

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

In the Matter of:

STUDENT,

Petitioner,

v.

CORONA-NORCO UNIFIED SCHOOL
DISTRICT,

Respondent.

OAH CASE NO. N 2007080613

DECISION

Robert D. Iafe, Administrative Law Judge, Office of Administrative Hearings, Special Education Division, heard this matter on November 5, 19, 20, 28, 29, and December 6, and 19, 2007, in Norco, California.

James D. Peters, III, advocate with the Peter D. Collisson Prof. Corp., appeared on behalf of Student (Student). Dian Tackett, Donna Kohatsu, Kimberly Rendler, and Maya Sandjaya attended various days of the hearing as assistants to Mr. Peters. Mother (Mother) of Student was present during most days of the hearing. Father (Father) was present during the entire hearing. Student did not appear during the hearing.

Jacqueline D. Berryessa, attorney with the Law Offices of Margaret A. Chidester & Associates, appeared on behalf of Respondent Corona-Norco Unified School District (District). Courtney M. Cooke, attorney with the Law Offices of Margaret A. Chidester & Associates, also appeared on the first day of the hearing. Jim Huckeba, SELPA Administrative Director for District, was present during the entire hearing.

PROCEDURAL BACKGROUND

On August 21, 2007, Student filed the request for due process hearing in this case. On August 22, 2007, OAH gave written notice setting October 15, 2007, as the date for the due process hearing to commence. On September 19, 2007, District requested OAH to continue the due process hearing date to permit additional time for mediation. Student did

not agree to the continuance request and the hearing date remained as originally set by OAH. On October 12, 2007, Student and District agreed to waive the previously set date for hearing and agreed to commence the hearing on November 5, 2007.

The administrative law judge (ALJ) opened the record for the due process hearing on November 5, 2007. The ALJ received sworn testimony and documentary evidence during the seven non-consecutive hearing days through December 19, 2007. With the agreement of the parties, the record remained open for the service and filing of simultaneous written closing argument by January 4, 2008, with any reply brief by January 11, 2008, and the issuance of a decision by February 21, 2008.

The closing argument and reply brief of District were timely filed. The closing argument and reply brief of Student were not timely filed. Rather, Student filed Petitioner's Closing Argument after business hours on January 4, 2008, with no request for permission to file after the time the parties had agreed, and the ALJ had ordered that closing argument would be due. District objected to consideration of this brief in its reply on the grounds the brief was served late, contained numerous blank lines and incomplete sentences, was unsigned and undated, and was not accompanied with a proof of service. Student's closing argument, received by OAH after the time it was to be filed, was not considered. Student did not file a reply but rather filed a paper entitled Petitioner's Sur Reply after hours on January 11, 2008. District provided OAH with a copy of Petitioner's Sur Reply noting it was served upon District by facsimile transmission on January 11, 2008, after business hours at approximately 7:56 p.m. District also objected to consideration of this brief in its reply on the grounds the brief was filed late. Both counsel were engaged before the ALJ in another due process hearing during the week of January 7-11, 2008, that was being continued from day to day based upon the illness of Student's counsel. In view of counsel's illness, and the fact that Student's two and a half hour late filing did not have any impact on any further response or the ability of the other party to respond, the brief was considered. After receipt of the parties' written closing argument and reply, the record was closed and the matter was submitted on January 11, 2008.

ISSUES

1. Did District fail to provide an appropriate inclusive education with the appropriate support and services in the least restrictive environment for the 2005-2006 school year? Student alleged substantive violations including:

- A. District did not develop an appropriate behavior plan.
- B. District did not provide adequate occupational therapy.
- C. District did not provide appropriate speech and language services.
- D. District did not provide appropriate services to meet Student's behavior, communication, motor, and sensory needs.
- E. District failed to conduct an appropriate functional analysis assessment of Student.

2. Did District fail to provide an appropriate inclusive education with the appropriate support and services in the least restrictive environment for the 2006-2007 school year? Student alleged substantive violations including:

- A. District did not develop an appropriate behavior plan.
- B. District did not provide adequate occupational therapy.
- C. District did not provide appropriate speech and language services.
- D. District did not provide appropriate services to meet Student's behavior, communication, motor, and sensory needs.
- E. District failed to conduct an appropriate functional analysis assessment of Student.

3. Did District fail to develop an appropriate individualized education program (IEP) for the 2005-2006 school year? Student alleged procedural violations including:

- A. District failed to have a general education teacher present at the IEP meeting convened on June 15, 2006.
- B. District did not provide adequate occupational therapy.
- C. District did not provide appropriate speech and language services.
- D. District did not provide appropriate services to meet Student's behavior, communication, motor, and sensory needs.
- E. District failed to conduct an appropriate functional analysis assessment of Student.

4. If Student was denied a FAPE, is Student entitled to compensatory education?

PARTIES' CONTENTIONS

Student contends District did not offer him a free, appropriate public education (FAPE) for the past two school years because District failed to provide appropriate supports for Student to participate in a general education setting which Student urges is the least restrictive environment (LRE) for him. Student contends that he could receive educational benefit from a general education placement if District provided him with the appropriate support and services to help him succeed. Student contends his IEPs for these years are deficient for the failure of District to consider Student's ability to be educated in the general education environment. Student also contends his unique needs in the areas of behavior, speech and language, and occupational therapy were not appropriately provided for. Student also contends District failed to have a general education teacher present at an IEP Team meeting which his Parents requested be convened on June 15, 2006. Student asserts District failed to consider the continuum of placement options for Student because no general education placement was ever seriously considered by District. Because of this, Student seeks an order that he is entitled to compensatory education by way of a 40-hour per week in-home applied behavior analysis program.

District contends it provided Student with special education preschool services that constitute a FAPE for the 2005-2006 school year. District also contends it made an appropriate offer of FAPE to Student for the 2006-2007 school year. District asserts the IEPs for these years were designed to meet Student's unique needs and were calculated to provide him with educational benefit. District also contends Parents gave no indication as to why Parents asked to convene the IEP Team meeting on June 15, 2006. District contends the failure to have a general education teacher present at that IEP Team meeting requested by Parents does not result in any denial of a FAPE because Parents would not tell District the purpose of the meeting. District contends Student is not entitled to compensatory education because each IEP provided a FAPE for Student.

FACTUAL FINDINGS

Jurisdictional Matters

1. At the time this case was filed, Student was a five-year-old boy who was eligible for special education and related services because of his autism. He has been eligible for such services since he turned three years old, and his first IEP was developed, in November 2004. During the time of these proceedings, Student had not attended any District school since near the end of the school year in June 2006. During the entire time period at issue, Student has resided with his Mother and Father (collectively Parents) in Corona, California, within the geographical boundaries of District.

Background

2. This case arises from the disagreement between Student and District over whether the IEPs provided by District for the 2005-2006 and the 2006-2007 school years constitute a FAPE for Student. To resolve the issue of whether District's program constitutes 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 Student reached age three and began receiving services from District, Student was enrolled in the Children's Center Early Start program and attended the program five days a week. In anticipation of Student reaching three years of age, District began its assessment of Student's needs in September 2004. Although the 2004 assessments are not at issue in this case, these assessments were relied upon by District for the 2005-2006 school year and beyond and they provide important information to understand Student's needs. The assessments were designed and conducted to gather information that would be needed to develop an individualized educational program for Student. District's assessments included a multidisciplinary psychoeducational report, a play based observational assessment, and a school-based occupational therapy assessment.

Student's Unique Needs as Assessed by District

4. A student is entitled to receive specially-designed instruction and related services that meet the student's unique needs and are necessary to assist in benefiting from the education. To accomplish this purpose, a district is obligated to identify a student's unique educational needs.

A. The September 2004 Multidisciplinary Psychoeducational Report by District

5. District prepared a Multidisciplinary Psychoeducational Report (MDPR) dated September 30, 2004. This was a report on District's assessment of Student's needs as the responsibility for his educational program transferred from Regional Center to District on his third birthday. The MDPR was compiled from the efforts of several District representatives including Alison McAdams-Bever, licensed educational psychologist; Monica Pope, speech language pathologist; Sharon Vejnar, registered nurse; and Kathleen Yugo, Applied Behavior Analysis (ABA) specialist. The MDPR included results on several measures designed to evaluate Student's abilities and needs. To assess Student's intellectual ability at this young age of two years and 10 months, the assessment team included standardized assessment instruments, play based assessment, and parent interview. The report noted, however, that tests of the cognitive ability of a very young child might not be reliable.

6. On the Vineland Adaptive Behavior Scales (VABS), with Mother as the respondent, Student received low scores in a number of areas: a communication domain standard score (SS) of 58, at the less than 1st percentile; a daily living skills SS of 59, at the less than 1st percentile; a socialization domain SS of 57, at the less than 1st percentile; and a motor skills SS of 74, at the 4th percentile. These results indicate Student was functioning in the deficit range in the areas of communication, daily living skills, and socialization; and in the moderately low range in motor skills.

7. On the Differential Assessment of Autism and Other Developmental Disorders (DAADD), with Parents as respondents, Student received scores of 63 percent for autism and Rhett's Syndrome; 59 percent for pervasive developmental disorder, not otherwise stated (PDD-NOS) and mental retardation; 57 percent for other syndromes; 47 percent for Asperger's Syndrome; and 38 percent for learning disability. The MDPR noted a score of 40 percent or higher is significant on this measure, and that Student's scores gave a strong positive result as to the diagnosis of autism spectrum disorder.

8. The Dynamic Play Based Assessment of Student included assessment of his cognitive play, social emotional play, and motor play. Results for cognitive play fell in the range from 21 to 27 months of age with Student engaging in nonsystematic trial and error and stacking of up to five blocks. In the area of social emotional play Student scored in the range from 12 to 18 months; the report noted Student used eye contact briefly, had an otherwise inefficient eye gaze, and turned away when an adult got too close. Student's motor play score was in the range from 30 to 36 months. Caution should be used in considering the play based assessment results since the MDPR noted Student gave minimal

effort to this assessment measure and these results were considered a low estimate of his abilities at the time of testing. A Visual Motor Integration Observation in the MDPR noted Student accomplished one random mark on the page with a crayon. From this observation, Student was given an age equivalent of 25 months.

9. To assess in the areas of communicative play and language functioning, there was observation, record review, parent interview, and some standardized testing. The MDPR noted Student gave minimal attention to these measures, however, and the results should be considered only an estimate of his abilities. For example, in reporting on communicative pragmatic behaviors, the report noted Student briefly looked at his examiners upon arrival and had inefficient eye gaze with them. He did not engage in activities presented to him when responding to his name would only stop and look briefly at the speaker.

10. In assessing Student's speech and language, Pope administered some standardized tests. Pope has been a speech language pathologist for District since 1980 and was well qualified to conduct the assessment of Student. On the Preschool Language Scale-3 (PLS-3) Student's expressive language was extremely low in the 1st percentile. On the Receptive-Expressive Emergent Language Scale-3 (REEL-3), his expressive language was at nine months of age. The MDPR noted that Student's overall expressive language skills were judged to approximate 11 months of age. Similarly, Student's overall language comprehension skills, based on his PLS-3 score in the 1st percentile, and his REEL-3 score of six months, were judged to approximate eight months of age. The MDPR noted Student communicates through grunts and growls (when agitated), babbling, pouting, and by taking an adult's hand and walking to what he wants. Parents reported Student was saying "mama" and "dada" before age 2, but there was a regression in speech by that age. During this assessment, Student was heard to pronounce only a few speech sounds, including /p/, /m/, /b/, and /d/, in duplicated and varied syllable patterns. The report noted Student did not imitate sounds or words and did not attempt to sing along with familiar songs.

11. Based on the results of this testing, the MDPR concluded Student qualified for special education services as a student with autism. The report recommended the results of testing be shared with other members of the IEP Team. Recommendations also included that the team may discuss placement in a special day class (SDC); speech and language services, parenting programs; presentation of information to Student in a visual format with many opportunities to respond in hands on activities; and use of a picture schedule in class and at home.

B. The October 2004 ABA Observational Assessment Report by District

12. In connection with the MDPR, Kathleen Yugo, an ABA Supervisor for District, conducted a play based observation and assessment of Student with the help of an instructional aide. Yugo prepared a written report of her assessment entitled ABA Assessment Report. Although the report is not dated, Yugo recalled that she conducted her assessment shortly before Student's November 16, 2004 IEP. Yugo's report was based on

the observations she made of Student at his home, plus information gathered from Parents. She estimated she spent about 45 minutes while observing Student.

13. Under the heading of item exploration, the report noted Student brought items to his face to smell and bite them. He removed items from their containers and threw them around the room in a scattering manner. Parents reported consistent behaviors.

14. Under the heading of self stimulation/pressure, the report noted Student would clap his hands in rapid succession and clasp his hands with fingers entwined. He also pressed his hands and upper body into the carpet, and banged on the television screen. He also hit himself on the upper sides of the head with an average of three to four impacts per event. During the 45 minutes of observation, Student initiated hitting himself on the head nine times. Parents reported similar pressure related activities and noted the head hitting had increased in the recent past.

15. Under the heading of following instruction, the report noted Student could follow the direction to put objects into an open container, but did not sort them in corresponding shaped holes. His attention to stack nesting cups was minimal. Parents stated that Children's Center staff told them Student is able to be part of a group activity for up to 20 minutes on some occasions including circle time, singing, and reading. During these activities, staff reported that Student is able to remain in close proximity to others, does not leave the immediate area, and is not disruptive.

16. At the conclusion of the report Yugo made several suggestions including that Student would benefit for enrollment in a District preschool program to address his educational, social, and developmental needs. Yugo also suggested Student would benefit from District's Autism Program, which may include application of discreet trial training techniques, use of visual support systems, and independent work stations. She also suggested Student would benefit from implementation of a picture exchange communication system to make his wants and needs known and understood by others.

C. The November 2004 School-Based Occupational Therapy Assessment by District

17. District also conducted an occupational therapy assessment of Student in November 2004 to assess his then current level of performance in the area of fine motor skills due to Parents concern over delay. At the time of the assessment, Student was already receiving OT services through the Corona Regional Center to address motor planning, problem solving, dressing, and upper body strengthening during weekly sessions. District's occupational therapist tested Student in his home with Mother present. The assessment tools employed included two subtests of the Peabody Developmental Motor Skills -2 (PDMS-2), clinical observation, parent interview, and file review.

18. For the standardized testing of Student's fine motor skills, District used two subtests of the PDMS-2 including Grasping and Visual Motor Integration. On the Grasping subtest, Student earned a raw score of 32, placing him in the less-than-first percentile. On

the Visual Motor Integration subtest, Student earned a raw score of 77, placing him in the 2nd percentile. This yielded a Fine Motor Quotient of 58, which placed Student in the less-than-first percentile overall for fine motor skills.

19. The observations of Student yielded short lists of tasks he could and could not perform. Tasks Student could perform included being able to turn single pages of a book, scribble more than one inch long, grasp two cubes with one hand, and crumple paper using both hands together. Tasks that were difficult for him to perform included stacking cubes, removing the lid from a small bottle, imitating vertical strokes, and manipulating buttons.

20. In the area of Self Care, and based on Mother's report, the assessment noted Student could assist with dressing and could drink from an open cup with minimal spilling. However, Student could only attempt to use a fork for self-feeding until he was unsuccessful to the point of frustration. Student was also unable to use a spoon successfully and attempts often resulted in spilling most of the food.

21. In the area of Sensory Processing, and based on Mother's report, the assessment noted Student liked to swing and explore different textures. He would often bring objects to his nose or mouth for exploration. Student could ascend the stairs of a slide but had difficulty descending. The report also noted Student's grinding of teeth was audible at one point during the assessment.

22. The assessor's Behavioral Observations noted Student would run out of the therapist's sight when Student lost interest in a task. Student was more interested in throwing blocks around the room than more purposeful activity such as stacking them. Mother reported Student would clap his hands spontaneously and hit his head with his hands or against the wall if agitated. The report also noted Student is non-verbal and this conduct was seen as used to get the attention of an adult.

23. The report also included a Summary/Recommendations section which concluded Student had a significant delay in the area of fine motor skills. The report recommended OT services to facilitate further development of Student's fine motor and visual motor skills as related to the educational setting.

D. Student's Initial IEP dated November 16, 2004

24. Although not at issue in this case, an understanding of Student's initial IEP, which was continued in large part into the 2005-2006 school year, is helpful. In view of Student's deficits, the IEP Team created goals in several areas of need. There were goals to address classroom routines, group activities, fine motor skills, and appropriate play. There were goals to address visual skills, greetings, and expression of wants through a picture exchange communication system (PECS). There were also goals to address following directions and imitative behavior.

25. There were no speech and language services offered or provided to Student. Pope explained that Student was not ready for speech and language services because of his deficits. He was non-verbal. He had no communication system. He did not imitate speech sounds. He had no words at all. He grunted, growled, babbled, and pouted. She explained that Student was not communication ready. He did not have the skills to attend, or to focus, or to make a communication connection with another person. Because of this, she explained he would not benefit from direct speech and language services. Rather than direct speech and language services, she recommended a more developmental model for Student in which there would be intervention that would get Student ready to communicate, so that direct services in the areas of speech sound production, fluency, voice, language, and grammar could be addressed at a later time. The development of communication readiness skills was to be addressed by the ABA specialist working with Student.

26. To implement the goals in this initial IEP, District placed Student in District's preschool SDC for five days per week. It is important to note that for students attending kindergarten through grade 12, District provides a variety of different programs including both general education classes and special day classes. However, for students who are too young for kindergarten, District does not have a general education preschool program. Therefore, the preschool program provided by District is always a special day class. District also provided Student with OT services for 25 sessions at 20 minutes per session, and ABA services for 50 sessions at 15 minutes per session, under this initial IEP.

The IEP Team Meeting and Amendment dated September 19, 2005

27. When the 2005-2006 school year began, District began providing services to Student under the IEP dated November 16, 2004. A few weeks later on September 19, 2005, District convened an IEP Team meeting to discuss the number and duration of sessions for the ABA program being provided for Student. Father attended this meeting. The only persons in attendance at this IEP Team meeting on behalf of District were Renee Becker, Student's special education teacher; Catina Vargas, District's autism specialist; and Kathleen Yugo, who was present at this meeting as the administrator designee.

28. At this meeting, District relied on its assessments from the previous year and classroom observations to develop Student's program for this year. There was no additional testing of Student at the beginning of the 2005-2006 school year. Pursuant to the November 19, 2004 IEP, District had been providing ABA services to Student in 15 minute sessions. District's autism specialist and special education teacher recommended that an increase in the amount of time student received in the ABA program would help Student with his academic and communication skills.

29. With an understanding Student needed additional ABA services, The IEP Team agreed to increase the amount of time Student received ABA services from 15 minutes to 30 minutes per session. The one page IEP Amendment dated September 19, 2005, provided for an increase in Student's ABA program to 30 minutes per session at the rate of four times per week.

The IEP Team Meeting and Annual IEP dated November 3, 2005

30. On November 3, District convened an IEP Team meeting for an annual review of Student's program. Father and Mother attended this meeting. The persons in attendance at this IEP Team meeting on behalf of District were Student's special education teacher; a speech language pathologist, an occupational therapist, and an administrator designee.

31. To address Student's needs, the IEP Team formulated 11 goals. The IEP Team was aware of Student's inability to imitate actions. To address Student's need to learn how to imitate, Goal 1 provided that Student will participate in group activities (songs, finger play, interactive stories) by attending to the teacher (clapping, imitating actions) in four out of five trial days. The persons responsible for implementing this goal included the special education staff, Student, Parents, and a speech language pathologist. The speech language pathologist was to provide service on a consultation/collaboration model only. The speech language pathologist would not provide any direct services to Student under this IEP.

32. There were several goals directed to Student's needs in the area of behavior. The IEP Team noted Student also did not initiate interactions with other children appropriately. To address this need, Goal 2 provided the Student will initiate appropriate interactions with another peer, or a small group of two to three students, 80 percent of the time. Student also put a variety of objects in his mouth, both edible and non-edible. To address this need, Goal 3 provided Student "will independently handle materials and objects appropriately (i.e., only putting edible things in mouth) 80 percent of the time." Goal 4 was to address Student's inability to follow two step directions. With a baseline noting Student is able to follow one step routine directions, Goal 4 provided that Student "will follow two step related oral directions, given by an adult, with one verbal prompt 60 percent of the time."

33. In the area of OT, Student was deficient in his pre-writing skills and was only able to make random scribbles on a page. There was also an understanding by the IEP Team that Student seeks out and benefits from deep pressure sensory input. To address these needs, Goal 5 provided that following sensory input, Student will reproduce a vertical line, a horizontal line, and a circle with a functional grasp on a writing utensil, with left to right and top to bottom directionality, in four out of five trials.

34. A critical deficit for Student was his inability to communicate. He did not have any functional form of communication at the time. For a communication baseline, the IEP Team noted Student "hand leads and gestures." To address Student's need for a communication system, Goal 7 provided for use of a picture exchange communication system (PECS) to express Student's wants and needs.

35. With no system in place to communicate, the IEP Team was also aware that Student had deficits in his social skills. For example, Student did not verbalize greetings or even wave hello or good-bye when visitors or family members would enter or exit the home. To address this need, Goal 6 provided that Student "will reciprocate verbal and gestural

greetings when people enter or exit his area with 80 percent independence in eight out of 10 trials.”

36. The IEP Team was also aware that Student did not play with toys as they were designed. The ABA Observational Report had noted and Parents agreed that Student seemed to enjoy emptying containers of manipulatives and toys; he also enjoyed scattering them around the room rather than playing with them. Another goal, Goal 8, provided that Student “will play appropriately with a minimum of eight toys with 80 percent independence in eight out of ten trials.” Noting that Student did not demonstrate an ability to match three dimensional or two dimensional objects, the IEP Team agreed on Goal 9 which provided that Student “will demonstrate his ability to match two dimensional illustrations of 25 familiar objects with 80 percent accuracy in eight out of 10 trials.”

37. Finally, to address Student’s inability to follow directions consistently, the IEP Team included two additional goals. Goal 10 provided that Student will follow a minimum of eight compliance directives including, for example, “sit,” “come here,” “wait,” and “quiet hands.” Goal 11 provided that Student will demonstrate the ability to imitate a minimum of eight nonverbal movements or actions when given a prompt and model to imitate.

38. To implement this IEP, Student remained placed in District’s preschool SDC. Special education teacher Becker was the teacher of this class. At the hearing, she described a typical day in the preschool SDC. Becker followed a routine each day during the time Student attended from 7:45 to 11:15 a.m., during which he moved through several activities each day. For the first 15 minutes of the day the students in the class would put their back packs away and work on self help skills including toilet training. Beginning at 8:00 a.m. Becker did speech with all the students in her class for about a half hour. Speech was done in the classroom setting as a group activity. Becker explained they would do a sound song where they worked on specific sounds for the three-, four- and five-year-olds in the class. They also worked on a worksheet or some other activity, which was provided to Becker by a speech therapist, to work on some of the concepts that all students in the class needed to know such as prepositions. After speech time, and about 8:30 a.m., Student would be taken to the ABA room which was either right next door to the classroom or across the quad. He received ABA services for 30 minutes and returned for circle time at about 9:00 a.m. With an average of 10 students in the class, Becker explained they worked on a variety of things during circle time including from name recognition to social skills. She noted that during circle time, Student’s attention span was short and he needed a break after about every five to six minutes. He usually needed hand over hand prompts to get back to the circle. By 9:30, the classroom activity changed to table time where students would work on fine motor and pre-academic skills like writing names and counting. Student’s attention span was described as from two to three minutes for such tasks. The students would move to different tables for different activities with the assistance of aides and visual prompts. Table time activities would generally take an hour. With additional time for breaks with social group interaction and lunch from 11:00 to 11:15, it was time to end the day.

39. There was no formal behavior plan for Student in the preschool SDC. Becker explained that Student did not display any uncommon behaviors that her classroom staff could not work on or modify in their classroom environment. She did observe Student to pinch and hit others at times. She explained she and her staff were able to help him modify that behavior without any individual behavior plan for Student. Under an Individualized Education Program - Amendment dated November 23, 2005, District also provided its in-home ABA program to Student for four times per week for 45 minute sessions and provided training to Parents two times a month for 30 minutes each session. This amendment provided January 9, 2006, as the start date for these in-home ABA sessions that District provided to Student.

The IEP Team Meeting and Amendment dated March 9, 2006

40. District arranged for an IEP Team meeting on March 9, 2006, to discuss Student's transition from preschool to kindergarten for the 2006-2007 school year. Mother and Father attended this meeting. Student's then current special education teacher and a general education teacher both attended this meeting. In addition to these teachers, District IEP Team members also included a speech language therapist, and an occupational therapist, and an administrative designee for District.

41. District brought a form entitled Individualized Education Program – Amendment to this meeting. Except for initials, signatures, and dates for those signatures, the entire contents of this one page document were fully typed in before the meeting took place. Inside the area used to describe the purpose of the meeting, District representatives had already typed in:

“This meeting serves as [Student's] transition meeting from Preschool SDC to Kindergarten SDC. [Student] will be of Kindergarten age for the 2006-2007 school year.”

Inside the area for discussion, the document included the following statements before the meeting began:

“Discussion: Placement options were discussed. Placement in a general education Kindergarten with appropriate supports and services or placement in a Special Day Class with appropriate supports and services was discussed.”

Finally, inside the area for action, the document also included the following statements before the meeting began:

“Action: The IEP Team feels placement as a Kindergartner in a Kindergarten SDC class with appropriate supports and services would be appropriate for [Student] for the 2006-2007 school year. [Student] will receive ABA, Speech Therapy and Occupational Therapy. Percentage in special education will be

90%. [Student] will continue to receive services in Preschool Special Day Class until June 23, 2006.”

These three paragraphs contained the entire substantive contents of this document such that the description of the discussion and action taken at the meeting was summarized on the document before the discussion and action actually took place.

42. In contrast to what this document stated, Father and Mother testified that the first thing Parents were told by District members of the IEP Team was that Student was going to go to a kindergarten SDC class at Orange Elementary with a teacher by the name of Liz Mases. There was a brief statement that general education was not suitable for Student based on his abilities. However, District representatives never went over what types of services, or what type of supports, that Student might be able to get in a general education classroom. Participation in a general education kindergarten classroom was never an option that was discussed with Parents. There was no discussion of the possibility of Student participating in a general education classroom. Parents were never given the opportunity to go to a general education classroom teacher to see what the classroom was about. Rather, there was only the statement that Student was suited for placement in District’s kindergarten SDC.

43. Based on the observations and the recommendations of District, Parents testified they placed their confidence in the professional opinions of District representatives at the time of the meeting and agreed to the placement offer in the March 9, 2006, IEP Amendment. Parents signed their consent to the single page Individualized Education Program – Amendment dated March 9, 2006.

The IEP Team Meeting and Amendment dated April 27, 2006

44. Shortly after the March 9, 2006, IEP Amendment, Father explained that he attended an all day seminar where he had the opportunity to gather information from parents, therapists, and other professionals about educational programs for children with autism. He said he heard from parents and professionals that children with autism could imitate typical peers and, with appropriate supports, the general education classroom would be a good starting point to see what a student’s capabilities are. However, none of the parents or professionals who made these statements to Father had reviewed any of Student’s assessments, or his IEP, or any progress reports, or any notes from Student’s teacher.

45. On April 27, 2006, Mother attended the IEP Team meeting with District representatives including Student’s special education teacher Becker, a general education teacher, a speech language therapist, an occupational therapist, an autism specialist, and an administrator designee. The purpose of this meeting was to modify and create additional ABA and classroom goals for Student for the remainder of the 2005-2006 school year and for the upcoming 2006-2007 school year.

46. At this meeting, the IEP Team added four new ABA goals that provided Student would receptively identify eight basic shapes, eight basic colors, and 20 known objects/pictures, and would follow eight basic one step directions. The IEP Team also added one new classroom goal that Student would remain dry when taken to the bathroom a number of times during the school day. These goals were based on Student's identified needs for things to be broken down into the smallest teachable components, and his needs for minimal auditory and visual distractions, for repetition of the same piece of information, and his low level of attention to task. These goals were below the kindergarten level and Student would not get instruction in these areas in the kindergarten classroom that would reinforce what Student would be learning in the restrictive ABA environment.

The June 15, 2006, IEP Team Meeting

47. At some point during the month of May 2006, Parents, with the assistance of an advocate, decided to request changes to Student's IEP. Parents therefore requested District convene an IEP Team meeting. However, Parents did not tell any District representative the purpose of the meeting or what Parents wanted to discuss at the meeting. In an attempt to determine what Parents wanted to discuss at the meeting, District's autism specialist Vargas telephoned Parents. Father testified he only told her that Parents had issues with Student's program that they wanted to discuss. He told her he could not get into specifics because he had an advocate who was going to speak on their behalf at the June 15, 2006 meeting.

48. On June 15, 2006, Parents and Student advocate James D. Peters, III, attended the IEP Team meeting. Present on behalf of District were the following individuals: Student's special education teacher Becker, ABA specialist Yugo, a speech language pathologist, and a District administrator.

49. Parents and advocate brought a developmental optometry report dated June 14, 2006, and prepared by Beth E. Ballinger, O.D., to this June 15, 2006 meeting. This was the only assessment report that Parents and advocate brought to the June 15, 2006 meeting. Parents' requests for changes to Student's IEP were based on this assessment and Father's research about educational programs.

50. District's ABA specialist Yugo was the person who wrote the notes for this IEP Team meeting. She acknowledged that the few pages of notes were only a summary of a meeting that took a few hours to conduct. Yugo recalled that during the meeting, Parents' advocate repeatedly asked Student's teacher about inappropriate behaviors, and the teacher repeatedly said that there were none. Student's teacher, Renee Becker, advised the team on Student's class performance and behaviors. When the advocate focused on what adverse behaviors occurred at school, Becker had concerns about Student going through the trash can to get food, and taking marshmallows off art projects, and being very insistent on trying to get to the food of other children. The IEP notes also reflected Student was on a Parent chosen diet, and he seemed sad and cried when he wanted food at non-snack and non-lunch times. Parents related Student also cried at home over food restrictions. At the meeting,

there was also a discussion of behaviors which Parents had seen exhibited by Student including hitting, yelling, pinching, pushing, and tantrums. However, Becker explained that the behaviors they saw at school were not unusual or extreme behaviors that they could not handle. The behaviors were typical of what she encountered in her SDC and she and her staff could redirect Student without the need for a behavior plan in place.

51. During the meeting, Student's advocate made requests for several changes in Student's IEP. To memorialize some of the discussion that occurred at the meeting, District prepared an IEP Amendment dated June 15, 2006, which Parents and their advocate signed showing they were "present only" but did not consent to. As documented in the handwritten notes of the June 15, 2006 IEP Amendment, the following Parent requests were identified:

- Placement in a general education classroom; would accept Orange Elementary
- One-to-One instructional aide assigned
- ABC requested as the ABA program provider
- Want ABA from NPA in classroom
- 25 hours per week of NPA service
- 6 hours supervision per month
- 4 hours clinic per month
- OT two times per week for 60 minutes each, OT to be certified in sensory integration
- Speech services, direct, two times per week for 45 minutes each
- Request auditory processing assessment
- Additional parent training re: ASD student characteristics
- Behavior plan with data collection
- Request for response from District by Monday

52. Father also testified that Student's advocate made additional requests at the meeting asking for an ecological assessment, a functional analysis assessment (FAA), and a functional behavioral assessment (FBA). District's ABA supervisor Yugo testified she had no recollection of an ecological assessment being discussed at the IEP Team meeting. She explained she had never heard of that term before being asked about it at the hearing and did not know what an ecological assessment was. She said the term ecological assessment was such an unusual term that it would have caused all of the IEP Team members to pause and she would have written it in the notes as that specific term. Because this was such an unusual term for Yugo, she explained that if Parents had requested an ecological assessment, an explanation of what an ecological assessment is would also have to have been written in the notes. No other witness who testified, except for Mother, could recall the substance of any discussion about an ecological assessment during this meeting. Moreover, the IEP Team notes did not have any reference to an ecological assessment, an FAA, or an FBA.

53. There was disagreement in the testimony about whether these certain assessments were actually requested by Parents and their advocate at this meeting. The proposed IEP Amendment dated June 15, 2006, made no reference to any discussion about, or request for, any ecological assessment, any FAA, or any FBA. Student points to the fact

that District representative Yugo was the person who made the handwritten notes on the IEP Amendment. Student takes the position Yugo intentionally or carelessly made no reference to these assessments in the notes. However, Student's Parents and advocate were present at this meeting. It is clear they reviewed this document for accuracy near the time they signed it as evidenced by the very last entry in the discussion notes. This entry, identified as a separate paragraph numbered 10, provides, "Parents want to note that no general education teacher was present." It appears to have been written by the same hand that wrote the rest of the document, but the slant and spacing of the letters is slightly different from the previous paragraphs, a characteristic which is consistent with being written after the page was circulated for review and returned to Yugo to add another line. If Parents and their advocate had made a request for an ecological assessment, an FAA, or an FBA during this meeting, a separate entry like paragraph 10 where Parents made their requests known in the notes would be expected.

54. The meeting lasted several hours during the morning. After a break to review some of the information presented during the meeting, District members of the IEP Team offered to continue discussing Student's requests into the afternoon of Thursday, June 15, 2006. Parents and their advocate were unavailable to do so and had to leave before the meeting discussions were finished. Among the IEP discussion notes was the statement that, "District will consider requests and reconvene after reviewing information. District will respond with meeting or in writing."

55. District members of the IEP Team knew that Parents wanted a response to their requests by Monday, June 19, 2006. However, District members also wanted to continue to get more information from Parents and to discuss the rationale for the requests that were made. The very next day, District attempted to reconvene the meeting that they tried to continue into the afternoon of June 15. District sent Parents three notices dated June 16, 2006, with three alternate meeting dates for June 20, June 22, or June 23, 2006, with the request that Parents choose one of the dates. The cover letter to Parents, enclosing these three proposed meeting notices titled Parent Notification of Special Education Meeting, had a typographical error in the date showing June 13, 2006. However, the cover letter could not have been written on June 13 as it referred to the IEP Team meeting that occurred on June 15, 2006, and also referred to the Beth Ballinger optometry report that was dated June 14, 2006, and presented to District on June 15, 2006. Parents acknowledged receiving District's offer to reconvene the June 15, 2006 meeting, but chose to make no reply to District's offer to meet.

56. Parents removed Student from District's program shortly after the June 15, 2006, meeting. District noted the last day Student attended school was prior to the last day of the school year on June 23, 2006. Parents explained Student took ill during the last week of school and Parents made the decision to remove him from District before classes resumed in July. In either event, Father explained that he and Mother had been thinking about pulling Student out of District's school to get him a more intensive ABA program at home. After June 15, 2006, Parents also refused to allow District's ABA in-home program teacher to come to their home for Student. Father explained that because they made the decision to put

a more intensive ABA program in place for Student, there was no need for District's program any more.

57. After the June 15, 2006 meeting concluded, Parents also made the decision to have no further contact with District for any purpose. Both Father and Mother recalled that District made numerous attempts to reconvene the IEP Team meeting that began on June 15, 2006. Parents also acknowledged District sent multiple letters to Parents after June 15, 2006, asking to reconvene the IEP meeting. However, both Father and Mother made no response to District's requests to reconvene the IEP meeting. Father and Mother explained the reason they refused to have any contact with District after June 15, 2006, was because they were waiting for District to respond in writing to their requests as made at the June 15, 2006 meeting. Parents knew that District was continually sending letters and asking to reconvene the meeting. Parents took the position that District's attempts to reconvene the IEP Team meeting did not constitute an offer in response to their June 15, 2006 request for changes to Student's IEP.

The IEP Team Meeting and Proposed IEP dated August 21, 2006

58. As discussed above, District determined it needed more time to meet with Parents and Student's advocate to discuss and gather information to respond to the many requests made by Student at the June 15, 2006 IEP Team meeting. On the day after this meeting, District attempted to reconvene the meeting in writing. Parents acknowledged receiving District's letter requesting to reconvene the June 15, 2006 IEP Team meeting to respond to their requests. Even though the letter shows it was copied to Student's advocate, Father made a copy of the letter and sent it to his advocate to be certain the advocate received it. Father made a copy of every letter he received from District and provided those copies to his advocate. Father never contacted District to respond to this letter. Mother never contacted District to respond to this letter. Student's advocate never contacted District to respond to this letter. Rather, over a year later, Student's advocate filed the request for due process in this matter.

59. During the hearing, both Father and Mother testified they did not respond to District's letter because they did not consider a request to reconvene the IEP Team meeting as the written response to their advocate's requests. When Father was asked whether he believed Student's advocate had ever responded, Father testified he did not know. When Father was given the opportunity to go outside the hearing room and discuss in confidence whether his advocate had responded to any communication from District after June 15, 2006, Father and advocate declined to do so. Father explained the reason he chose to not attend any IEP Team meeting after the June 15, 2006 meeting was he was still waiting for District's IEP offer in response to their June 15, 2006 requests. However, he never told anyone at District this was why he stopped communicating with District.

60. In addition to the attempts to reconvene the June 15, 2006 IEP Team meeting in June, District sent proposed meeting notices for July 20, 2006, and for August 1, 2006. District's attempts to get Parents to contact District for these times also failed. On August 2,

2006, District gave written notice to Parents of an IEP Team meeting to take place on August 21, 2006. In the letter accompanying this notice, District advised Parents that if Parents did not come to the meeting on August 21, 2006, the meeting would go forward. Although Parents had received notice of the meeting, Parents chose to not attend and participate in the meeting.

61. Without Parents present, the following individuals from District were present at the August 21, 2006 IEP Team meeting. Student's most recent preschool special education teacher, a special education teacher from the SDC kindergarten class, and a special education teacher who started District's Program for Autistic Learners Success (PALS). Other IEP Team members included a general education teacher, speech language and occupational therapists, a program specialist, three autism specialists, a special education coordinator, and administrator for District.

62. After reviewing Student's most recent placement, the requests made at the unfinished IEP Team meeting on June 15, 2006, and input from the District members of the IEP Team then present, District proposed to add two new ABA goals for Student. Among the two ABA goals to be added to the IEP included the recognition of Student's deficits in paying attention to what is going on in a classroom. District proposed to add a goal that "[Student] will establish joint attention with an adult or peer by shifting his gaze between an item of interest and an adult or peer in three out of five opportunities with no more than two cues." District IEP Team members also proposed to add a goal that "[Student] will play with theme based toys using a sequence of three actions within the activity in four out of five opportunities with no more than two cues.

63. With these new goals added, District members of the IEP Team proposed the following program for Student:

1. Placement in the Program for Autistic Learners Success (PALS) at Foothill Elementary for 17.5 hours per week (adult to student ratio: one adult to two students).
2. District's ABA Program consisting of:
 - 10 hours per week outside the classroom, direct ABA teaching.
 - District supervision for four hours per month.
 - District ABA clinic for 2 hours per month.
 - District provided parent training two times per month for 30 minutes each.
 - District workshops for parents of autistic children offered monthly.
3. Evaluations for OT and speech and language services to provide the most accurate reflection of [Student's] current levels of performance.
4. Audiological assessment will be completed by a qualified audiologist to determine specific needs in the areas of hearing and auditory processing.

5. OT services will continue per the November 3, 2005, IEP until the OT assessment is complete, reviewed, and recommendations made by OT.
6. Speech and language services will be increased to: two times per week for 20 minute sessions individual and one time per week for 20 minutes small group.
7. Mainstreaming to general education kindergarten class 15 minutes per day for socialization.
8. Goals and objectives will continue from the November 3, 2005, IEP until the annual review date of November 3, 2006.
 - SLP will also be responsible for goals #6 and 7.
 - OT will also be added to goal #3.
 - ABA is proposing to add two new goals addressing joint attention and appropriate play.
9. District behavior specialist to observe [Student] in new setting to develop behavior plan if [student] experiences behavior challenges.

In addition to this offer of placement and services, District's IEP noted an assessment plan would be sent to Parents with a copy of the proposed IEP.

64. At hearing, Cheryl Brunswig described a typical day in the PALS program. Brunswig, a special education teacher for 37 years, knew the program well: she was involved in setting up the program for District and was also a teacher in the PALS program. Brunswig explained the buses arrive at 7:30 a.m. and the students are brought up to the classroom to unpack their back packs, start rotating through working on toileting program or things on the tables for the students to work on until 8:00 a.m. At this time the class starts with PECS usually in connection with breakfast snacks available for student selection. At 8:15, the class moves into group work at circle time. Circle time is used for imitation skills, song, calendar, name recognition, picture recognition. At 8:30, the class begins center rotations for about 30 minutes per activity. During center rotation, there are groups of up to three students which results in about 10-15 minutes of individual help per student during this time. The centers consist of the students' IEP goals, speech and language, structured play, and a sensory area. After center rotations, the students go outside to play with their group until 10:00a.m. At 10:00 a.m., the class does another group for story and music, followed by a theme or art activity. The students have lunch at 10:45, followed by a closing circle at 11:00 a.m. and the students are dismissed at 11:10 a.m. The afternoon session follows basically the same routine and uses the same centers for rotation.

65. Brunswig also described the difference between the kindergarten SDC and the kindergarten PALS program. The PALS program is very structured with schedules on the board for each student to know exactly what they are going to do every minute of the day. There is no unstructured play time as most of the children are still learning to play with toys.

There is a lot of adult interaction with the students to teach them how to interact. The classroom is kept quiet without an excess of visual and auditory stimulation. The language is kept simple and pictures are frequently used.

66. Brunswig also explained why a general education placement was not proposed for Student. She pointed out Student's short attention span of only a few minutes would not permit Student to attend for the longer periods of time required in the general education setting. The increased noise and the amount of visual information on the walls of the general education classroom and would result in distractions and Student being overwhelmed by all the information input. Student was still non-verbal with no communication system. And even with a one-to-one aide, she explained that the amount of support Student needed to interact with other would result in other students interacting with the aide rather than Student.

67. Under cover of its letter dated August 21, 2006, District sent a copy of the IEP dated August 21, 2006, to Parents with an assessment plan as described in the IEP. Parents acknowledged receiving a copy of this proposed IEP and the assessment plan. Parents understood this was District's offer in response to their requests made at the June 15, 2006 IEP Team meeting. Parents made no response to District's proposed August 21, 2006 IEP and assessment plan. In fact, the first time Parents contacted District after the unfinished June 15, 2006 IEP Team meeting was when the request for due process in this case was filed over a year later on August 21, 2007.

The August 25, 2006, Assessment by Autism Behavior Consultants

68. Within days after District sent the August 21, 2006 IEP and assessment to Parents, Parents engaged Autism Behavior Consultants (ABC) to assess Student. ABC is a nonpublic agency providing ABA services to children with autism. On August 25, 2006, ABC conducted its behavioral observation, parent interview, and review of past records. ABC's clinical director, Selena Emond, testified at the hearing about this assessment. She identified social skills and self help deficits for Student. She also noted that their assessment pointed out the glaring deficit for Student, who was then just shy of turning five years old, was that he had no form of communication. Student was nonverbal and she noted Student did not use PECS and did not use sign language. As a result, Student did not have a way to communicate. Emond also noted that at the time of this assessment, Student did not make eye contact which is necessary to build sustained attention and joint attention which are fundamental skills.

69. After the assessment in August, ABC prepared a written Initial Assessment report dated October 1, 2006. This report recommended an intensive behavioral intervention plan consisting of 40 hours of in-home therapy per week on a year round basis. Emond explained that it is not common for ABC to recommend as much as 40 hours of therapy per week. However, since Student was five years old, but only had the skills of a two year old child, such an intensive behavioral program was necessary. In addition, for Student's

program to be properly supervised, four hours of clinical direction and 12 hours of supervision per month were also recommended.

70. At the hearing, Father testified that soon after ABC provided their initial assessment, Parents began in-home ABA services for Student through ABC. As a result, Student received no services from District or any other provider from when they pulled Student out of District's school on June 15, 2006, until after the intake assessment was prepared by ABC on October 1, 2006. Parents have continued to use ABC as the ABA provider for Student.

The Independent Psychological Evaluation by Dr. Paltin on December 29, 2006

71. On December 29, 2006, David M. Paltin, Ph.D., evaluated Student at the request of Parents. Dr. Paltin is a clinical psychologist licensed in California and Hawaii since 1992. He received his Ph.D. in clinical psychology in 1990. He currently maintains a private practice in Orange, California, specializing in children, psychoeducational assessments, psychological assessments, and working with attention deficit and developmental disorders. He is also a core adjunct faculty member at National University where he teaches psychopharmacology, biological psychology, and cognitive psychology among other courses.

72. Dr. Paltin estimated his evaluation of Student took between two and two-and-a-half hours. This time was spent at his office location and included approximately 15 minutes of initial interaction; 45 minutes of observation time, during which he asked questions of Parents; 45 minutes of play time with Student; and the remainder of time for discussion with Parents. He prepared a written report of his assessment dated December 29, 2006 which identified Student's primary impairments in the areas of focusing and attention, behavioral regulation, and attunement to his interpersonal environment. Dr. Paltin also highlighted Student's serious communication impairments, noting that his low level of language is a key barrier to his continued development and integration into school.

73. With regard to focusing and attention, Dr. Paltin described Student's attention span as from approximately three to five minutes long during non-salient activity and as approximately 10 minutes long for high interest tasks. This is an increase of from one to two minutes over the attention span noted for Student over six months earlier during the time Student was attending District's program. With respect to behavioral regulation, Dr. Paltin noted Student's self-stimulatory behavior was not constant and was not generally disruptive of other activities taking place. He identified only a few behaviors such as head scratching, the seeking of tactile stimulation such as feeling the carpet, and the seeking of deep pressure hugs from Parents, noting he did not observe any self-injurious behaviors. With respect to attunement, the report noted Student was willing to engage in cooperative interaction with Dr. Paltin, but that interaction required redirections, verbal prompting, and individual engagement. In discussing communication, Dr. Paltin did not identify any verbal communication by Student. Rather, Dr. Paltin noted a connectedness and responsiveness on

the part of Student when he attempted to use verbal cues with Student and when he engaged Student in the play environment. This was in contrast to the lack of communication connection that Student had exhibited, and was noted by speech language pathologist Pope, a year earlier.

74. Dr. Paltin's report noted that Student's then current programming included approximately 25 hours per week of ABA therapy.¹ The 25 hours per week of therapy that Student was receiving from ABC was less than the 40 hours per week that ABC's clinical director Emond testified she had originally recommended. Dr. Paltin recommended some 5 hours more per week, for a total of 30 hours of intensive ABA therapy per week, with goals to primarily focus on attention and visual orientation to the target situation or facilitator; to follow a behavioral sequence involving two or three chained actions; and to replace distracting stimulatory behavior and "walk away" behavior with an alternative soothing behavior. He also recommended at least three hours of direct individual speech and language services which should not be substituted with being placed in a language based environment. Finally, as of the date of his evaluation on December 29, 2006, Dr. Paltin recommended that Student's IEP Team should discuss consideration of a non-SDC placement. In spite of this final recommendation, there was no evidence that Parents provided Dr. Paltin's December 29, 2006, report to District until the time the parties exchanged copies of documents shortly before the commencement of this hearing.

Testimony by Dr. Lou Brown

75. Student called Lou Brown, Ph.D., for his opinions on the least restrictive environment for Student. Dr. Brown received his M.A. in Clinical Psychology from East Carolina University in 1965. He received his Ph.D. in Special Education and Vocational Rehabilitation from Florida State University in 1969. From 1969 until his retirement in 2003 he was a professor in the department of Rehabilitation Psychology and Special Education at the University of Wisconsin. He has written extensively about special education and has testified as an expert witness in numerous federal district court proceedings. Dr. Brown was well qualified to testify regarding special education and LRE.

76. When he was first called by Student to testify in this case on December 6, 2007, Dr. Brown had never seen any document relating to Student and had never seen any of the exhibits in this case. When he later testified on December 19, 2007, Dr. Brown was an able advocate for integrating special education students with their general education peers in general terms. However, his opinions relating to Student were based on his general perception of special education placements for children with autism and not on the individual needs of Student. For example, Dr. Brown testified that Student, like all autistic children, should be given the opportunity to start his education in a general education class. He explained that he used to recommend the special day class setting, but said he has not recommended placing a student in a special day class for the last 35 years.

¹ There was no claim for reimbursement for educational expenses incurred for this intervention, and no evidence of the cost of this intervention was introduced, at this due process hearing.

77. Dr. Brown's testimony regarding Student is given little weight. Dr. Brown never met Student. He never observed Student in any setting in person or via videotape. He never interviewed or spoke with Student's Parents, teachers, or any service provider. Dr. Brown also testified in direct contravention to ABC's clinical director Emond, another witness called by Student, when he stated emphatically that a 40 hour-a-week in-home ABA program, as recommended and provided by ABC, was not an appropriate placement for Student.

Reasonably Calculated to Provide Educational Benefit

78. For an IEP to be appropriate under the IDEA, a school district's proposed program must also have been reasonably calculated to provide Student with some educational benefit. As provided above, the IEP for the 2005-2006 school year had placed Student in District's preschool SDC. The IEP proposed by District for the 2006-2007 school year proposed to place Student in District's kindergarten PALS program

The Program District Provided for the 2005-2006 School Year

79. The preschool SDC where Student attended during 2005-2006 was special education teacher Becker's class. As described above in Factual Finding 38, for a half hour of each day the students in this class received speech services as a group activity. In this group setting, they worked on specific speech sounds and would sing sound songs. They also worked on worksheets and other activities such as learning prepositions. There was group circle time for a half hour, table time for an hour, and 30 minutes of ABA services in a room separate from the classroom.

80. At the time the IEP was formulated, there was no question that Student would derive little to no educational benefit from many of these services. The group speech providing sounds to imitate was not calculated to provide benefit to Student as District's assessments were clear that Student was nonverbal and did not imitate sounds. The use of written worksheets and other activities such as learning prepositions was also not calculated to provide educational benefit for Student where Student did not even have a communication system. Student needed to develop communication readiness skills before Student would derive any benefit from the provision of such direct services in the areas of sound production, language, and grammar.

81. Student would also derive little to no educational benefit from the activities during circle time and table time. Student had not yet developed the skills to attend or to focus to be able to maintain attention to these activities for more than two or three minutes. Without attention, focus, and a communication system, Student could not derive benefit from the group social skills during circle time. He would lose interest after just a few moments and walk away from the circle, needing hand over hand prompting to return. Without basic eye contact and a communication system to understand what was being taught during table time, Student could not derive educational benefit by moving from the different activities being taught, such as learning to write and counting, as well.

82. Finally, the ABA services provided to Student amounted to only 30 minutes of his three and a half hour school day during November and December 2005. Beginning January 9, 2006, an additional 45 minutes per day of in-home ABA services brought the total amount of time up to one hour and fifteen minutes per day. This small amount of time was not calculated to address development of the critical attention, focus, and communication readiness skills that the ABA specialist needed to be working on with Student. Based on the foregoing, the program provided by District for the 2005-2006 school year did not provide Student with a FAPE in the LRE.

The Program District Proposed for the 2006-2007 School Year

83. The kindergarten PALS program was District's placement offer for the 2006-2007 school year. As described above in Factual Findings 64 and 65, the PALS program resembled the SDC but was more structured. It also reduced circle time to less than 30 minutes of the day and eliminated unstructured play time completely. However, during the time of center rotations, Student would only derive individual instruction for about 10-15 minutes of every half hour as he moved through the rotations. For a half hour of each day the students received speech services as a group activity. In this group setting, they worked on specific speech sounds and would sing sound songs. They also worked on worksheets and other activities such as learning prepositions. There was group circle time for a half hour, table time for an hour, and 30 minutes of ABA services in a room separate from the classroom.

84. Student would derive minimal benefit from many of these services. The activities during circle time would again be lost to him. For example, during circle time in the PALS program they would work on things such as imitation and song in the group setting. However, Student was not able to focus and attend, did not imitate, and did not repeat sounds that were modeled to him; Student would therefore not benefit from this time. Similarly, with Student's deficits in attention, focus, and communication skills, Student would not be able to derive benefit from the time table time unless he was receiving individual assistance. As described above, Student would receive individual attention only 10-15 minutes of each half hour devoted to working on IEP goals during table time and that would amount to less than half the time Student was engaged in these activities. That would provide as little as 30 to 45 minutes of individual teaching time, leaving him with from 45 minutes up to an hour of unassisted time, during each of the table time activity sessions. This would result in less than an hour of each school day where Student would receive the direct, structured, one-to-one interaction that he needed to progress academically. Until Student developed more of the skills to be successful in the activities provided by the PALS program, such program was not calculated to provide more than minimal educational benefit for Student.²

² The findings in this decision are not to be construed as any criticism of District's PALS program. To the contrary, the PALS program appears designed to provide educational benefit to an array of needs. Rather, it is Student's IEP, a portion of which includes the PALS program, which does not provide a FAPE for Student for the 2006-2007 school year.

85. In addition to Student participating in the kindergarten PALS program for three and a half hours each day, District also proposed to provide its ABA program outside the classroom for an additional two hours each day. This was a substantial increase over the 45 minutes per day of in-home ABA services that District previously provided to Student from January to June 2006. This direct one-to-one intervention for Student would be supported by four hours of supervision each month, two hours of ABA clinic each month, and two 30 minute training sessions for Parents each month. This portion of the proposed IEP was calculated to provide educational benefit to Student in the home setting. However, considering the two hours per day of in-home program, plus the less than one hour of each day of direct ABA services in the school setting, Student would receive less than three hours of intensive ABA therapy per day overall. While the increase in the in-home portion of the program would help promote generalization, in view of Student's need for intensive intervention as of the summer of 2006, less than 15 hours of intensive intervention per week was not calculated to provide educational benefit to Student.

86. District also offered direct speech and language services to Student in this IEP. District proposed to provide services in both individual and small group settings. Direct individual speech and language services twice a week, plus small group speech and language services once a week, in 20 minute sessions was designed to help Student develop skills for speech. With this program, Student would be provided instruction in a one-to-one environment with a therapist to help him acquire those pre-communication skills necessary for development of a communication system. While his pre-communication skills were also being developed in the ABA program, these direct individual services would provide opportunities for a speech therapist to be present several times a week to immediately identify and reinforce those critical skills as soon as Student began demonstrating them. With this program, Student would also be provided with small group instruction to help foster social interaction for communication development. With the opportunities for development of communication designed to occur across several environments including individual interaction, small groups, the PALS classroom setting, and the in-home environment, this portion of District's program appears calculated to provide educational benefit to Student in his critical area of need for speech and language.

87. Moreover, District's proposal to evaluate Student to provide the most accurate reflection of his current speech and language performance was oriented to providing speech and language services that would benefit Student. District's speech language therapist was actually still of the opinion that Student had not yet developed sufficient pre-communication skills for the direct service model to be employed. In spite of this, District still made the proposal for direct service in anticipation of those skills being developed by Student and provided this opportunity for a re-evaluation of Student's skills to provide appropriate speech and language interventions in this important area of need.

88. In the area of OT, District's August 21, 2006 IEP offered to continue providing direct and collaborative OT services to Student. District also offered to conduct an OT evaluation to update perceptual-motor development information as well as to assess Student's sensory needs as requested during the June 15, 2006 meeting.

89. District also offered to conduct an assessment by an audiologist to report on Student's hearing and auditory processing. Parents had requested an auditory processing assessment during the June 15, 2006 meeting. District's proposal to provide a qualified audiologist to perform this assessment was designed to identify other potential areas of need for Student which, if found to exist, could be addressed by the IEP Team.

90. District also offered to mainstream Student in the kindergarten general education class for socialization for 15 minutes each day. At first blush, this may seem like a short period of time to promote socialization, especially when one considers that typically developing peers in general education settings spend hours of each kindergarten day interacting with each other to develop their social skills. However, in view of Student's unique deficits and need to develop even pre-communication skills, this general education interaction appears reasonable. With Student's short attention span, lack of imitation skills, and no communication system, these 15 minutes of socialization was designed to begin to introduce Student to interactions with typically developing peers. Without the ability to focus, imitate, or communicate, Student would not likely benefit from additional time with such peers. This is especially true where Student had difficulty making communication connectedness with the adult aide supporting him, and such aide would be the person interacting with other kindergarten students in the general education setting. Student certainly deserves as much opportunity to interact with typically developing peers as is possible, but Student needed to develop his skill levels in order to benefit from more of those opportunities.

91. District also offered a behavior specialist to conduct observations of Student in his new setting to develop a behavior plan in the event Student experienced behavior problems. The data collected by a behavior specialist would help determine whether Student had any of the types of inappropriate behaviors in the school that Student's advocate inquired about during the June 15, 2006 IEP Team meeting. In the absence of a request for an ecological assessment, an FAA, or an FBA, such data collection was designed to confirm or rule out the existence of adverse or maladaptive behaviors in the kindergarten PALS setting which would be a new environment for Student with more structure, less auditory and visual distractions, more direct adult interaction with Student, and more simple language and pictures to promote communication. With a behavioral specialist following Student into his kindergarten class to observe and collect data on his behaviors in this new environment, this portion of the IEP was plainly calculated to provide behavioral benefit to Student from his very first contacts with the new program.

Least Restrictive Environment

92. A school district must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services. This continuum includes regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions. In determining where to place a student along this continuum, a school district is required to provide special education to a student in the least restrictive environment. The purpose of this requirement is to enable a

disabled student's education to occur with non-disabled peers to the maximum extent possible. To determine whether a placement is in the least restrictive environment for a particular student, there must be a balancing of several factors. These factors include the educational benefits to the student of placement full-time in a regular class; the non-academic benefits of such placement; the effect the student has on the teacher and other children in the regular class; and the costs of mainstreaming the student.

LRE for the 2005-2006 School Year

93. Student has urged the least restrictive environment for the 2005-2006 school year was not the preschool SDC that Student attended, but rather a general education setting. However, the evidence was undisputed that District did not have any preschool general education program. The only preschool programming provided by District was the preschool SDC. As a result, District's preschool SDC would be the least restrictive environment in which to implement any IEP for Student for the 2005-2006 school year. Nevertheless, the program provided by District was not calculated to provide more than minimal educational benefit for Student and failed to provide a FAPE for that school year.

LRE for the 2006-2007 School Year

94. For the 2006-2007 school year, Student again takes the position that the least restrictive environment was a kindergarten general education class, not the kindergarten PALS class proposed by District. A balancing of the benefits, effects, and costs of placement must be considered.

Academic benefits

95. The academic benefits of the kindergarten PALS program is discussed above in Factual Findings 83 through 91 in the discussion of the Program District proposed for the 2006-2007 School Year. As discussed in that section, Student would receive significant academic benefit from District's proposed program.

96. The academic benefits of the kindergarten general education program would be less. The basic noise levels in the class would be a distraction for Student. In addition to the auditory distractions, the general education program had extensive visual distractions throughout the classroom. During the hearing, Student's advocate asked District witnesses if student's goals could be implemented if Student was in a general education placement. For the most part it was agreed that for any particular goal in Student's IEP, when considered alone, such goal could be implemented in a general education setting. However, while Student could be pulled out to a quiet area for his ABA programming, and could be pulled out to a quiet area for his speech and language therapy, and could be taught with one-to-one interaction when pulled to a corner of the general education classroom isolated from other distracting influences of other students, it became apparent that there was very little time and opportunity for interaction with typically developing peers.

97. The problem with Student receiving academic benefit in a kindergarten general education class is based on his unique and serious deficits in being able to focus, attend, and communicate. Without the ability to focus and attend beyond two to three minutes at a time, Student would need a one-to-one aide to provide constant redirection and hand over hand prompting and guidance. Student would essentially be learning through the aide, and separate from the other students in the class, rather than through the teacher along with the other students. The nature and severity of Student's needs result in a finding that Student would not receive academic benefits in the general education environment except for the time he was away from his typically developing peers with individual support and services.

Non-academic benefits

98. A student's opportunity to interact socially with non-disabled peers is an important benefit of the general education environment. However, as discussed above, Student lacked the basic skills to even begin to benefit from social interaction with his peers. In contrast, the program designed by District, which included the PALS program in the school setting and the ABA program in the home setting, would capitalize on social interaction with adults in the very structured settings that Student required. The structured adult interactions would help develop and guide Student as he began to acquire his pre-communication skills and social interaction skills. As such it is doubtful there would be a net benefit to Student being schooled with non-disabled peers.

99. Moreover, Student's cognitive deficits, including severe memory and speech and language deficits, likely causes greater academic and social pressure in the larger general education setting. At this point in Student's life, such increases to Student's levels of anxiety, stress, and worry, cancel out the potential non-academic benefits of the general education setting.

Effect on the regular education teacher and other students

100. There was little testimony on the issue of Student's effect on a general education teacher and any other students in a general education class. Dr. Paltin noted he did not observe any behaviors that would interfere with a general education teacher trying to teach other students. However, the entire time of observation was less than two and a half hours in a clinical setting: the observations took place in Dr. Paltin's office, with Parents always present, and not in a school setting with other children and classroom distractions in place. This part of the balancing test was found to be neither a plus nor a minus in determining the least restrictive environment for Student.

Costs of Placement

101. There was no testimony from any witness on the issue of the costs of the placement options for Student. This part of the balancing test was found to be neither a plus nor a minus in determining the least restrictive environment for Student.

102. In balancing the factors above, the weight of the evidence showed that Student would not derive academic benefit by virtue of his inclusion in a general education setting beyond the time he spent gaining benefit from his individual one-to-one support time and pull-out services. Moreover, the distractions and excessive stimulation of the general education setting would actually interfere with Student's ability to learn. As such, the benefits to Student in being educated in the PALS program setting outweighed being placed in the general education setting as of August 21, 2006. The evidence showed, therefore, that Student cannot be educated satisfactorily in a general education classroom, and that the District's offer of placement in the kindergarten PALS program would have been the least restrictive environment if the overall program provided more of the individual therapy Student needed to receive educational benefit. Until Student could develop more basic skills, a more restrictive environment, not less, was the appropriate placement for Student.

103. Based on the foregoing, the August 21, 2006 IEP was not reasonably calculated to provide educational benefit to Student and would not have provided him with a FAPE for the 2006-2007 school year in the least restrictive environment.

LEGAL CONCLUSIONS

Applicable Law

1. Student, as the petitioner, 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].)

2. A child with a disability has the right to a free appropriate public education (FAPE) under the reauthorized Individuals with Disabilities Education Improvement Act (IDEA 2004). (Ed. Code, §§ 56000, 56026; 20 U.S.C. § 1412(a)(1)(A).) FAPE is defined as special education and related services that are available to the student at no cost to the parent, that meet the State educational standards, and that conform to the student's individualized education program (IEP). (Ed. Code, § 56031; Cal. Code Regs., tit. 5 § 3001, subd. (o); 20 U.S.C. § 1401(9).) The term "related services" (designated instructional services (DIS) in California) includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from education. (Ed. Code, § 56363; 20 U.S.C. § 1401(26).)

3. 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 of the Hendrick Hudson Central School District 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.)

4. 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 that district provided 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.)

5. 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, 98 L.Ed.2d 686]; 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, citing *Fuhrmann v. East Hanover Bd. Of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1041.) 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.)

6. The IEP is a written document detailing, in relevant part, (1) the student's current levels of academic and functional performance (for preschool children, how the disability affects the child's participation in appropriate activities), (2) a statement of measurable academic and functional goals designed to meet the child's educational needs and enable the child to make progress, (3) a description of how the goals will be measured, (4) a statement of the special education and related services to be provided the Student based on peer-reviewed research to the extent practicable, (5) the beginning date along with the anticipated frequency, location and duration of the special education and related services, and (6) an explanation of the extent to which the child will not participate with non-disabled children in a regular class or other activities. (20 U.S.C. § 1414(d)(1)(A)(i); 34 C.F.R. § 300.320(a); Ed. Code, § 56345, subd. (a).) The statement of measurable annual goals must be designed to meet the individual's needs that result from the individual's disability to enable the preschool pupil to participate in appropriate activities. (Ed. Code, § 56345, subds. (a)(1)(B), (a)(2)(A); see also 34 C.F.R. § 300.320(a).)

7. 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); Ed. Code, § 56341, subd. (a).) An annual IEP shall contain a statement of the individual's present levels of academic achievement and functional performance, including the manner in which the disability of the individual affects his or her involvement and progress in the general education curriculum. (Ed. Code, § 56345, subd. (a)(1); 20 U.S.C. § 1414(d)(1)(A)(i).) An annual IEP must also contain a statement of measurable annual goals designed to: (1) meet the individual's needs that result from the individual's disability to enable the pupil to be involved in and make progress in the general curriculum; and (2) meet each of the pupil's other educational needs that result from the individual's disability. (Ed. Code, § 56345, subd. (a)(2); 20 U.S.C. § 1414(d)(1)(A)(iii).)

Procedural Violations

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

9. Each meeting to develop, review, or revise an IEP must be conducted by an individualized education program team (IEP Team). A school district shall convene an IEP Team meeting at least annually to review the student's progress, the IEP, including whether the annual goals are being achieved, the appropriateness of the placement, and to make any necessary revisions. (Ed. Code, § 56343, subd. (d).) A district shall have an IEP in effect for each child with exceptional needs at the beginning of each school year. (Ed. Code, § 56344, subd. (b); 34 C.F.R. § 300.323(a)(2006).)

10. In addition to at least one parent, the IEP Team members must include not less than one regular education teacher if the student is, or may be, participating in the regular education environment, not less than one special education teacher, a knowledgeable representative of the school district who is qualified to supervise the provision of special education services, and an individual who can interpret the instructional implications of the assessment results. (Ed. Code, § 56341, subd. (b).) When required, the failure to include at least one regular education teacher, standing alone, is a structural defect that prejudices the right of a disabled student to receive a FAPE. (*M.L. v. Federal Way School District* (9th Cir. 2004) 387 F.3d 1101, 1115.)

11. In order to fulfill the goal of parental participation in the IEP process, the school district is required to conduct, not just an IEP meeting, but a meaningful IEP meeting. (*Target Range, supra*, 960 F.2d at p. 1485.) A parent has meaningfully participated in the development of an IEP when he or she is informed of the child's problems, attends the IEP meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1036 [parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].) “A school district violates IDEA procedures if it independently develops an IEP, without meaningful parental participation, and then simply presents the IEP to the parent for ratification.” (*Ms. S. etc. v. Vashon Island School District* (9th Cir. 2003) 337 F.3d 1115, 1131.) The test is whether the school district comes to the IEP meeting with an open mind and several options, and discusses and considers the parents’ placement recommendations and/or concerns before the IEP Team makes a final recommendation. (*Doyle v. Arlington County School Board* (D.C. Va. 1992) 806 F.Supp. 1253, 1262.) The core of the IDEA statute is the cooperative process that it establishes between parents and schools and the central vehicle for this collaboration is the IEP process. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 163 L.Ed.2d 387].)

Substantive Violations

12. Regarding substantive appropriateness under the IDEA, the Supreme Court’s *Rowley* opinion determined that a student’s IEP must be designed to meet the unique needs of the student, be reasonably calculated to provide the student with some educational benefit, and comport with the student’s IEP. However, the Court determined that the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student’s abilities. (*Rowley*, 458 U.S. 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. 200.)

13. Federal and state laws also require a school district to provide special education in the least restrictive environment (LRE). (20 U.S.C. § 1412(a)(5)(A); *Poolaw v. Bishop* (9th Cir. 1995) 67 F.3d 830, 834 (*Poolaw*).) A special education student must be educated with non-disabled peers “to the maximum extent appropriate,” and may be removed from the regular education environment only when the nature or severity of the student’s disabilities is such that education in regular classes with the use of supplementary aids and services “cannot be achieved satisfactorily.” (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114; Ed. Code, § 56364.2, subd. (a).)

14. The IDEA establishes a strong preference in favor of the placement of a special education student in the LRE. (20 U.S.C. § 1412 (a)(5)(A); *Rowley, supra*, 458 U.S. at 181 n.4; *Poolaw, supra*, 67 F.3d at p. 834.) In light of this preference, and in order to measure whether a placement is in the LRE, the Ninth Circuit, in *Sacramento City Unified*

Sch. Dist. v. Rachel H. (9th Cir. 1994) 14 F.3d 1398, 1403, has adopted a balancing test that requires the consideration of four factors:

- (1) the educational benefits of placement full-time in a regular class;
- (2) the non-academic benefits of such placement;
- (3) the effect [the student] had on the teacher and children in the regular class; and
- (4) the costs of mainstreaming the [student].

Compensatory education.

15. The IDEA empowers courts to grant requests for compensatory services as the court determines is appropriate. (*Burlington Sch. Comm. v. Massachusetts Dept. of Education* (1985) 471 U.S. 359 [105 S.Ct. 1996] (*Burlington*)). Equitable considerations may be considered when fashioning relief for violations of the IDEA. (*Florence County Sch. Dist. Four v. Carter* (1993) 510 U.S. 7, 16 [114 S.Ct. 361]; *Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496 (*Student W.*)). 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, citing *Student W., supra*, 31 F.3d at 1496.) Compensatory education is not a contractual remedy, but an equitable remedy, part of the court's resources in crafting "appropriate relief." (*Student W., supra*, 31 F.3d at p. 1497; see also *Burlington, supra*, 471 U.S. at p. 374 [equitable considerations are relevant in fashioning relief].) "The conduct of both parties must be reviewed to determine whether relief is appropriate." (*Target Range, supra*, 960 F.2d at p. 1486; see also *Student W., supra*, 31 F.3d at p. 1496.) Factors to be considered when determining the amount of reimbursement to be awarded include the existence of other, more suitable placements; the effort expended by the parent in securing alternative placements; and the general cooperative or uncooperative position of the school district. (*Target Range, supra*, 960 F.2d at p. 1487; *Glendale Unified Sch. Dist. v. Almasi* (C.D. Cal. 2000) 122 F.Supp.2d 1093, 1109.) 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.)

Determination of Issues

Issue 1.

Did District fail to provide an appropriate inclusive education with the appropriate support and services in the least restrictive environment for the 2005-2006 school year? Student alleged substantive violations including:

- A. *District did not develop an appropriate behavior plan.*
- B. *District did not provide adequate occupational therapy.*
- C. *District did not provide appropriate speech and language services.*

- D. *District did not provide appropriate services to meet Student's behavior, communication, motor, and sensory needs.*
- E. *District failed to conduct an appropriate functional analysis assessment of Student.*

1. Pursuant to Factual Findings 4-23 and 24-39 and Legal Conclusions 1-7 and 12-14, District failed to provide the appropriate support and services in the least restrictive environment for the 2005-2006 school year.

2. The evidence presented at hearing showed Student had basic communication and socialization needs that had to be met before Student could benefit from being taught in a classroom or even in a small group. The most recent assessment information available to the IEP Team was the testing done by speech language pathologist Pope one year earlier. With no increase in Student's pre-communication skills reported, Student was performing with extremely low communication skills, with assessment results in the extremely low first percentile. This meant Student was performing in the range similar to a typically developing child between the age of six months and one year. Student was performing at a level that required him to be taught how to focus and how to attend in a one-to-one teaching environment.

3. District's speech language pathologist explained the inability of Student to benefit from direct services for speech and language intervention: he could not focus or attend to the instruction and did not even have the skills necessary to imitate what was being demonstrated for him. She explained that the services for speech and language would be provided on a consultation/collaboration basis, consisting of developing pre-communication skills, and would be handled by the ABA therapist. For these same reasons, Student could not benefit from the small group instruction provided in the preschool SDC. The IEPs that covered this school year included the November 16, 2004 IEP, the September 19, 2005 IEPO Amendment, and the November 3, 2005 IEP. When the 2005-2006 school year began, Student was receiving 15 minutes per day of ABA services pursuant to the IEP from November 2004. Although this was increased to 30 minutes per day on September 19, 2005, it was fixed at only 30 minutes per day for four days per week in the November 3, 2005 IEP. These 30 minutes per day would not provide anything more than a minimal amount of educational benefit to Student.

4. Pursuant to all the Factual Findings and Legal Conclusion 1, there was insufficient evidence to support any findings that District failed to provide appropriate services to meet Student's occupational therapy, motor, or sensory needs during the 2005-2006 school year.

5. Pursuant to Factual Findings 50, 52, and 53, there was also insufficient evidence to support any findings that District failed to develop any behavior plan or conduct any functional analysis assessment of Student during the 2005-2006 school year. The testimony of special education teacher Becker that the Student's behaviors were typical of

the behaviors she and her staff encountered, and were manageable in the classroom was genuine and credible.

Issue 2.

Did District fail to provide an appropriate inclusive education with the appropriate support and services in the least restrictive environment for the 2006-2007 school year? Student alleged substantive violations including:

- A. District did not develop an appropriate behavior plan.*
- B. District did not provide adequate occupational therapy.*
- C. District did not provide appropriate speech and language services.*
- D. District did not provide appropriate services to meet Student's behavior, communication, motor, and sensory needs.*
- E. District failed to conduct an appropriate functional analysis assessment of Student.*

6. For similar reasons, and pursuant to Factual Findings 1-7, 8-43, 45-78, 83-91, and 94-103, and Legal Conclusions 1, 4-7, and 12-14, District failed to provide the appropriate support and services that were reasonably calculated to provide educational benefit to Student in the least restrictive environment for the 2006-2007 school year.

7. District failed to provide adequate speech and language services for Student for the 2006-2007 school year. Student had no communication system and no way to adequately make known his needs and wants. He was still nonverbal, and did not use any other communication system such as sign language or PECS. After more than a year in District's preschool SDC, he was still not yet ready to learn communication, since he still lacked sufficient pre-communication skills. Student had not increased his skills sufficiently in the preschool SDC environment with the small amount of one-to-one intensive service provided to Student. An increase of the one-to-one service in the PALS program might have benefited Student if that benefit was not offset by the greater amount of time that Student would not receive one-to-one service, which was critical to his development of pre-communication, focus and attention skills. As a result, Student was denied a FAPE in District's IEP offer dated August 21, 2006.

8. Pursuant to Factual Findings 52 and 53, the evidence also demonstrated that the only time Parents assert they raised the issue of a functional analysis assessment was during the June 15, 2006 IEP Team meeting. There was no written request for this assessment. There was no other witness that recalled discussion of such assessment. And the notes of the June 15, 2006 IEP Team meeting, reviewed and signed by Parents and their advocate, was silent on this assessment. Even though Student's teacher testified there were no unusual behaviors that would require the formulation of a behavior plan for Student, there was a notation among the requests by Student for a "behavior plan with data collection." District's offer to have a behavior specialist observe Student in a new educational placement was designed to promptly identify any behavior challenges upon Student's return to

District's school. However, Parents' refusal to participate in any further IEP Team meeting, or to communicate in any fashion with District after the truncated June 15, 2006 meeting, prevented any further inquiry into the collection of data which would be necessary before formulating a behavior plan.

Issue 3.

Did District fail to develop an appropriate individualized education program (IEP) for the 2005-2006 school year? Student alleged procedural violations including:

- A. District failed to have a general education teacher present at the IEP meeting convened on June 15, 2006.*
- B. District did not provide adequate occupational therapy.*
- C. District did not provide appropriate speech and language services.*
- D. District did not provide appropriate services to meet Student's behavior, communication, motor, and sensory needs.*
- E. District failed to conduct an appropriate functional analysis assessment of Student.*

9. Pursuant to Factual Findings 40-43, and 44-47, and Legal Conclusion 10, there was no violation for the failure to have a general education teacher present at the June 15, 2006 IEP Team meeting. The March 9, 2006 IEP Team meeting was convened for the purpose of providing for Student's transition from preschool to kindergarten. At the March meeting, a general education teacher was present, and Parents agreed to the kindergarten SDC class. At the April 27, 2006 meeting, there was no discussion of any request for a general education setting and the parties actually added goals to be implemented in the kindergarten SDC class. Therefore, as far as District representatives knew on June 15, 2006, Student was not going to be participating in the general education environment during 2006-2007, his kindergarten year.

10. A general education teacher is required to be present if the student is, or may be, participating in the regular education environment. Parents had agreed to the SDC placement as provided in the March 9, 2006 IEP. Moreover, there was an April 27, 2006 Amendment to the IEP providing for the kindergarten SDC placement which did not make any mention of any general education placement request. District had no knowledge that Parents had any interest in any general education placement request. In fact, District had asked Parents what they wanted to discuss in anticipation of the June 15, 2006 IEP Team meeting, but Parents would not tell District what they wanted to discuss, other than a reference to Student's program. District representatives testified credibly that if they knew a request for a general education placement would be made at the June 15, 2006 IEP Team meeting, they would have secured the attendance of a general education teacher for that meeting. Since Student was not, and likely would not be, participating in the general education environment as of June 15, 2006, there was no procedural violation for District's failure to have a general education present at this meeting.

11. For the same reasons in the substantive discussion in Issue 1, there were also no procedural violations relating to Student's occupational therapy, motor, sensory, or behavioral needs.

Issue 4.

If Student was denied a FAPE, is Student entitled to compensatory education?

12. Compensatory education, to provide a student with missed educational opportunity, is an equitable remedy. For the failure to provide Student a FAPE for the 2005-2006 school year, District should be required to provide compensatory education in the form of the intensive ABA in-home therapy provided by ABC, for 30 hours per week, for a total of 16 weeks. Although there was a discussion of a 40 hour program at the time of the initial assessment by ABC, there was credible evidence provided by Dr. Paltin that Student was actually receiving a program consisting of 25 hours of intervention per week. Dr Paltin's opinion that Student should be receiving 30 hours per week to meet his needs was persuasive. An additional 12 hours per month, or three hours per week, of supervision and four hours per month, or one hour per week, of clinical direction, would be appropriate to supervise the program.

13. The provision of this program for 16 weeks would represent approximately one-half of a school year of intervention. In view of the serious deficits that were known to exist for Student in June 2006, a time which was over a year before the request for hearing was filed in this case, an evaluation of the benefits of this program and any changes that should be made, should be undertaken by the end of this 16 week period and another IEP Team meeting should be convened to review this evaluation.

14. Parents' failure and refusal to communicate in any fashion with District after June 15, 2006, makes it inequitable to award compensatory services beyond 16 weeks. From the time District learned that Parents wanted to formulate a new IEP for Student and made their requests at the June 15 meeting, District has attempted to work with Parents to do so. It is Parents who have refused to cooperate in the IEP process.

ORDER

1. District shall provide intensive in-home ABA therapy for Student for 30 hours per week, for 16 weeks, with an additional three hours of supervision and one hour of clinical direction per week, through Autism Behavior Consultants as compensatory education for the failure to provide a FAPE to Student for the 2005-2006 school year and failing to offer a FAPE for the 2006-2007 school year.

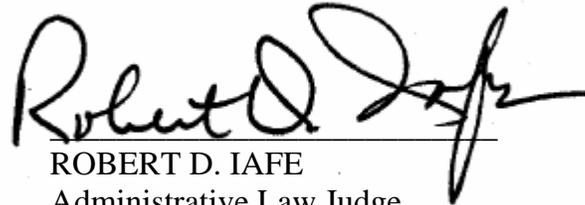
PREVAILING PARTY

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 the issues 1.C., 2.C., 3.C., and 4; and District prevailed on issues 1.A., 1.B., 1.D., 1.E., 2.A., 2.B., 2.D., 2.E., 3.A., 3.B., 3.D., 3.E, as heard and decided 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: February 20, 2008

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
Special Education Division