

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
SPECIAL EDUCATION DIVISION
STATE OF CALIFORNIA

In the Matter of:

STUDENT,

Petitioner,

v.

VALLEY CENTER-PAUMA UNIFIED
SCHOOL DISTRICT,

Respondent.

OAH CASE NO. N 2007080145

DECISION

Robert D. Iafe, Administrative Law Judge, Office of Administrative Hearings, Special Education Division, heard this matter on October 9, 10, 11, and 12, 2007, in San Diego, California.

Ellen Dowd, Attorney at Law, appeared on behalf of Student (Student). Father (Father) and mother (Mother) of Student were present during most days of the hearing. Student did not appear during the hearing.

Peter Sansom, attorney with Lozano Smith, appeared on behalf of respondent Valley Center-Pauma Unified School District (District). Ray Easler, Director of Special Education for District, was present during the hearing. Laura Lembeck, law clerk with Lozano Smith, was also present during most of the hearing.

PROCEDURAL BACKGROUND

On August 6, 2007, Student filed the request for due process hearing in this case. On August 8, 2007, OAH gave written notice setting September 28, 2007, as the date for the due process hearing to commence. On September 13, 2007, Student and District jointly requested OAH to continue the initial due process hearing date to October 9, 2007, to accommodate the parties' schedules and ensure continuous hearing dates. On September 14, 2007, OAH gave written notice of the continued due process hearing to commence on October 9, 2007.

The administrative law judge (ALJ) opened the record for the due process hearing on October 9, 2007. The ALJ received sworn testimony and documentary evidence during four consecutive hearing days through October 12, 2007. At the request of the parties, the record remained open until October 30, 2007 for the submission of written closing arguments and reply. After receipt of the parties' written closing arguments and final reply, the record was closed and the parties stipulated to extend the time for rendering the decision in this matter to December 17, 2007.

ISSUES

1. Did District offer and provide a free appropriate public education to meet Student's unique needs for the 2006-2007 school year in District's individualized education programs (IEPs) dated October 30, 2006, and April 19, 2007? Student alleged substantive violations including:
 - A. District's offers failed to adequately address Student's individualized needs in the area of speech and language.
 - B. District's offers failed to adequately address Student's individualized needs in the area of occupational therapy.¹
 - C. District's offers failed to adequately address Student's individualized needs in the area of safety on campus.
 - D. District's offers failed to adequately address Student's individualized needs in the area of social communication.
 - E. District's offers failed to adequately address Student's individualized needs in the area of socialization.
 - F. District's offers failed to adequately address Student's individualized needs in the area of autistic-like behaviors by considering the provision of data-driven, scientifically based learning programs.
2. Did the District preclude Student's parents from meaningfully participating in the October 30, 2006, and April 19, 2007 IEPs for the 2006-2007 school year? Student alleged procedural violations including:
 - A. District failed to consider the recommendations of Dr. Wiedenhoff for the April 19, 2007 IEP.

¹ On the third day of the hearing, and for reasons unrelated to the remaining issues, Student withdrew issue 1.B. concerning whether District failed to adequately address Student's individualized needs in the area of occupational therapy.

- B. District failed to consider the continuum of placement options, including nonpublic school placement, for the October 30, 2006, and April 19, 2007 IEPs.
- C. District failed to consider Student's individualized communication and socialization needs.
- D. District failed to follow procedures necessary to get Student to attend school or a school program.
- E. District offered a predetermined placement to Student for the October 30, 2006, and April 19, 2007 IEPs.

3. If Student prevails on any of the substantive or procedural violations raised in this proceeding, is Student entitled to any remedies? Student alleges she is entitled to the following remedies:

- A. District should reimburse Student's parents for Dr. Wiedenhoff's independent educational evaluation.²
- B. District should provide compensatory education to Student in a non-public school placement, such as TERI, Inc.

PARTIES' CONTENTIONS

Student contends District did not offer a free appropriate public education (FAPE) in two IEPs formulated by District over a six month period. At issue are District's proposed IEP dated October 30, 2006 (the October IEP), and District's proposed IEP dated April 19, 2007 (the April IEP). Student contends these IEPs are deficient for the failure of District to consider Student's unique needs in the areas of speech and language, safety, social communication, socialization, and behavior. Student also contends District denied her parents the right to participate in a meaningful way in the formulation of both these IEPs in a number of ways. Student asserts District did not consider an independent educational evaluation, did not consider the continuum of placement options for Student, and did not consider Student's unique needs as proposed by Parents. In short, Student contends District predetermined its placement offer for Student and stayed with its offer without regard for the concerns of Parents as part of the IEP team. For these failures, Student seeks an order that she is entitled to a compensatory education program in a nonpublic school placement to make up for the education she missed during the 2006-2007 school year.

² At the conclusion of the hearing, and for reasons unrelated to the remaining issues, Student withdrew issue 3.A. concerning whether District should reimburse Student's parents for Dr. Wiedenhoff's independent educational evaluation.

District contends that both the October IEP and the April IEP provided a FAPE for Student. District also contends Parents were given every opportunity to participate in the formulation of these IEPs and that Parents' participation was a valuable part of the process for developing the IEPs. In short, District contends the fact that District's written proposal in an IEP resembled what District originally offered at the end of an IEP team meeting does not mean District failed to consider Parents' concerns in the formulation of that IEP. Accordingly, District contends Student is not entitled to compensatory education.

FACTUAL FINDINGS

Jurisdictional Matters

1. Student is a twelve-year-old girl who has been eligible for special education and related services since she was three years old. She had been qualified to receive special education and related services under the category of autistic-like behaviors for the school years before 2004. Beginning from 2004 to the present, Student's eligibility was changed to the category of mental retardation. During the entire time period at issue, Student has resided with Mother and Father (collectively Parents) in Valley Center, California, within the geographical boundaries of District.

Background

2. The dispute in this case arises from disagreements between Student and District over whether the October IEP and April IEP proposed by District constituted a FAPE for the 2006-2007 school year. To resolve the issue of whether District's offers constituted a FAPE in this case, Student must show there was some procedural or substantive violation of the Individuals with Disabilities Education Act (IDEA).

3. Before the school year at issue in this case, Student had attended District's Lilac Elementary School. In the spring of 2006, Parents requested and District arranged for independent educational evaluations in the areas of occupational therapy, psychoeducational, and speech and language to assist in formulating an appropriate educational program for Student.

4. Dissatisfied with District's eligibility determination and programming, Parents stopped sending Student to school in June 2006 near the end of the 2005-2006 school year. Parents did not send Student to any school during the entire 2006-2007 school year. During this period of time, Mother provided some instruction and review in academic areas, but did not follow any specific curriculum for a home schooling program.

Student's Unique Needs During the 2006-2007 School Year

5. Under the IDEA and case law, District's proposed program must meet the following requirements in order to constitute an appropriate educational program: (1) it must

be designed to meet Student's unique needs, (2) it must be reasonably calculated to provide Student with some educational benefit, (3) it must comport with Student's IEP, and (4) it must be provided in the least restrictive environment (LRE).

6. Regarding substantive appropriateness under the IDEA, the first prong requires that a student's IEP must be designed to meet the unique needs of the student. Based on the "snapshot rule," discussed below, it is therefore critical to have an understanding of the needs of Student from information available to the IEP team at the times of the October IEP and the April IEP offers from District.

7. Student has a variety of needs which are caused by a number of different disabling conditions. The evaluations conducted during the 2006 school year help identify these needs and provide the assessors' diagnoses of Student. Parents do not allege any violations with respect to the design or conduct of the assessments of Student.

The April 2006 Psycho-Educational Assessment by Dr. Patterson

8. On April 27, 2006, Robert Patterson, Psy.D., conducted a psychoeducational assessment of Student. Dr. Patterson's education and experience includes a B.A. in biology, psychology and education in 1959, and an M.A. in education and psychology in 1962. Over the next 20 years, he received an M.A. in zoology, animal behavior in 1971, and an M.A. in developmental psychology in 1983. In 1988, he earned his Psy.D. in psychology, family therapy. Since 1991, he has been in private practice in Santa Ana, California. Since 1994, he has had nonpublic agency status with the special education division of the California Department of Education, providing therapy, counseling and behavioral interventions and assessments. Dr. Patterson's services include providing independent educational evaluations for students regarding special education eligibility, services and placement. Dr. Patterson estimates that over the past 15 years, he has assessed some 30 to 50 people who were autistic, from very young ages to adult.

9. Prior to his private practice, Dr. Patterson was employed by the Tustin Unified School District from 1981 to 1993 in a variety of positions including teacher; counselor; career center director; assistant principal in charge of athletic programs and student services; assistant principal in charge of teachers and curriculum; assistant principal in charge of child welfare, attendance and discipline, and special education services; school psychologist for a number of years; district director of special education; and SELPA director. After retiring from school district employment, Dr. Patterson taught child psychology at Chapman University for a number of years. Dr. Patterson estimated he has testified at a due process hearing 15 to 20 times and has testified in a state or federal court proceedings regarding an IDEA dispute five or six times. He was paid \$150 per hour for his time to testify at the hearing on behalf of District.

10. Dr. Patterson was employed by District to provide District and Parents with an understanding of what he saw regarding the levels of functioning of Student and her educational needs. To document his assessment of Student, Dr. Patterson prepared a written

PsychoEducational Report (Patterson Report) dated May 10, 2006. Dr. Patterson included an extensive history in his report because Student had a number of different diagnoses over the years and some of the characteristics of these diagnoses fall under different disorders. He noted Student has been labeled at one time as having an attention deficit disorder and at another time she was labeled as not having it. She has been labeled as having, within the spectrum of autism disorders, both autism and pervasive developmental delay, not otherwise specified. She has been labeled at one time as having fetal alcohol syndrome (FAS), and at another time she was labeled as not having FAS. She has been labeled as having mild mental retardation and she has also been labeled as having mental retardation.

11. Dr. Patterson conducted a number of formal standardized tests during his assessment of Student. Some of the testing conducted by Dr. Patterson, with the results he obtained, follows. To determine Student's cognitive functioning, he administered the Kaufman Assessment Battery for Children - Second Edition (KABC-II). This assessment tool has five clusters that deal with separate types of processing. Student's scores on these five clusters included: a sequential processing standard score (SS) of 60; a simultaneous processing SS of 54; a planning SS of 67; a knowledge SS of 59; and a learning SS of 60. These scores on the KABC-II placed Student in the first percentile for planning, and in the less-than-first percentile for the other four clusters. These scores resulted in a mental processing composite SS of 50 (within the range of 45-57) and a nonverbal index SS of 59 (within the range of 54-68), both of which placed Student in the less-than-first percentile for cognitive functioning.

12. To determine Student's achievement functioning, Dr. Patterson administered several test instruments. On the Peabody Individual Achievement Test – Revised, New Form (PIAT-R(nu)) Student's scores included: a reading recognition SS of 65; a reading comprehension SS of 62; a total reading SS of 62; a mathematics SS of 62; and a spelling SS of 55. These scores placed Student in the less-than-first percentile for spelling and at the first percentile for all others. On the Wide Range Achievement Test – 3rd Revision (WRAT-3), Student's scores included a reading recognition SS of 58; a spelling SS of 60; and an arithmetic SS of 48. All three of the scores on the WRAT-3 placed Student in the less-than-first percentile. He also administered the writing sample test from the Woodcock Johnson PsychoEducational Test Battery – Third Revision (WJ-III). Student had a written language cluster SS of 56 which also placed her in the less-than-first percentile.

13. To evaluate Student's attentional functioning, Dr. Patterson used the Conner's Parent Rating Scale-Revised: Long Form, completed by Mother, which revealed attention span problems and trouble concentrating at school. Student's scores revealed significant difficulties in terms of oppositionality, inattentivity, hyperactivity, perfectionism, and social problems. The neuropsychological screening of Student included the Inventory of Neurobehavioral Symptoms. The results for Student, and recommended interventions, were documented by Dr. Patterson. Results from these instruments showed that Student had problems on the Mental Inertia Scale. Students with mental inertia problems benefit from heavy structured environments, coaching and prompting. Student had problems on the Social Inappropriate Scale, problems which often require positive daily routine with

behavioral intervention. Student also had problems on the Dissociation of Affect and Behavior Scale. Students with these problems benefit from very structured social experience training.

14. Although eligibility for special education was not at issue and was not the reason for referral to Dr. Patterson, most of the report was directed to an analysis of Student's eligibility criteria. The October IEP and the April IEP at issue in this case, identified Mental Retardation as Student's primary disability, leaving the space reserved to identify any secondary disability blank. Dr. Patterson's report, as well as testimony at hearing, revealed Student had been identified as being on the autism spectrum at an earlier time until her June 2004 IEP when mental retardation (FAS) was identified as the criteria for her eligibility. Moreover, there were several competing diagnoses for Student over the years including language and developmental delays; autism spectrum disorder (ASD); (FAS); fetal alcohol effect (FAE); attention-deficit/hyperactive disorder (ADHD); and mental retardation.

15. The diagnosis discussion in Dr. Patterson's report identified Student with Developmental Coordination Disorder (Fine Motor); Communication Disorder NOS; Mild Mental Retardation; and Psychosocial and Environmental Problems – Difficulty with Social and Primary Support Group. However, in pointing out the symptoms presented by Student, he agreed that many of the disorder characteristics are common to children with different diagnoses including mental retardation, autism, and attention deficit disorders. Children with these different disorders may have difficulties with attention and with language. By way of example, Dr. Patterson concluded that Student's fleeting eye contact was a characteristic of her attention span problem, but pointed out this can also appear in children with autism, children with mental retardation, as well as children with ADHD.

16. The Patterson Report concluded with three recommendations for Student, identified in these three numbered paragraphs from his report:

1. It is recommended that consideration be given by the school district to change the behavioral assumptions for the classroom that [Student] is currently enrolled in. It is recommended that an independent agency come in and do a functional analysis of [Student's] behaviors, particularly with reference to tantruming and to oppositionality and refusing to do work, analyzing the behavior in terms of antecedents to the behavior, the cycle of the behavior, the consequences of the behavior, and developing a program of appropriate positive replacement behaviors linked to a reinforcement schedule for that. There are a number of mechanical things that can be done to improve that as well so that learning will be involved in the process. It is irrelevant whether or not other students see the same system or not or that [Student] is getting different reinforcement than they might be earning. It is really not relevant in terms of behavioral work; most students in actuality do not care what another student receives when the program is explained to them.

2. It is recommended that there be coordination between a home and school program and that the Regional Center be invited to the IEP meeting so that there could be a frank discussion about the need for behavioral interventions consistent across all environments, not necessarily the same provider, but with consistency with the use of the same strategies, same language, and same reinforcers since there is such a diversity of opinion about her performance at school versus home.
3. It is recommended that consideration be given to evaluating how [Student] learns and to move to a system that is more visually based and less auditorially based so that there is reinforcement of the auditory with the visual, but as a result there are visually-based reading programs that she may benefit more from than a phonics-based program.

17. In discussing his first recommendation, Dr. Patterson explained that he understood District's behavioral assumption was that Student was not that significantly impacted by her behaviors. However, his impression after interviewing Student's teacher and aide was that Student was having a series of behavioral meltdowns that were negatively impacting her education. The second part of this recommendation was based on his observation that the SDC teacher for Student had a basic belief system that children in her class should be treated the same. Her perception was, if one student was treated with a different reward system, then other students would want to participate in that same reward system. In view of this perception, Dr. Patterson's recommendation for the class was that most children are either unaware of when another student is on a different reward system or just do not care. After Dr. Patterson provided his report to District, no one from the District ever contacted him to find out what he meant by this specific recommendation.

18. The second recommendation was based on Dr. Patterson's opinion that if there is a behavioral based program at school, there should be a behavioral program at home to obtain consistency between the two environments. For Student, that consistency should be promoted by inviting the regional center to Student's IEP meeting to address the need for consistent behavioral interventions in both the school and the home environments.

19. The third recommendation was made because there are a number of educational systems that provide reading for students who are mentally retarded such as the Edmark system, which he recommended District to consider. If Student is having difficulty reading, and the District wants to move her to a functional based learning program, then the use of a sight-based system may benefit Student. This is in contrast to the phonics based system then being employed with Student.

20. Although the Dr. Patterson Report stated that Student was performing "above her level of cognition showing that the educational program has been working for her," the standardized testing results conducted by District showed otherwise. When confronted with Student's results on California's Standardized Testing and Reporting (STAR) Program, a different result appeared. Student participated in the STAR Program by taking the California Alternate Performance Assessment (CAPA) in the Spring of 2005 and again in the Spring of

2006. For both years, she participated in the CAPA Level III test for students in Grades 4-5. Her results from the spring of 2005 included an English-Language Arts score of 40 (proficient) and a Mathematics score of 49 (advanced). Her results from the spring of 2006 declined to an English-Language Arts score of 32 (a decline from proficient to basic) and a Mathematics score of 41 (a decline from advanced to proficient). Dr. Patterson agreed the decline in Student's scores could be a result of her educational programming or due to a bad testing day on the CAPA. However, he had no information that the CAPA was administered incorrectly or that Student was not feeling well when she participated in the CAPA testing.

21. During Dr. Patterson's interview with the behavioral aide who worked with Student, the aide told him she wanted to use more behavioral interventions to help Student avoid her noncompliant behaviors. The aide told him that District had instructed her not to use any treatment strategies that would be different from what the other students in the class were receiving. The aide also told him she was frustrated because she wanted to apply more of her behavioral skills, but District had told her she needed to conform to the rules and regulations in the classroom. Dr. Patterson noted in his report that if a full behavioral program were implemented with Student, she would respond very positively. With respect to transitions, Dr. Patterson observed Student during transition and noted that after she went out for a snack break at recess, she returned to the classroom oppositional and defiant and it took some consistent effort with reinforcers to get her unblocked so she could work. Based on his direct observations of Student, Dr. Patterson concluded that when a task was difficult for Student or when she became frustrated, Student exhibited noncompliant behaviors, she had poor impulse control, and could be manipulative, intrusive, demanding and uncooperative.

The April 2006 San Diego State University Communication Clinic Evaluation

22. On April 12 and April 19, 2006, San Diego State University Communication Clinic conducted an Assistive Device Evaluation of Student. This was a comprehensive assessment of Student's communication needs. This evaluation was done at the request of Mother due to concerns over lack of progress and access to the school curriculum. The evaluation was conducted by three graduate student clinicians under the direction of Charlotte Lopes, M.A., CCC-SLP, clinical supervisor of the Communication Clinic. To document the findings and recommendations of this evaluation, the assessment team prepared their written San Diego State University Communication Clinic Evaluation Summary (SDSU Report) concerning Student.

23. Although the SDSU Report concluded that Student did not need any assistive device, it contained much information about Student's speech and language needs. The SDSU Report was reviewed during the October IEP team meeting by Nancy Beck (Beck), the speech language pathologist who worked with Student. Beck had been employed as a speech language pathologist by District for three years and by the Escondido Union School District for the two years before that. She earned her M.A. in communicative disorders at San Diego State University with an emphasis in speech language pathology. She was familiar with the communication clinic at SDSU.

24. Beck met Student in September 2004 when she began providing speech language services to her. She provided direct speech language services to Student in a small group setting (with two to three students) for 60 minutes per week and in the SDC classroom (with about eight students) for 30 minutes per week. She provided her services to Student for two school years from September 2004 through June 2006. Although she has assessed approximately 350 students in the area of speech and language during the past five years, she has never formally assessed Student. She was familiar with the speech, social skills, and articulation needs of Student.

25. In reviewing the SDSU Report, Beck noted the purpose of the report was to determine whether Student needed assistive or augmentative communication devices. However, the report also described comprehensive testing results of Student's speech and language and gave recommendations for goals.

26. Several assessment tools were administered to Student at the Communication Clinic. Some of the tests used normative samples that included children with similar profiles to Student. Among these assessment tools were the Test of Auditory Comprehension of Language-3 (TACL-3); the Structured Photographic Expressive Language Test-II; an expressive language sample (where Student's mean language utterance was in the range of a 9 year old, and her type-token ratio was in the range of children 2 to 9 years old); the Goldman-Fristoe Test of Articulation-2 (where Student's standard score was less than 41, which gave her a ranking in the less-than-first percentile); and the Test of Early Reading Ability-Third Edition. Beck agreed with the findings in this report and did not find anything in the report that was different from her understanding of Student's needs. She found these results to be consistent with her understanding of Student's needs based on working with Student for two years.

27. Beck was present at the October IEP and presented four goals that she had drafted. Her goals were designed to address Student's needs in syntax (use of the present copula word "is"); semantics (descriptions of objects); narrative (answer to "wh-" questions); social skills (good speech behaviors); and articulation (produce /r/ clusters). In spite of her agreement with the findings in the SDSU Report, Beck did not provide for any services designed to generalize into different environments. The SDSU Report identified a need for the generalization of functional communication skills to outside of the therapy environment. It also identified a need for parent and aide training. The IEP proposed by District contained no provisions for carryover of skills into the home or community, and no training provided for Parents or any of Student's aides.

28. Beck recalled Parents were present at this meeting with their attorney. She recalled discussion of the SDSU Report with Parents and responding to a specific question about the type-token ratios identified in the expressive language sample.

The August 2006 Psychological Evaluation by Dr. Wiedenhoff

29. Before the 2006-2007 school year began, Alice R. Wiedenhoff, Ph.D., conducted a psychological assessment of Student. Dr. Wiedenhoff has been the Clinical Director of the North County Child Study Center for Tri-City Medical Center in Carlsbad, California, for over six years. In this position as clinical director, Dr. Wiedenhoff provides differential diagnosing and parenting services. Dr. Wiedenhoff's education and experience includes a B.S. in nursing in 1959, and an M.S. in psychiatric-mental health nursing in 1972. Beginning in 1959, she worked in the nursing field for almost 20 years. She returned to school and received an M.A. in psychology in 1975, and a Ph.D. in 1993 with a major in clinical child and school psychology and a minor in special education. Most recently, she received a two year clinical post doctorate degree in psychopharmacology in 2001. During the time she has been clinical director for the Child Study Center, Dr. Wiedenhoff estimates she has seen and assessed some 900 children, of whom some 50 to 60 were diagnosed with autism. She also sees children with attention problems and learning differences.

30. To document her assessment of Student on August 3, 2006, Dr. Wiedenhoff prepared a written Psychological Evaluation report (Wiedenhoff Report). Dr. Wiedenhoff explained that Parents came to her for an opinion about the least restrictive environment (LRE) for Student's educational placement and also for diagnostic elucidation or differential diagnosing. She noted Parents provided her with information that Student had received a number of different diagnoses over the years. Dr. Wiedenhoff's diagnosis identified Student with autistic disorder, with attention-deficit/hyperactivity disorder (ADHD) and mixed expressive-receptive language disorder subsumed, oppositional defiant disorder (ODD), moderate mental retardation, and partial fetal alcohol syndrome (FAS). Similar to the Patterson Report, the Wiedenhoff Report noted that there likely is symptom overlap among the disorders identified for Student.

31. A variety of assessment tools provided the basis for the Wiedenhoff Report. Some of the test instruments included the Kaufman Brief Intelligence Scale (K-BIT), where Student had an IQ composite standard score (SS) of 52, with a consistent verbal SS of 51, and a nonverbal SS of 53. This placed her in the less-than-first percentile on this instrument. On the Wechsler Individual Achievement Test – Second Edition (WIAT-II), subtests for word reading, numerical operations, and spelling, Student had a SS of 50, 50, and 49, respectively. These standard scores all placed her in the less-than-first percentile as well. The results for the Bender Gestalt, showing an age equivalent of 5-year, 2-3-month-old child, placed Student in the less-than-fifth percentile reflecting difficulty with handwriting and written tasks. The results on the Scales of Independent Behavior – Revised (SIB-R) included a motor skills SS of 55, a social interaction and communication skills SS of 61, a personal living skills SS of 55, a community living skills SS of 40, and a broad independence SS of 48. All of these standard scores placed Student in the less-than-first percentile as well. Dr. Wiedenhoff saw Student during the summer time when District personnel were on vacation. As a result, she only gave the assessment scales to Mother and did not have any input or responses from District educators familiar with Student. However, the formal testing

conducted by Dr. Wiedenhoff provided consistent findings across measures with reliable validity as well.

32. Dr. Wiedenhoff's formal testing revealed Student has much trouble with pragmatics, higher level language skills, and with articulation. Dr. Wiedenhoff was aware of the speech and language evaluation of Student conducted in April 2006 at the San Diego State University Communication Clinic Evaluation Summary which found moderate receptive and expressive language deficits and a moderate-severe phonological disorder. While discussing Student's communication deficits, Dr. Wiedenhoff noted Student had eight of the 12 diagnostic criteria for autism. As a result of her communication deficits, Student does not always understand other students and she is vulnerable to being duped and picked on by other students. Although she never saw Student in a school setting, Dr. Wiedenhoff pointed out that with Student's IQ in the moderately retarded range, and with ADHD, she is functioning like a child who is half her age. During her assessment, Student did not reciprocate with Dr. Wiedenhoff in communication, could only follow one direction at a time, could read only eight words, and had no ability to use phonetic logic. Student did not understand body language and nonverbal communication.

33. Dr. Wiedenhoff concluded that Student's mild mental retardation and disinhibition and driven motor behavior (ADHD), superimposed on her inability to interpret social and emotional cues (autism) are responsible for her behavior. The resulting executive dysfunction and cognitive disabilities likely preclude her inability to inhibit or interrupt her behaviors. Student's interpersonal and internal rigidity results in overreacting to frustration which promotes the development of aggressive behavior. Student's failure to appreciate the consequences of her actions may result from her impaired ability to process nonverbal communication and to interpret the emotional state of others. She has trouble understanding the connection between thought and behavior, and has difficulty interpreting social cues. Dr. Wiedenhoff also noted that Student's partial FAS makes her vulnerable to a disruption in frontal lobe functions, including the control of judgment, inhibition, concentration, self-control, conscience, personality, emotional traits, cognition, memory, motor speech, and movement skills.

34. Dr. Wiedenhoff gave her opinion that the appropriate educational placement for Student required as high a teacher-to-student ratio as possible in a very highly structured, routine classroom where the teaching staff is very knowledgeable about autism and autism spectrum disorders and the whole curriculum is focused on teaching in accordance with that handicap. In this regard, Dr. Wiedenhoff recommended a one-to-one behaviorist with specialized training, not just an unspecified aide, be provided to assist Student. She also noted the most effective methods for teaching Student would use discreet trail learning and the use of individual contingencies, not group contingencies.

35. Dr. Wiedenhoff was familiar with the program at the Training, Education and Research Institute, Inc. (TERI). She described TERI's structured programs for children with autism, for children on the spectrum, and for Student's behavior problems. Dr. Wiedenhoff received no payment to provide her testimony in these proceedings. She noted the attorney

for Parents did not seek out her expert assistance and she did not meet counsel for Parents until being involved in this due process proceeding. Rather, Parents sought the services of Dr. Wiedenhoff on their own and arranged for the assessment of Student.

36. In the event Student's educational placement would not be to attend TERI, but would be to remain in public school, Dr. Wiedenhoff recommended Student's handicapping code for special education eligibility should include a reference to her autism. She recommended institution of a vocational program in lieu of an academic tract, with the provision of the following services consistent with her autistic disorder needs:

- a. Parent training
- b. Participation in a social skills group through a school psychologist
- c. Provision of a one-to-one behavioralist
- d. Extended year programming
- e. Extended day programming
- f. A schedule reflecting minimal unstructured time – individualized schedule with little or no down time
- g. Continued speech and language therapy
- h. Continued occupational therapy
- i. Continued adaptive physical education

37. No one from District contacted Dr. Wiedenhoff to discuss any part of her report. No one from District contacted her with questions about her report. No one from District contacted her to say District disagreed with any portion of her report. No one from District contacted her to give her any additional information that was not available to Dr. Wiedenhoff during the summer. In addition, no one from District ever invited her to attend any IEP meeting to discuss her report in any fashion. She did not attend any IEP team meeting for Student.

Input from Student's Mother Regarding Student's Needs

38. Mother testified that Student had mastered skills that appeared on IEPs at later times. She believed that the repetition of mastered goals resulted from an attempt to avoid challenging Student in class. For example, Mother pointed out that Student had mastered counting by fives up to 100 by the end of the first grade. However, a goal for counting by fives was repeated years later in the fourth grade. Similarly, Mother pointed out the Student was reported as having mastered telling time to the hour, then to the half hour, and a later goal reverted to telling time to the hour. Since Student's aggressive, oppositional, and defiant behaviors were triggered by frustration with more difficult work, it was easier to avoid challenging her than to challenge her with new work. The behaviors that resulted when Student was challenged in social situations were aggressive and Mother reported Student would spit, kick, bite, and hit.

39. During the time Student was not attending school during the 2006-2007 school year, Mother taught Student on an informal basis. She covered new material and also

reviewed old material with her. Mother was clear that when Student was confronted by more demanding tasks, and more difficult material, Student would refuse to participate and her aggressive behaviors would increase. This was true with the variety of subjects covered including mathematics, reading, spelling, working with money, working on Student's speech cards, and just about every time she was challenged.³ She attributed Student's lack of progress and repeated instruction by District to be a result of allowing Student to coast, rather than confront her with new material which would trigger the inappropriate behaviors by Student. By actively not challenging Student in the SDC classroom, the negative behaviors did not occur.

40. On the issue of safety, Mother described some events that gave her great concern for Student's safety. Mother told of an incident on September 7, 2005, in which Student described being in the school restroom washing her hands when another student came over wanting to kiss Student. Student said she did not want to be kissed but the other student pushed her against the wall and kissed her on the mouth, on her neck, and the right side of her chest. Student said she pushed the other girl away and went back to the classroom. She also said the other girl told her she would do it again and not to tell anyone.

41. In response to Mother's complaint about this incident, District investigated this incident but concluded it did not occur the way Mother said Student described it. In any event, District made certain there was always an adult in the restroom with Student from that time forward. There was no allegation of any other misconduct involving kissing or touching, whether in the restroom or in any other place, after the one incident in September 2005.

42. On the issue of safety, Mother also described concern for Student's safety on the school bus. She described an incident when Student was wandering around the areas where the buses parked and a school bus driver had to get her and put her on the bus. There was an incident where Student walked away from her bus alone in the rain but did not go to her classroom. She also described Student's unpleasant nose picking and other students calling her names. To resolve the problems on the school bus ride home, Mother had Student leave school an hour earlier to ride the bus home with her younger sister to avoid these problems. District also made certain Student was never alone again whether coming or going to the bus area.

Input from Student's Case Manager Regarding Student's Needs

43. Megann Ramsey (Ramsey) was first employed by District for the 2006-2007 school year. She was hired to be the special day class (SDC) teacher at Lilac Elementary School. Although she was the case manager for Student, Ramsey never met Student. She explained she called Parents the day before school started to introduce herself as the new teacher and to see if Parents had any questions for her. During this telephone conversation,

³ The increase in Student's inappropriate behaviors when confronted by a challenging or non-preferred task was confirmed by witness Michael Sanchez, who provided respite services for Student on Saturdays.

Parents told Ramsey they were not going to bring Student back to school until their due process proceeding was resolved. As a result, she had no personal knowledge of Student's current needs in October 2006 or April 2007, as all the information she had was from other District representatives whose most recent knowledge of Student was from May 2006. Ramsey understood the importance of obtaining present levels of Student's performance for the October 2006 IEP team meeting.

44. In spite of the need for present levels of performance, Ramsey did not do anything to obtain present levels of performance for Student. Other than the phone call Ramsey made to Parents the day before the school year started, Ramsey never contacted Parents to ask that Student be brought to school. She never asked Parents if she could meet Student or talk to her or do some informal testing of Student in an attempt to obtain present levels of performance. She never contacted Parents to request any opportunity to assess Student's present levels.

45. Ramsey recalled that at the October IEP team meeting, District reviewed three reports: the Patterson Report; the SDSU Report; and an occupational therapy report. She recalled Parents requested a nonpublic school consideration, but District IEP team members did not consider it. She could not recall any discussion about the merits of the nonpublic school versus District's proposed program. The team meeting notes for this meeting also provided no evidence that there was any discussion of consideration of a nonpublic placement. She knew the nonpublic school being requested by parents was the TERI program, but she was not familiar with the program and was not able to describe the program. Ramsey also could not recall any discussion of nonpublic school at the April 2007 IEP team meeting: she could recall Parents' request, but no discussion or comparison of the TERI program to District's program. There was no evidence that there was any discussion of the pros and cons of placing Student in the TERI program or any other nonpublic school placement.

Input from Student's Most Recent Classroom Teacher Regarding Student's Needs

46. Before Student stopped attending school near the end of the 2005-2006 school year, Katia West (West) was Student's last classroom teacher. West first met Student during the summer of 2004 when Student joined the summer school class she was teaching. West also provided instruction to Student as her SDC teacher for the fourth and fifth grades during the 2004-2005 and the 2005-2006 school years. She denied knowledge of any safety issues involving Student. She said she had no knowledge of any physical harm to Student by others or any behaviors where Student physically harmed herself. She stated there was no physical danger to Student whether in her SDC classroom, during lunch time with her classmates, or while going to the school bus at the end of the school day when accompanied by an aide. However, she did admit to instances of some students preying upon less sophisticated students in her class.

47. At the beginning of the 2006-2007 school year, West met in the SDC classroom with Ramsey who was taking over as the SDC teacher in place of West. During

the 2006-2007 school year, Ramsey taught in the same physical SDC classroom in which West had taught Student for the two previous years.

48. In addition to the one meeting with Ramsey in the SDC classroom, West described one conference call concerning Student which involved West, Ramsey, Beck, and Shannon Hargrave, the principal of Lilac Elementary. The call took place after the school year began in 2006 but before the October IEP team meeting. West is familiar with District's practice of conducting a pre-meeting, involving only District members of an IEP team, before a full IEP team meeting. She was clear that this conference call was not such a pre-meeting. Rather, this conference call was only to go over the goals that West had written for Student. There was no discussion of placement during this conference call.

The October IEP Proposed by District

49. On October 30, 2006, the IEP team convened to review the educational program for Student. The IEP team members present at this meeting included Ramsey, the SDC teacher and facilitator of the meeting; Beck, speech language pathologist; Jill Rybeck, occupational therapist; Ray Easler (Easler), director of special education; Laurie Alcocer, school psychologist; Steven Manier, adapted PE teacher; Shannon Hargrave, principal; and Parents. Both the attorney for District and the attorney for Student were also present at this meeting. At the time of this meeting, Student had not attended school at all since the beginning of the school year.

50. Although Student had not attended school since the start of the school year, Easler testified the reason District did not file any request for a due process hearing was District did not want to inflame matters between the parties. He noted Parents had filed several times before. It was his impression if District had filed it would just create more of an adversarial atmosphere between the parties. Although District policy and state law provides for District to notify parents in writing of the absence of a student from school, District did not do so by the time of the October IEP team meeting.⁴

51. Easler testified that District representatives believed Parents were providing educational services to Student through a home school program during the 2006-2007 school year. However, there was no factual basis for any belief that Student was receiving any education services from anyone. No District witness provided any testimony that described what educational program Student was receiving during the 2007-2007 school year. No IEP team meeting notes reflected Student's then current program. In fact testimony from several District witnesses confirmed that there was no discussion of any home schooling, no discussion of any home-hospital instruction, and no discussion of Student's then current programming at the IEP team meeting.

⁴ The first written notice from District to Parents concerning Student's absence from school was Easler's letter dated April 12, 2007, which enclosed a copy of student's attendance records pursuant to Parents' written request for such records.

52. District's October IEP proposed 17 goals for Student in the following areas of need. In the area of reading decoding, there was a goal to address reading sight words. In the area of reading comprehension, there was a goal to address identification of character and place. In the area of written language, there was a goal to write a sentence with describing words. In the area of math/vocational, there was a goal to count by tens to 100. In the area of motor/keyboarding, there was a goal to type using proper finger placement. In the area of attention, there was a goal to address following multi-step directions with verbal prompting. In the area of life skills, there was a goal for personal identifying information. In the area of syntax, there was a goal to produce "is" sentences with prompting. In the area of semantics, there was a goal for describing objects. In the area of narrative communication, there was a goal to address "wh-" questions with prompting. In the area of social skills communication, there was a goal to address good speech behaviors. In the area of articulation, there was a goal to produce /r/ clusters. In the area of game skills, there was a goal to participate in modified team sports. In the area of fitness, there was a goal to complete exercises without rest stops. In the area of stretching/flexibility, there was a goal for flexibility exercises. In the area of cardiorespiratory fitness, there was a goal for a cardiorespiratory exercise. In the area of math, there was a goal to address one-digit addition and subtraction using manipulatives.

53. District's October IEP placed Student in the SDC to be taught by Ramsey, noting there was a full time aide in this classroom. It provided for services in the classroom or in small groups. District offered language and speech services for 90 minutes per week, occupational therapy for 30 minutes a week, adapted PE for 60 minutes per week, and specialized academic instruction. There was no mention of any specialized training for the aide who would be working with Student. There was an offer to provide a special circumstance instructional aide evaluation to determine if Student needed such individual assistance in the classroom, on the playground, and while being transported to and from school.

54. Although all special education services were offered in a group setting, Dr. Patterson opined that Student would receive educational benefit from such services. Dr. Patterson explained that when he looks at a program, he always tries to see what can be done to maximize the delivery of service. On cross-examination, he discussed the difficulty Student had with some transitions, and the oppositional and defiant behaviors that resulted. In his report, Dr. Patterson agreed that applied behavioral techniques would be appropriate to employ in Student's program. Student's functional behavior and academic engagement was much better when she received one-to-one services. In spite of this, the October IEP proposed only group settings for her language and speech services, occupational therapy, adapted PE, and specialized academic instruction.

55. Concerning participation at this IEP team meeting, Father explained that Parents felt like they were being told to stop asking questions at this meeting. Father testified that counsel for District said "we can agree to disagree" several times during this meeting. Father believed this was a way to cut off discussion of a topic at the meeting.

56. At the time of the October IEP team meeting, Easler explained that discussion of Parents' request for consideration of the TERI program revolved around District representatives saying that it appeared Student could make progress in the public school setting and she did not need the services at the TERI program. The evidence showed that among the District members of the IEP team, Easler had the most recent knowledge of the TERI program. However, Easler's personal knowledge was based on visits to the TERI program that he made more than two years before in connection with a different student's IEP. There was no discussion about what a present TERI nonpublic school placement could provide for Student.

57. After the October 2006 meeting, District did not take any steps to provide an educational program to Student until convening the April 2007 IEP team meeting almost six months later. District representatives, including special education director Easler and principal Hargrave, knew of District's right to request a due process hearing to determine whether District's proposed IEP provided a FAPE for Student. However, with no knowledge of Student's educational program from the beginning of the 2006-2007 school year, District filed no such request. Rather, Easler explained that he directed District representatives to try to work with Parents in a positive fashion by continuing to invite Parents for IEP meetings, to have a desk in the classroom for Student, and to make placement available if Parents chose to bring Student back to school. Other witnesses, including Hargrave and Ramsey, confirmed this direction by confirming that they had a desk in the SDC classroom for Student if her Parents chose to bring her back to Lilac Elementary.

The April 2007 IEP Proposed by District

58. During the April IEP team meeting, Dr. Easler reviewed the Wiedenhoff Report. He summarized and stopped at critical sections of the report to explain. Mother and her counsel were given the opportunity to ask questions. They were given the opportunity to make comments and express their disagreement. They were not prevented from asking questions, making comments, or expressing their disagreement during the meeting.

59. District's April IEP proposed essentially the same program for Student as the October IEP. Beck was present at the April 2007 IEP meeting and noted she added several additional goals in the area of social skills. Beck also recommended an additional 30 minutes of speech language services for a total of 120 minutes per week. She explained the additional amount of time and goals were to make the April 2007 IEP more attractive to Parents. She specifically recalled Mother being present at this meeting with her attorney and being given the opportunity to ask any questions.

60. District's April IEP again placed Student in the SDC classroom at Lilac Elementary, with services to be provided in the same fashion as was offered in October 2006: both the small group and classroom settings. District also increased the OT services and adapted PE by 30 minutes per week each. There was still no mention of any specialized training for Student's aide.

61. During the April meeting, counsel for Parents gave notice they would enroll Student in the nonpublic school program at TERI. No one from District ever requested an opportunity to observe Student in the placement and no one offered to visit the nonpublic school.

62. Beck recalled the attorney for Parents specifically asking for a nonpublic school placement at the April 2007 IEP team meeting. She also recalled that after Parents' request for a nonpublic school placement, there was no discussion by District of the consideration for a nonpublic school placement with the IEP team members. She explained that all District IEP team members believed District's proposal was appropriate. No District IEP team member made any comment about whether Student would need a nonpublic school placement at the April IEP team meeting.

63. At the April meeting, there was also a discussion concerning changing the primary eligibility category for Student to autism and Ramsey recalled District was willing to do that. In spite of this, the proposed IEP mailed to Parents the week after the IEP team meeting concluded continued to show Student's primary disability as mental retardation.

The TERI Program

64. Witness Michael Ramirez described the TERI program. He has been a one-to-one instructional aide at the TERI academy for five years. His educational background includes a degree in philosophy and a law degree. His knowledge of Student is based on providing Saturday respite service with her for several months. Such respite service is provided separate from educational services at the TERI academy. He explained the TERI academy is a certified nonpublic school which provides education for students whose behaviors preclude them from getting an education in a less restrictive setting, including developmentally disabled children and children with autism. He described there were currently about 60 students in the school. With the number of adult teachers, instructional aides and behaviorists, there is a one-to-one ratio of adults to students.

65. The primary focus of the TERI program is behavioral intervention. Depending on the needs of a student, TERI can provide both academic and functional educational programs. The functional skills programming is generalized into the community where students are escorted with one-to-one adult support. To help control behavior, TERI employs token economy systems with their students. There is no requirement that the systems or rewards be the same for each student. Rather, they try to tailor the token economy system to something that is as motivating as possible for each individual student. This motivation is designed to enhance the student's ability to progress.

66. Mother also described the TERI program as highly structured. There is intensive one-to-one programming with a lot of work on social interaction.

67. In view of all the above, the weight of the evidence supports a finding that the District's offer of the October IEP and the April IEP did not address all of Student's unique needs.

LEGAL CONCLUSIONS

Applicable Law

1. Under the Individuals with Disabilities Education Act (IDEA) and state law, children with disabilities have the right to a free appropriate public education (FAPE). (20 U.S.C. § 1400(d); Ed. Code, § 56000, et seq.)⁵ FAPE consists of special education and related services that are available to the child at no charge to the parent or guardian, meet the state educational standards, and conform to the child's individualized education program (IEP). (20 U.S.C. § 1401(9).) "Special education" is defined as specially designed instruction, at no cost to the parents that is provided to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); Ed. Code, § 56031.) "Related services" means transportation and such developmental, corrective, and supportive services as may be required to assist the child to benefit from special education. (20 U.S.C. § 1401(26); Ed. Code, § 56363, subd. (a).)

2. There are two parts to the legal analysis of whether a school district has complied with the IDEA. The first examines whether the district has complied with the procedures set forth in the IDEA. (*Board of Education v. Rowley* (1982) 458 U.S. 176, 206-07 [102 S.Ct. 3034] (*Rowley*)). The second examines whether the IEP developed through those procedures was reasonably calculated to enable the child to receive educational benefit. (*Ibid.*) In *Rowley*, the United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the substantive requirements of the IDEA. (*Id.* at p. 200.) The Court determined that a student's IEP must be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services to maximize a student's abilities. (*Id.* at pp. 198-200.) The Court stated that school districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instructional and related services which are individually designed to provide educational benefit to the student. (*Id.* at p. 201.) As long as a school district provides a FAPE, methodology is left to the district's discretion. (*Id.* at p. 208.)

3. To determine whether a district offered a student a FAPE, the analysis must focus on the adequacy of the district's proposed program. (*Gregory K. v. Longview Sch. Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314 (*Gregory K.*)). If the district's program was designed to address the student's unique educational needs, was reasonably calculated to provide him some educational benefit, and comported with his IEP, then the district provided

⁵ All statutory citations to the Education Code are to California law.

a FAPE, even if the student's parents preferred another program which would have resulted in greater educational benefit. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56031.)

4. The IEP is the “centerpiece of the [IDEA’s] education delivery system for disabled children” and consists of a detailed written statement that must be developed, reviewed, and revised for each child with a disability. (*Honig v. Doe* (1988) 484 U.S. 305, 311 [108 S.Ct. 592]; 20 U.S.C. § 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345.) The Ninth Circuit Court of Appeals has endorsed the “snapshot” rule, explaining that the actions of the District cannot be “judged exclusively in hindsight...an IEP must take into account what was, and what was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted.” (*Adams v. State of Oregon* (9th Cir. 1999) 195 F. 3d 1141, 1149.) The focus is on the placement offered by the school district, not on the alternative preferred by the parents. (*Gregory K.*, *supra*, 811 F.2d at p. 1314.)

5. In developing the IEP, the IEP team shall consider the strengths of the child, the concerns of the parents for enhancing the education of their child, the results of the initial evaluation or most recent evaluation of the child and the academic, functional and developmental needs of the child. (20 U.S.C. § 1414(d)(3)(A).) A school district must ensure that a continuum of alternate placements is available for each child with a disability. (300 C.F.R. § 300.115(a); Ed. Code, §§ 56360, 56361.)

6. Under *Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528], Student, as petitioner in this case, has the burden of proof.

Predetermination of Placement

7. Predetermination of an educational placement “occurs when an educational agency has made its determination prior to the IEP team meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives.” (*H.B. v. Las Virgenes Unified School District*, 2007 WL 1989594 (9th Cir. 2007).) Predetermination is a procedural violation which amounts to a denial of FAPE if the violation results in a loss of educational opportunity for the student, or seriously infringes upon the parents’ opportunity to participate in the IEP process. (*W.G. v. Board of Trustees of Target Range School* (9th Cir. 1992) 960 F.2d 1479, 1484; see also Ed. Code, § 56505, subd. (f)(2).)

Compensatory Education

8. The right to compensatory education does not create an obligation to automatically provide day-for-day or session-for-session replacement for the opportunities missed. (*Park v. Anaheim Union Sch. Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033.) Compensatory education is not a contractual remedy, but an equitable remedy, part of the court’s resources in crafting “appropriate relief.” (*Student W. v. Puyallup School District* (9th Cir. 1994) 31 F.3d 1489, 1497; see also *School Committee of Burlington v. Dept. of Education* (1985) 471 U.S. 359, 374 [105 S.Ct. 1996][equitable considerations are relevant

in fashioning relief].) The award must be “reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.” (*Reid ex. rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.) The award also may take into consideration the reasonableness of the actions by the student’s parents. (300 C.F.R. § 300.148(d)(3).)

Determination of Issues

Issue 1.A.

1. Pursuant to Factual Findings 7, 22-27, 52-54, and 59-60, and Legal Conclusions 1-6, District’s offers failed to adequately address Student’s needs in the area of speech and language.

2. The evidence presented at hearing showed the most recent information available to the IEP team regarding Student was in the SDSU Report. District’s speech language pathologist found this report consistent with her understanding of Student’s needs. The SDSU Report noted the severity of Student’s needs in the basic areas for speech production, such as articulation in the less-than-first percentile, and the need for functional communication skills to be generalized outside of the therapy environment. There was also a need for carryover into the home and community environments, with training recommended for Parents and Student’s aide. In the absence of services to meet these needs, the IEP offers failed to adequately address Student’s needs.

Issue 1.B.

3. In view of Student’s withdrawal of Issue 1.B. on the third day of the hearing, there is no need to determine whether District’s offers failed to adequately address Student’s individualized needs in the area of occupational therapy.

Issue 1.C.

4. Pursuant to Factual Findings 7, 40-42, and 46, and Legal Conclusions 1-6, District’s offers adequately addressed Student’s individualized needs in the area of safety on campus.

5. The evidence showed that all of the safety problems identified by Parents were adequately addressed by District. Although Mother was justifiably concerned about the incident involving physical contact and kissing in the school restroom, District instituted the requirement that an adult be present in the restroom to avoid any future problems. There was no other inappropriate contact or kissing following the first incident.

6. The problem with Student wandering unattended when arriving or departing on the school bus was also appropriately resolved by District. By insuring that Student was always accompanied in the school bus areas, her safety was properly provided for.

Issue 1.D.

7. Pursuant to Factual Findings 7, 22-27, 52-54, and 59-60, and Legal Conclusions 1-6, District's offers adequately addressed Student's individualized needs in the area of social communication.

8. Student's deficits in the area of social communication would have been addressed appropriately with speech and language services in the small group and classroom settings. A setting with two to three students was a realistic environment to address social greetings and social interaction with Student.

9. The offer of 90 minutes in the October IEP and 120 minutes in the April IEP were both appropriate offers in view of the social skills curriculum employed in the SDC. It was clear that the additional 120 minutes of service offered in the April IEP was offered with the belief that 90 minutes was sufficient, and was not an admission the earlier offer was an inappropriate amount. The presence of the speech language pathologist in the classroom setting provided direct opportunity for social communication development which would be carried over by the classroom teacher throughout the remainder of the school day.

Issue 1.E.

10. Pursuant to Factual Findings 7, 22-27, 52-54, and 59-60, and Legal Conclusions 1-6, District's offers adequately addressed Student's individualized needs in the area of socialization.

11. The only evidence presented at hearing showed that social communication and socialization meant the same thing. For the reasons identified in Issue 1.D., Student's socialization needs were appropriately met.

Issue 1.F.

12. Pursuant to Factual Findings 7, 8-21, and 29-36, and Legal Conclusions 1-6, Student failed to establish that District's offers failed to adequately address Student's individualized needs in the area of autistic-like behaviors by considering the provision of data-driven, scientifically based learning programs.

13. The evidence presented at hearing showed that both psychological experts found favor with the use of applied behavior modifying techniques with Student. Dr. Patterson's recommendations addressed developing a program of appropriate positive replacement behaviors. Dr. Wiedenhoff's recommendations proposed the provision of a one-to-one behavioralist in the public school setting. But there was insufficient evidence that District refused to consider any data-driven, scientifically based programs for Student.

Issue 2.A.

14. Pursuant to Factual Findings 7, 29-37, and 58, and Legal Conclusions 1-6, District did not fail to consider the recommendations of Dr. Wiedenhoff for the April 19, 2007, IEP.

15. One of the reasons for convening the April IEP team meeting was to review the Wiedenhoff Report. There was ample evidence, by both testimony and documents, that director Easler went over the Wiedenhoff Report at this meeting. District was not obligated to accept everything in the report as true, and in fact District representatives disagreed with its conclusions. However, the Wiedenhoff Report was discussed and the recommendations were considered, and District explained why it did not agree with it.

16. District representatives agreed with the conclusions in the Patterson Report which were contrary to the Wiedenhoff Report especially with respect to the diagnosis of autistic disorder. Although the Patterson Report found Student had some symptoms that were found in students with autism, the final diagnosis in that report did not include autistic disorder.

Issue 2.B.

17. Pursuant to Factual Findings 7, 38-39, 43-45, 48, and 49-63, and Legal Conclusions 1-7, District failed to consider the continuum of placement options, including nonpublic school placement, for the October 30, 2006, and April 19, 2007 IEPs.

18. The burden of showing a district is unwilling to consider any alternatives to its own offer of placement is a heavy one. Student met that burden at this hearing.

19. There is little doubt that District members of the IEP team designed a program they thought was appropriate for Student. They reviewed all records available for Student. They arranged for independent educational evaluations in several areas. They reviewed those evaluations when they were presented. It may have been the good faith belief of each District team member that they had fashioned an appropriate program that made it difficult to consider any alternatives.

20. But the evidence showed that there was no consideration given to the request for placement at the TERI program. The problem with missing the procedural step of considering the continuum of placement options, is that the IEP team is deprived of the opportunity to evaluate the benefits, as well as the drawbacks, of other placement options. If a District representative had visited the TERI program with Student in mind, there may have been some element of that placement that could have been employed in Student's program. But to hold fast to District's offer, without the discussion of the pros and cons of other placement options, prevents a full analysis of what placement is appropriate for Student. This omission resulted in a loss of educational opportunity for Student and seriously infringed upon Parents' right to meaningful participation in the subject IEP meetings.

Issue 2.C.

21. Pursuant to Factual Findings 7, 22-27, 52-54, and 59-60, and Legal Conclusions 1-6, District adequately considered Student's individualized communication and socialization needs.

22. As discussed in Issue 1.C., District's offers adequately addressed Student's individualized needs in the area of social communication and socialization. In preparing to adequately address Student's needs, District adequately considered those needs.

Issue 2.D.

23. Pursuant to Factual Findings 7, 39, 43, 44, 50-51, and 57, and Legal Conclusions 1-8, District failed to follow procedures necessary to get Student to attend school or a school program.

24. The evidence presented at hearing showed that District did little to provide an educational program for Student during the 2006-2007 school year. On the one hand, District is to be commended for maintaining a relationship with Parents, and not wanting to inflame matters between the parties or create more of an adversarial atmosphere between the parties. However, District had the obligation to provide a FAPE to Student, and merely convening two IEP team meetings during the 2006-2007 school year, while having a desk available for Student should she return, was a failure to perform that obligation.

Issue 2.E.

25. Pursuant to Factual Findings 7, 38-39, 43-45, 48, and 49-63, and Legal Conclusions 1-7, District offered a predetermined placement to Student for the October 30, 2006, and April 19, 2007 IEPs.

26. For the reasons discussed in Issue 2.B., the evidence presented at hearing established that District made a predetermined placement offer to Student. While there was no express agreement made by District team members before they walked in for an IEP team meeting, the effect of agreeing to disagree about whether District's offer was appropriate resulted in the failure to consider the TERE placement option requested by Parents. There is nothing wrong with agreeing to disagree. But that disagreement must be promptly followed by efforts to get beyond that disagreement because, as in this case, Student's educational program remains undetermined. In this case, that resulted in District's failure to provide no educational program for the entire 2006-2007 school year.

Issue 3.A.

27. In view of Student's withdrawal of Issue 3.A. at the conclusion of the hearing, there is no need to determine whether District should reimburse Student's parents for Dr. Wiedenhoff's independent educational evaluation.

Issue 3.B.

28. Pursuant to the determination of Issues 1.A., 2.B., 2.D., and 2.E., Factual Findings 64-66, and Legal Conclusions 1-8, District should provide compensatory education to Student in a nonpublic school placement such as TERI.

29. District failed to provide a FAPE for Student for the entire 2006-2007 school year. The TERI program is a certified nonpublic school which provides education for students whose behaviors preclude them from getting an education in a less restrictive setting, including developmentally disabled children and children with autism. It does not matter whether the parties eventually agree to label student with mental retardation or autistic-like behaviors. The TERI program is appropriate for the demonstrated needs of Student.

30. In determining the amount of compensatory education, it is important to note District failed to take steps regarding Student's education other than to convene two IEP meetings during the 2006-2007 school year. However, Parents refused to return Student to school until after the due process proceedings were completed. Under these circumstances, it is appropriate for District to provide education at TERI for the remainder of the 2007-2008 school year.

ORDER

1. District shall provide compensatory education to Student in the certified nonpublic school known as TERI from the date of this Decision to the end of the 2007-2008 school year.

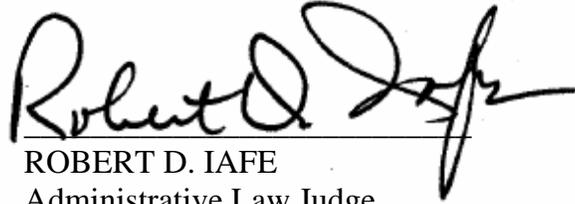
PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Student prevailed on Issues 1.A., 2.B., 2.D., 2.E., and 3.B. District prevailed on Issues 1.B., 1.C., 1.D., 1.E., 1.F., 2.A., 2.C., and 3.C. in this case.

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within ninety (90) days of receipt of this decision. (Ed. Code, § 56505, subd. (k).)

Dated: December 17, 2007

A handwritten signature in black ink, appearing to read "Robert D. Iafe", written over a horizontal line.

ROBERT D. IAFE
Administrative Law Judge
Office of Administrative Hearings