose any changes to the speech and language services for Student at the May 25, 2011 IEP team meeting. Student did not present any additional evidence that the District needed to provide additional speech and language services besides those contained in the October 28, 2010 IEP. Therefore, for the same reasons set forth in Factual Finding 62, the District provided adequate speech and language services.

## LEGAL CONCLUSIONS

### *Burden of Proof*

1. Student, as the party requesting relief, has the burden of proof in this proceeding. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 163 L.Ed.2d 387].)

### *Elements of a FAPE*

2. Under the federal IDEA and California law, children with disabilities have the right to a FAPE. (20 U.S.C. § 1400(d); Ed. Code, § 56000.) A FAPE means special education and related services that are available to the child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(a)(9).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(a)(29).)

3. In *Board of Educ. v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that the IDEA does not require school districts to provide special education students the best education available, or to provide instruction or services that maximize a student's abilities. (*Id.* at p. 198.) School districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instruction and related services individually designed to provide educational benefit to the student. (*Id.* at p. 201; *J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950-953.) The Ninth Circuit has referred to the educational benefit standard as "meaningful educational benefit." (*N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2007) 541 F.3d 1202, 1212-1213; *Adams v. State of Oregon* (9th Cir. 1999) 195 F.2d 1141, 1149. (*Adams*).)

4. There are two parts to the legal analysis of a school district's compliance with the IDEA. First, the tribunal must determine whether the district has complied with the

procedures set forth in the IDEA. (*Rowley, supra*, 458 U.S. at pp. 206-207.) Second, the tribunal must decide whether the IEP developed through those procedures was designed to meet the child's unique needs, and was reasonably calculated to enable the child to receive educational benefit. (*Ibid.*) An IEP is not judged in hindsight; its reasonableness is evaluated in light of the information available at the time it was implemented. (*J.G. v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801; *Adams, supra*, 195 F.3d at p. 1149.) To determine whether a school district offered a pupil a FAPE, the focus is on the appropriateness of the placement offered by the school district, and not on the alternative preferred by the parents. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.)

5. An IEP must contain a statement of measurable annual goals related to "meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum" and "meeting each of the child's other educational needs that result from the child's disability." (20 U.S.C. § 1414(d)(1)(A)(ii); Ed. Code, § 56345, subd. (a)(2).) The IEP must also contain a statement of how the child's goals will be measured. (20 U.S.C. § 1414(d)(1)(A)(viii); Ed. Code, § 56345, subd. (a)(3).) The IEP must show a direct relationship between the present levels of performance, the goals, and the educational services to be provided. (Cal. Code Regs., tit. 5, § 3040, subd. (c).)

6. The methodology to be used to implement an IEP is left up to the school district's discretion so long as it meets a student's needs and is reasonably calculated to provide some educational benefit to the child. (See *Rowley*, 458 U.S. at p. 208; *Adams, supra*, 195 F.3d at p. 1149; *Pitchford v. Salem-Keizer Sch. Dist.* (D. Or. 2001) 155 F.Supp.2d 1213, 1230-32; *T.B. v. Warwick Sch. Comm.* (1st Cir. 2004) 361 F.3d 80, 84.)

7. In *Rowley*, the Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA. (*Rowley, supra*, at pp. 205-06.) However, a procedural error does not automatically require a finding that a FAPE was denied. Since July 1, 2005, the IDEA has codified the pre-existing rule that a procedural violation results in a denial of a FAPE only if the violation: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see, Ed. Code, § 56505, subd. (f)(2); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

#### *Assess in All Areas of Suspected Disability*

8. The student must be assessed in all areas related to his or her suspected disability, and no single procedure may be used as the sole criterion for determining whether the student has a disability or determining an appropriate educational program for the student. (20 U.S.C. § 1414(b)(2); 34 C.F.R. § 300.304(b)(2), (c)(4) (2006)<sup>14</sup>; Ed. Code,

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<sup>14</sup> All subsequent references to the Code of Federal Regulations are to the 2006 version.

§ 56320, subs. (e), (f).) A school district's failure to adequately assess a student is a procedural violation that may result in a substantive denial of FAPE. (*Orange Unified School Dist. v. C.K.* (C.D.Cal. June 4, 2012, No. SACV 11-1253 JVS(MLGx)) 2012 WL 2478389, \*8; 20 U.S.C. § 1415(f)(3)(E)(ii); see, Ed. Code, § 56505, subd. (f)(2).)

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

10. A student is eligible in California for special education and related services if, among other things, he "exhibits any combination of the following autistic-like behaviors, to include but not limited to:

- (1) An inability to use oral language for appropriate communication.
- (2) A history of extreme withdrawal or relating to people inappropriately and continued impairment in social interaction from infancy through early childhood.
- (3) An obsession to maintain sameness.
- (4) Extreme preoccupation with objects or inappropriate use of objects or both.
- (5) Extreme resistance to controls.
- (6) Displays peculiar motoric mannerisms and motility patterns.
- (7) Self-stimulating, ritualistic behavior."

(5 Cal. Code Regs., § 3030, subd. (g).)

*Issue 1: From October 10, 2010 through September 21, 2011, did the District deny Student a FAPE by failing to provide him comprehensive assessments in the areas of:*

- a) *Neuropsychological functioning;*
- b) *Autism;*
- c) *Psychoeducation;*
- d) *Behavioral functioning;*
- e) *Speech and language;*
- f) *OT; and*

g) AT?

11. Pursuant to Factual Findings 7 through 44 and Legal Conclusions 1 through 10, Student did not establish that the District failed to assess him in all areas of suspected disability. Dr. Yabrove conducted a thorough psychoeducational assessment that assessed Student's neuropsychological functioning, psychoeducational areas, and behavioral functioning. Also, during times relevant to this action, Student did not demonstrate any need for an assessment in the area of autism because of his lack of significant social communication deficits, perseverative or self-stimulative behaviors, inappropriate social interaction and resistance to control. Dr. Kusters' expert testimony was not as persuasive as Dr. Yabrove's due to his more extensive knowledge of Student, thoroughness of his assessment, and forthrightness of his testimony. Additionally, Dr. Kusters' often based her opinions on taking selective results of various assessment tools to support a contention, and ignoring contrary information. Further, she failed to conduct an autism assessment using a tool, such as the ADOS, even though she opined that Student had indications of autism.

12. Student did not establish that the District failed to adequately assess him as to OT and AT as Student failed to produce adequate evidence to contradict Ms. Wilburn as to the adequacy of her OT and AT assessments. The same is also true as to speech and language as Student failed to produce adequate evidence to establish that Ms. Sharp did not assess all of Student's speech and language areas of need. Therefore, Student did not establish that the District failed to assess him in all areas of suspected disability.

#### *Parents' Right to Participate in the Educational Decision-Making Process*

13. Federal and state law require that parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. (20 U.S.C. § 1414(d)(1)(B)(i); Ed. Code, §§ 56304, 56342.5.) A district must ensure that the parent of a student who is eligible for special education and related services is a member of any group that makes decisions on the educational placement of the student. (Ed. Code, § 56342.5.) Among the most important procedural safeguards are those that protect the parents' right to be involved in the development of their child's educational plan. (*Amanda J. v. Clark County Sch. Dist.* (9th Cir. 2001) 267 F.3d 877, 882.)

14. A school district has the right to select a program for a special education student, as long as the program is able to meet the student's needs; the IDEA does not empower parents to make unilateral decisions about programs funded by the public. (See, *N.R. v. San Ramon Valley Unified Sch. Dist.* (N.D. Cal. January 25, 2007, No. C 06-1987 MHP) 2007 WL 216323; *Slama ex rel. Slama v. Indep. Sch. Dist. No. 2580* (D. Minn. 2003) 259 F.Supp.2d 880, 885; *O'Dell v. Special Sch. Dist. of St. Louis* (E.D. Mo. 2007) 503 F.Supp.2d 1206.) Nor must an IEP conform to a parent's wishes in order to be sufficient or appropriate. (*Shaw v. Dist. of Columbia* (D.D.C. 2002) 238 F.Supp.2d 127, 139 [The IDEA does not provide for an "education . . . designed according to the parents' desires.'], citing *Rowley, supra*, 458 U.S. at p. 207.)

15. A school district is required to consider the results of a privately procured assessment when developing an IEP. (Ed. Code, § 56341.1.) However, the school district is not required to adopt its recommendations. (Ed. Code, § 56329, subd. (c).)

16. Predetermination occurs when an educational agency has decided on its offer prior to the IEP team meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives. (*Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2004) 392 F.3d 840, 858.) A district may not arrive at an IEP team meeting with a “take it or leave it” offer. (*JG v. Douglas County School Dist.*, *supra*, 552 F.3d 786, 801, fn. 10.) However, school officials do not predetermine an IEP simply by meeting to discuss a child’s programming in advance of an IEP team meeting. (*N.L. v. Knox County Schs.*, *supra*, 315 F.3d at p. 693, fn. 3.)

*Issue 2a: At the October 28, 2010 and November 4, 2010 IEP team meetings, did the District commit procedural violations that prevented Parents from meaningfully participating in Student’s educational decision-making process, which denied Student a FAPE, by predetermining its IEP offers?*

*Issue 5a: At the April 22, 2011 and May 25, 2011 IEP team meetings, did the District commit procedural violations that prevented Parents from meaningfully participating in Student’s educational decision-making process, which denied Student a FAPE, by predetermining its IEP offers*

17. Pursuant to Factual Findings 46 through 48, 67 through 72 and 81 through 84 and Legal Conclusions 1 through 7 and 13 through 16, Student did not demonstrate that the District prevented Parents from meaningfully participating in his educational decision-making process. Regarding the October 28, 2010 IEP, Parents were active participants in the development of the IEP and the District made changes to the proposed goals in response to parental comments. As to the April 22, 2011 IEP meeting, the purpose of the IEP team meeting was to listen to Dr. Kusters report presentation and make any needed changes to Student’s IEP. Because Dr. Kusters’ assessment did not necessitate any changes to Student’s IEP, the District’s failure to make any changes does not mean that the District predetermined its decision not to change Student’s IEP. Finally, the District did not predetermine its May 25, 2011 IEP offer by bringing a draft IEP to start the discussion. The District made changes to Student’s IEP in response to parental concerns in adding additional RSP support, and the fact that the changes were not what the Parents wanted as to Student being placed in an SDC and provided LMB services does not mean that the District did not consider their input. Accordingly, Student failed to prove that the District predetermined its IEP offers.

*Issue 4: At the April 22, 2011 IEP team meeting, did the District commit procedural violations that prevented Parents from meaningfully participating in Student's educational decision-making process, which denied Student a FAPE, by not having an authorized representative attend the April 22, 2011 IEP team meeting?*

18. Pursuant to Factual Findings 64 and 65 and Legal Conclusions 1 through 7 and 13 through 16, the District had an authorized representative attend the April 22, 2011 IEP team meeting. Ms. Mead was authorized to make changes to Student's IEP if needed based on information presented by Dr. Kusters. However, no changes were needed. Ms. Thomas was convincing that she had delegated authority to Ms. Mead to make any needed changes to Student's IEP in her absence. Therefore, Student did not demonstrate that the District failed to have an authorized representative at the April 22, 2011 IEP team meeting.

*Issue 2b: At the October 28, 2010 and November 4, 2010 IEP team meetings, did the District commit procedural violations that prevented Parents from meaningfully participating in Student's educational decision-making process, which denied Student a FAPE, by failing to provide baseline data for Student's annual goals leading to failure to develop appropriate goals for Student?*

*Issue 5b: At the April 22, 2011 and May 25, 2011 IEP team meetings, did the District commit procedural violations that prevented Parents from meaningfully participating in Student's educational decision-making process, which denied Student a FAPE, by failing to provide baseline data for Student's annual goals leading to failure to develop appropriate goals for Student?*

19. Pursuant to Factual Findings 50, 51 and 87 and Legal Conclusions 1 through 7 and 13 through 16, Student failed to demonstrate that the District failed to provide baseline data to support its IEP goals. Ms. Mead was not convincing that the District's baseline information in its goals was not adequate. Ms. Mead focused solely on what the District wrote on the goals pages, while considering the IEP as a whole demonstrated that the District had adequate baseline information to support its proposed goals. However, federal and state special education laws do not require an educational agency to formulate baselines for annual goals. (*Student v. San Diego Unified School District* (December 9, 2011) Cal.Ofc.Admin.Hrngs. Case No. 2011080459, pp. 10-11.) Finally, the baseline information was not confusing. Therefore, Student failed to prove that the District's baseline data denied Student a FAPE because it led to inappropriate goals for Student.

*Issue 5c: At the April 22, 2011 and May 25, 2011 IEP team meetings, did the District commit procedural violations that prevented Parents from meaningfully participating in Student's educational decision-making process, which denied Student a FAPE, by failing to consider Dr. Diane Kusters' neuropsychological assessment report?*

20. Pursuant to Factual Findings 67 through 72, 90, 91, 95, 99 and 102 and Legal Conclusions 1 through 16, the District did consider Dr. Kusters' assessment report. While the District did not make any changes to Student's IEP at the April 22, 2011 IEP team

meeting or changes Parents requested at the May 25, 2011 IEP team meeting, this does not mean that the District did not consider its content. Dr. Yabrove was convincing that the District had already implemented most of Dr. Kosters' recommendations, and that other changes to the IEP were not needed and that her assessment only brought forth minimal new information. As to Student's request for a LMB reading program, Student did not prove that Ms. Hahn and Ms. Luhmann were incorrect that Student had made meaningful educational progress with the existing reading methodology. Accordingly, Student did not establish that the District did not consider Dr. Kosters' assessment report.

*Issue 3a: Did the District's October 28, 2010 IEP deny Student a FAPE by failing to offer goals to address his anxiety and behavioral needs?*

*Issue 6a: Did the District's April 22, 2011 and May 25, 2011 IEP's deny Student a FAPE by failing to address his anxiety and behavioral needs?*

21. Pursuant to Factual Findings 10, 11, 18, 38, 52 through 59, 73 and 88 through 92 and Legal Conclusions 1 through 7, Student did not establish that the District failed to offer adequate goals to address his anxiety and behavioral needs. Dr. Yabrove's assessment was more accurate in finding that Student's anxiety and behavioral needs were not as severe as Dr. Kosters found. The evidence established the appropriateness of the District's IEP goals to meet his needs. Also, the two incidents during SY 2010-2011, that Student discussed during the hearing to show that he had significant school anxiety issues were not as severe as he attempted to demonstrate. One incident lasted about 30 minutes, and the evidence established that Ms. Luhmann appropriately handled it. For the other incident, Ms. Hahn speedily resolved by allowing Student to quickly complete his assignment and go outside and play. While Student had issues at home concerning homework completion, Mother's testimony by itself was not adequate to establish that his problems at home were the result of issues at school. Student needed evidence from Student's therapist for a finding that Student's problems at home were related more to school performance concerns rather than interpersonal issues in the home. Accordingly, Student did not establish that the District denied him a FAPE by not preparing goals to address his anxiety and behavioral needs.

*Issue 3b: Did the District's October 28, 2010 IEP deny Student a FAPE by failing to provide behavior and counseling services?*

*Issue 6b: Did the District's April 22, 2011 and May 25, 2011 IEP's deny Student a FAPE by failing to provide behavior and counseling services?*

22. Pursuant to Factual Findings 10, 11, 18, 38, 60, 61, 73 and 94 through 95 and Legal Conclusions 1 through 7, Student failed to demonstrate that the District needed to provide additional services to meet his behavior and counseling needs. The District provided a supportive environment in his elementary school that could appropriately respond to his anxiety problems and the academic and organizational support through RSP services reduced his performance anxiety concerns. Regarding whether the District needed to provide additional services for middle school for SY 2011-2012, Student did not establish that the

May 2011 IEP was inadequate based on his elementary school performance. Additionally, whether Student would need additional services based on the additional academic rigors of middle school, and change of environment, was purely speculative.

*Issue 3c: Did the District's October 28, 2010 IEP deny Student a FAPE by failing to provide Student with appropriate services to address all of his speech and language needs?*

*Issue 6c: Did the District's April 22, 2011 and May 25, 2011 IEP's deny Student a FAPE by failing to provide Student with appropriate services to address all of his speech and language needs?*

23. Pursuant to Factual Findings 22 through 28, 42, 62, 73, and 104 and Legal Conclusions 1 through 7, Student did not demonstrate that the District failed to provide him with needed speech and language services. Student did not provide adequate evidence, especially the lack of any expert testimony, that the District's speech and language services were inadequate to meet his unique needs. Dr. Kusters was not qualified to provide any evidence in this regard, and Mother, who is qualified, did not provide any expert testimony. Accordingly, Student did not establish that the District denied him a FAPE as to speech and language services.

*Issue 6d: Did the District's April 22, 2011 and May 25, 2011 IEP's deny Student a FAPE by failing to implement the recommendations of Dr. Diane Kusters?*

24. Pursuant to Factual Findings 34 through 44, 66 through 73, 91, 95, 96, 99 and 103 and Legal Conclusions 1 through 7, Student failed to demonstrate that the District failed to implement the recommendations made by Dr. Kusters, or needed to implement the ones that the District disagreed with. The District had already implemented nearly all of the recommendations Dr. Kusters made, and the ones that the District had not implemented, such as a LMB reading program, were not needed for Student to receive a FAPE. Therefore, Student did not prove that he required additional behavior and counseling services, or that the District did not implement any appropriate recommendations Dr. Kusters made.

#### *IEP Implementation*

25. A school district violates the IDEA if it materially fails to implement a child's IEP. A material failure occurs when there is more than a minor discrepancy between the services provided to a disabled child and those required by the IEP. (*Van Duyn v. Baker School Dist.* (9th Cir. 2007) 502 F.3d 811, 815.) For example, a brief gap in the delivery of services may not be a material failure. (*Sarah Z. v. Menlo Park City School Dist.* (N.D.Cal. May 30, 2007, No. C 06-4098 PJH) 2007 WL 1574569, p. 7.)

*Issue 7: From October 10, 2010 through September 21, 2011, did the District deny Student a FAPE by failing to implement the accommodations listed in his IEP's, such as reducing his workloads by modifying school projects, and using short concise directions for him?*

26. Pursuant to Factual Findings 74 through 77 and Legal Conclusions 1 through 7 and 25, Student did not establish that the District materially failed to implement the accommodations in his IEP. For the entire portion of Student's fifth grade, Ms. Luhmann implemented the IEP accommodations, which were designed to address in part his anxiety and behavioral difficulties. Student's contention that Ms. Luhmann failed to modify his assignments did not acknowledge that most assignments did not require modification for him to successfully complete and that Ms. Luhmann also wanted to see what difficulty he experienced with an assignment to work with him on the problem that he was having. Finally, Student did not establish that he was not making meaningful educational progress or that his behavioral and anxiety issues were as significant as alleged, even with the purported failure to implement his accommodations. Accordingly, Student failed to establish that the District materially failed to implement the accommodations in his IEP.

#### ORDER

Student's request for relief is denied.

#### PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that the hearing decision indicate the extent to which each party has prevailed on each issue heard and decided. The District prevailed on all issues.

RIGHT TO APPEAL THIS DECISION

This is a final administrative Decision, and all parties are bound by 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 90 days of receipt of this Decision. A party may also bring a civil action in the United States District Court. (Ed. Code, § 56505, subd. (k).)

Dated: January 24, 2013

/s/

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PETER PAUL CASTILLO  
Administrative Law Judge  
Office of Administrative Hearings