

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENT on behalf of STUDENT,

v.

MORENO VALLEY UNIFIED SCHOOL  
DISTRICT.

OAH CASE NO. 2008120288 and  
2009010604

MORENO VALLEY UNIFIED SCHOOL  
DISTRICT,

v.

PARENT on behalf of STUDENT.

OAH CASE NO. 2008120285

**DECISION**

Elsa H. Jones, Administrative Law Judge, Office of Administrative Hearings (OAH) heard these consolidated matters on April 6, 7, 9, 10, and 27-30, 2009; May 27-29, 2009; and June 1, 2, and 4, 2009. The hearing was held in Riverside, California, except on April 6, 2009, when the hearing was held in Moreno Valley, California, and on June 4, 2009, when the hearing was conducted by telephonic conference call.

Student was represented by Tania L. Whiteleather, Attorney at Law, of the Law of Offices of Tania L. Whiteleather. Mother attended all hearing days, and Father attended several hearing days. Ms. Whiteleather was also assisted by Imari Nicoloff on the afternoon of April 10, 2009, and by Nicole Morrissey on May 27 and May 28, 2009.

Moreno Valley Unified School District (District) was represented by Jack B. Clarke, Jr., and Vivian E. Billups, Attorneys at Law, of Best Best & Krieger LLP. Peggy Reed, the Director of Special Education for the District, attended all hearing days.

District's Due Process Hearing Request (District's Complaint), OAH Case No. 2008120285, was filed with OAH on December 3, 2008. On January 6, 2009, District's Complaint was consolidated with Student's Complaint, OAH Case No. 2008120288, which

was filed on December 5, 2008. The hearing on the consolidated cases was continued on January 6, 2009 as well. On January 27, 2009, Student filed another Complaint, OAH Case No. 2009010604 (Student's Second Complaint). On February 25, 2009, the first issue of Student's Second Complaint was consolidated with Student's Complaint and the District's Complaint. The remaining issue in Student's Second Complaint was dismissed for lack of jurisdiction. All decision deadlines were ordered to be calculated based on Student's Complaint.

Sworn testimony and documentary evidence were received at the hearing. At the conclusion of the hearing, the parties were ordered to file written closing briefs by no later than 5:00 p.m. on June 15, 2009. On June 15, 2009, the parties stipulated that the deadline for filing written closing briefs would be extended to 5:00 p.m. on June 16, 2009. District filed its closing brief prior to 5:00 p.m. on June 16, 2009. Student filed his closing brief subsequent to 5:00 p.m. on June 16, 2009. Since Student's closing brief was only minimally tardy, and since its tardiness has not caused prejudice, Student's brief has been considered.<sup>1</sup> The record was then closed and the matter was submitted.<sup>2</sup>

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<sup>1</sup> Student's closing brief twice discusses the alleged failure of the District to produce certain e-mails to Student. The production of the e-mails was raised at hearing by means of the District's filing of a Motion to Quash the Student's Subpoena Duces Tecum requesting the subject e-mails from the District. The ALJ issued an Order granting the Motion to Quash, (Order) and thereafter denied Student's Motion for Reconsideration of the Order at hearing. As the matter has been ruled on, and the record made, this subject will not be further discussed in this Decision.

<sup>2</sup> Additionally, on or about June 17, 2009, subsequent to the due date for filing of closing briefs, Student submitted his Request to Admit Declaration of Mother (Request to Admit). The Request to Admit is based upon questions that were raised about Mother's educational and professional credentials at hearing. Among other things, Mother testified that she received a B.S. in Nursing from U.C.L.A., and, in 2005, a J.D. from U.C.L.A., and that she held a special education teaching credential. Prior to the close of the hearing, Mother requested the opportunity to produce documents, such as copies of diplomas and certificates, supporting her testimony regarding her educational background and credentials. Mother was ordered to produce such documents by no later than June 19, 2009. The ALJ also warned the parties on at least two occasions that no other evidence was to be submitted by any party. The Request to Admit filed by Student contains a citation to the California teacher credentialing website, and to the particular name under which Mother's credentials may be found, but no copies of any diplomas, certificates, or credentials. The Request to Admit also includes Mother's declaration. Student has thus failed to provide the documentation that Mother represented would be produced, and has attempted to produce additional evidence in the form of Mother's declaration. The ALJ has read the Request to Admit, and has reviewed the credential information on the website referred to therein. The information on the California teacher credentialing website reflects teacher credentials for two people, each of whom has the same first name and same married surname of Mother. The credentials listed on the website for one of these people, the one who was specifically referred to in the Request to Admit, are not the credentials that Mother testified to at hearing. The credentials listed for the other individual are most likely not Mother's credentials, because one of the certificates listed was issued in 1990. Mother did not graduate high school until 1991. The ALJ has not read or considered Mother's declaration.

On or about June 19, 2009, District submitted a response to Student's Request to Admit (District's Response). District's Response included a declaration of Ms. Reed. The ALJ has read the District's Response which states, inter alia, that District would not object to the admission of Mother's declaration if the ALJ would also consider the declaration of Ms. Reed and the rebuttal arguments contained in the Response to the effect that the information on the credential website does not refer to Mother. The Student's Request to Admit is denied, and Mother's declaration will not be admitted. The ALJ has not read or considered Ms. Reed's declaration and it will not be admitted.

## ISSUES<sup>3</sup>

### *Student's Issues*

1. Whether the District failed to provide Student a free appropriate public education (FAPE) from February 20, 2008, to the end of the 2007-2008 school year by reason of the following:

(a) Failing to timely and appropriately implement the placement and services identified in the individualized education program (IEP) of February 1, 2008, and February 20, 2008, specifically speech and language services (LAS), vision therapy services, and extended school year (ESY) services, and to reimburse for transportation to and from Montessori in Redlands (MIR);

(b) Failing to complete requested assessments in the areas of adaptive physical education (APE), assistive technology (AT), behavior, health, and vision<sup>4</sup>;

(c) Failing to timely complete assessments in the areas of APE, AT, behavior, health, and vision;

(d) Failing to create valid IEP documents at the February 1, 2008, and February 20, 2008, IEP meetings that included all mandated sections of the IEP, including present levels of performance, goals and objectives in all areas of need, accommodations, and modifications;

(e) Failing to hold an annual IEP meeting by March 20, 2008; and

(f) Failing to timely hold an IEP meeting to review all assessments.

2. Whether the District failed to provide Student a FAPE during the 2008-2009 school year, by reason of the following:

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<sup>3</sup> The ALJ has redrafted the issues for clarity. Additionally, the issue presented in Student's Second Complaint is not separately set forth, as it is in the nature of an affirmative defense to District's Issue 2, to wit: Whether District has failed to comply with assessment procedures by failing to provide an assessment plan to parents for their review and signature.

<sup>4</sup> In his Closing Brief, Student stated that he was withdrawing the issues that were designated in his Prehearing Conference Statement (PHC Statement) as 1(b) (insofar as it refers to vision assessment and behavior assessment), 3(b), and 3(c). Student did not further specify the issues to which he was referring. Nor did he specify the PHC Statement to which he referred, although he filed more than one. If Student is referring to his PHC Statement filed with OAH on or about March 24, 2009, it appears as though he seeks to withdraw his claims pertaining to failing to complete requested assessments in behavior and vision, failing to hold a timely annual IEP by March 20, 2008, and failing to timely complete assessments. District has not responded to Student's statement that he is withdrawing these issues. Student cited no legal authority which permits him to unilaterally withdraw individual issues after the conclusion of the due process hearing. Consequently, Student may not withdraw these issues, and this Decision will address them.

- (a) Failing to timely and appropriately implement the home hospital (HH) instruction identified in the IEP of July 16, 2008;
- (b) Terminating all special education services to Student on September 10, 2008, without legal justification;
- (c) Failing to address health needs and services required due to Student's autoimmune/immune disorder;
- (d) Failing to provide AT devices, including sensory devices agreed to in the July 16, 2008, IEP;
- (e) Failing to implement LAS, occupational therapy (OT), behavioral services, and vision therapy services; and
- (f) Failing to accept the recommendations of School Options regarding occupational therapy (OT) services; and
- (g) Failing to timely hold an IEP meeting to review the OT assessment.

*District's Issues*

- A. Whether the District offered a FAPE in the November 13, 2008, IEP; and
- B. Whether the District should be allowed to conduct its own medical assessment of Student over Parents' objection if Parents want the District to provide special education and related services to Student.

**REMEDIES REQUESTED**

Student seeks compensatory education and reimbursement for the costs of providing HH Instruction and other services and related equipment to Student. District seeks an order allowing it to implement the Student's IEP dated November 13, 2008, over Parents' objection, if Parents want the District to provide special education and related services to Student. District also seeks an order permitting it to assess Student's medical condition over Parents' objection, if Parents want Student to receive special education and services from the District.

## FINDINGS OF FACT

### *General Background and Jurisdictional Matters*

1. At the time of the hearing, Student was a 13-year-old boy. He has resided in the District at all relevant times. Student has been eligible for special education placement and services since preschool, at first with an eligibility of speech and language impairment, and subsequently with an eligibility of autism. In approximately 2002, Student was diagnosed with an unspecified autoimmune dysfunction. District was advised of Student's autoimmune dysfunction by no later than September 2007, as Student's doctor advised the District of Student's condition by letter dated September 14, 2007.

2. Student attended Big Springs Educational Therapy Center and School (Big Springs), a California certified nonpublic school (NPS), through and including the 2006-2007 school when Student was in fifth grade. During the entire 2007-2008 school year, Student attended sixth grade at Montessori in Redlands (MIR), a private school that was not certified as an NPS by the state of California. At the time of the hearing, Student was not attending school, but rather had received home hospital (HH) instruction since approximately August 2008 and throughout the 2008-2009 school year.

3. These consolidated cases are only one aspect of a history of due process complaints and related disputes between the parties.<sup>5</sup> In December 2007, the parties entered into a settlement agreement to resolve a previous due process dispute (2007 Settlement Agreement). The terms of the 2007 Settlement Agreement that are relevant to this Decision include:

- (a) District to fund placement for Student at MIR;
- (b) District to reimburse transportation costs to and from MIR for the 2007-2008, 2008-2009, and 2009-2010 regular school years, upon proper proof of attendance;
- (c) District to provide vision therapy services, including transportation if the services were not provided at school;
- (d) District to fund OT services with Horizon Therapy at one time per week for 45 minutes each session, until Student is "assessed for discharged [sic] from such services by an Occupational Therapist with School Options in the 2008-2009 school year";
- (e) "The results of the [School Options] written assessment shall be reviewed by an IEP team, which shall also review Student's program";
- (f) Student will complete the advanced Therapeutic Listening Program;
- (g) District to provide an annual vision evaluation from the Vision Enhancement Center;

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<sup>5</sup> In its Closing Brief, District requests that the ALJ take judicial notice of all filings in two of Student's previously filed cases: OAH Case Nos. 2008070372 and 2008100079. Those matters are not relevant to the issues considered in this Decision, and therefore the District's request is denied.

- (h) The placement and services provided by the settlement agreement would be written into an IEP format and contain goals and objectives;
- (i) Student's annual and triennial IEP due dates would be March 20 of each school year;
- (j) District to conduct an LAS assessment;
- (k) District to reimburse Parents for AT equipment previously purchased; and
- (l) Parent releases the District from any obligation to provide any educational services or reimbursement in addition to that provided for in the agreement, unless Student's educational needs change significantly.

4. Since MIR was not a state certified NPA, District's funding of Student's placement to MIR had to occur through reimbursement to Parents, rather than through direct payment to MIR.<sup>6</sup>

*IEP Meeting of February 1, 2008 and Related Events*

5. Pursuant to the terms of the 2007 Settlement Agreement, the District convened an IEP meeting on February 1, 2008, to incorporate the terms of the settlement agreement. By that time Lisa Bradshaw, a speech and language pathologist (SLP) with SenseAbilities, an NPA retained by the District, had completed the LAS assessment agreed to in the 2007 Settlement Agreement. Her assessment had concluded that Student would benefit from services to improve his use of language in social contexts.

6. The IEP team included Ms. Bradshaw (who participated by telephone), Emily Ewing (Student's teacher at MIR), Ralph Ruhter (Student's case carrier), Jeff Frazier, the District's Assistant Director of Special Education, and Mother. Mother serves occasionally as a special education advocate. She taught special education advocacy at the University of Southern California from approximately 2004-2007. During the pendency of these consolidated cases, Mother has been a member of the OAH Special Education Advisory Committee. Further, at various times she has been a member of other committees and organizations regarding special education and children with disabilities.

7. Mr. Ruhter was responsible for taking notes during the IEP meeting. At the time of the IEP meeting, Mr. Ruhter had been a program specialist for the District for nearly 10 years. He holds a mild/moderate special education credential, and is trained as a behavior intervention case manager (BICM). In January, 2008, Mr. Ruhter was assigned to Student's case, to monitor his IEP, observe him in the classroom, and coordinate services.

8. The team discussed present levels of performance and set goals and objectives in the areas of math, study skills, writing skills, sensory/gross motor/fine motor skills, social interactions, and pragmatic speech.

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<sup>6</sup> Education Code section 56365 et seq.

9. Pursuant to the 2007 Settlement Agreement, the IEP stated that Student would receive OT for 45 minutes per week, vision therapy for 60 minutes per week, and reimbursement for transportation for one trip per week to the Vision Enhancement Center. This reimbursement was noted on another page of the IEP as well. The service portion of the IEP also included LAS services at 60 minutes per week, as decided upon by the team based upon the LAS assessment.

10. Mr. Ruhter checked the box for “Extended School Year,” on the IEP, and the IEP noted that the ESY was “To strengthen and maintain academic & social skills.” The Settlement Agreement did not provide for ESY. The inclusion of ESY on the IEP was an error on Mr. Ruhter’s part, as he mistakenly believed that the 2007 Settlement Agreement provided for ESY.

11. At the meeting, Mother objected that the IEP team was not accurately recording the terms of the 2007 Settlement Agreement. Mother particularly objected to the wording in the IEP of the terms of the 2007 Settlement Agreement regarding transportation to MIR. The IEP stated that Parent would be reimbursed for one round trip per day. This was the round trip that Student made to attend school. Mother insisted that the settlement agreement provided for reimbursement for the two round trips per day that Parents were required to make to transport Student to and from school. Mother also insisted upon discussing AT at the IEP meeting. Like ESY, AT was not included in the settlement agreement, which the District understood to cover all of Student’s educational needs, unless those needs changed significantly. (LAS services themselves were not expressly included in the Settlement Agreement, either. However, since the 2007 Settlement Agreement specified that an LAS assessment would be performed, the 2007 Settlement Agreement contemplated that Student’s educational needs as of the time of the 2007 Settlement Agreement included LAS services.) The IEP meeting ended with the parties at an impasse on these issues. Mother requested that another IEP meeting be called to discuss AT and the transportation issue. Mother did not request an AT assessment at this IEP meeting. Mother agreed with the settlement agreement and the addition of LAS services.

12. After the February 1, 2008, IEP meeting, Mother advised Mr. Ruhter that the IEP erroneously included ESY. At hearing, Mother denied that she had imparted this to Mr. Ruhter. However, Mr. Ruhter’s testimony that Mother had advised him that he had erred in including ESY on the IEP form was more credible than Mother’s. Mr. Ruhter acknowledged that his job at the IEP meeting was to record the terms of the settlement agreement. ESY was not included in the settlement agreement, and there was no evidence that ESY was discussed at the meeting. Mr. Ruhter’s testimony is supported by a letter to Mother dated February 15, 2008, from Peggy Reed, the District’s Director of Special Education. In the letter, Ms. Reed advised Mother that the next IEP meeting would be convened on February 20, 2008. The letter also advised Mother that the reference in the IEP to ESY would be deleted “per your request and also due to Extended School Year was not part of the ‘Agreement.’” Notwithstanding, Ms. Reed’s letter, Mother continued to assert that Student was entitled to ESY services because Mr. Ruhter had checked that box on the February 1, 2008, IEP.

13. Ms. Reed's February 15, 2008, letter also addressed issues that had arisen between the parties regarding the District's attempts to obtain appropriate documentation for reimbursements. For example, District sought daily attendance records for Student from MIR, to verify his daily attendance for reimbursement for transportation. Mother advised District that MIR did not keep daily attendance records. Mother stated that MIR's attendance records were based upon Student's signing in when he entered the classroom each day. Since Student had great difficulty writing, he did not sign in, and therefore, Mother concluded, the school had no records of his attendance. Throughout her communications with the District on this topic during the 2007-2008 school year, as well as at hearing, Mother held to her position that MIR kept no daily attendance records regarding Student. Mother's information on this subject was incorrect, and reflects adversely on Mother's credibility. Mother's information was contrary to information that Maura Joyce, the Director of MIR, had imparted to the District in early 2008. Ms. Joyce had advised the District that MIR teachers kept a record of daily attendance. At hearing, both Ms. Joyce, a witness called by Mother, and Ms. Ewing, Student's teacher at MIR, confirmed that MIR kept daily attendance records, which were not entirely based on whether a student signed in when he entered the classroom.<sup>7</sup> Further, Parents were advised at both orientation and Parent's Night that daily attendance was taken.

14. Because Mother would not provide, or allow MIR to provide, appropriate documentation, the District could not determine the appropriate amount of transportation reimbursement. Ms. Reed reviewed the documentation provided by Mother to determine whether Student had attended MIR on a particular day, by noting whether Student had ordered lunch, or whether a field trip was scheduled, and reimbursed for transportation based on her assumption that such activities meant that Student had attended school that day.

15. Ms. Reed's letter of February 15, 2008, highlighted another, larger issue between the parties. Mother refused to permit MIR personnel to provide any information directly to the District administration, including Student's daily attendance records. Mother justified this refusal on the grounds that District was not paying MIR directly. Mother also considered that she was not hindering the District from obtaining information from MIR, since Student's case carrier, Ralph Ruhter, was permitted to observe Student at MIR and speak to his teachers, and also because she anticipated that Ms. Bradshaw, the District's SLP, would be providing services at MIR. However, Mother prohibited MIR from providing attendance records to Mr. Ruhter, even though Mother permitted Mr. Ruhter to observe Student at MIR. At hearing, Mother testified that she did not entirely stop communications between the District and MIR until approximately May 2008. Regardless, the documentary evidence revealed that Mother had refused to allow communication between MIR and the District administration commencing at least as early as January 2008, and continuing at least through July 14, 2008, well beyond the termination of the MIR school year. As is further discussed below, Mother's refusal to permit Ms. Reed and other District administrators to

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<sup>7</sup> Ms. Joyce noted that the daily attendance records were not as complete as she would have preferred, but, nevertheless, daily attendance records were kept.

communicate directly with MIR negatively impacted the ability of the District to render services to Student, to provide a FAPE to Student, and to provide proper reimbursement to Parents pursuant to the February 1 and February 20, 2008, IEPs.

*IEP Meeting of February 20, 2008*

16. The District convened another IEP meeting on February 20, 2008. The IEP team included Mother, Mr. Frazier, Mr. Ruhter, Ms. Ewing, Ms. Whiteleather (Mother's counsel), and Mother. The IEP document consisted primarily of attaching a summary of the 2007 Settlement Agreement to the IEP. Parent wrote a comment sheet that was attached to the IEP, stating that Mr. Frazier, the District representative, refused to discuss transportation, and refused to discuss AT services. Nowhere in Mother's comment sheet, or in the IEP, does Mother state that she requested the District to perform an AT assessment of Student.

17. Neither the February 1, 2008 nor the February 20, 2008 IEPs contained accommodations or modifications. Since MIR was a private school, it did not participate in districtwide or statewide assessments, and therefore there was no need to include testing accommodations. Additionally, since MIR was a Montessori school, it provided individualized instruction, and classroom modifications and accommodations were automatically incorporated into the program. Student's teachers at MIR accommodated Student's needs, such as his need to sit on his therapy ball, to have extra time to complete assignments, to type his assignments instead of handwriting them, and to take breaks. The comments written on, or included in, the February 1, 2008, and February 20, 2008, IEP documents by or on behalf of Mother do not object that no modifications or accommodations were included in the IEP. Mother consented to the IEP to the extent that it reflected the 2007 Settlement Agreement.

*Events Occurring After the February 20, 2008, IEP Meeting*

*District's Attempts to Provide LAS Services to Student*

18. The February 1, 2008, IEP provided that Student would receive 60 minutes of LAS services per week. District attempted to provide such services through Ms. Bradshaw, its contractor for LAS services. Commencing in approximately late February or March 2008, Ms. Bradshaw, Mr. Ruhter, and MIR personnel attempted to find an appropriate time whereby Student could receive the LAS services at MIR. At first, MIR was amenable to Student receiving services from Ms. Bradshaw on campus, but then MIR and Ms. Bradshaw had difficulty agreeing upon a schedule, and ultimately MIR determined that it would not be possible to have group LAS sessions on campus. Since MIR already had an SLP providing services at MIR, Mr. Ruhter attempted to arrange for that SLP to provide services to Student. However, MIR's SLP was a disabled person in a wheelchair, and Mother advised Mr. Ruhter that she was not comfortable with Student receiving services from a disabled person. Hence, Mother rejected this plan. Mother suggested to Mr. Ruhter a particular SLP located in Pasadena, but Mr. Ruhter could not locate the SLP.

19. Mr. Ruhter's and Ms. Bradshaw's difficulties in arranging for LAS services were exacerbated by Mother's refusal to permit the District's administrators to communicate directly with MIR. MIR and the District, working together, would have had more resources to bring to bear to resolve this situation more efficiently, and possibly more effectively, than could Mr. Ruhter and Ms. Bradshaw. Even if such an effort had failed, it is likely that both MIR and the District would have determined the feasibility of delivering LAS services to Student on the MIR campus in a more efficient manner than could Mr. Ruhter and Ms. Bradshaw. Ultimately, Student received no formal LAS services from the time of the February 1, 2008, IEP, through the end of the school year. Since MIR, as a Montessori school, provided an individualized program, and opportunities to work in small groups, Ms. Ewing was able to assist Student with his speech goal as set forth in the February 1, 2008 IEP, and he met the goal by June 2008. As is set forth below, the District later offered compensatory LAS services to Student.

*District's Attempts to Provide Vision Therapy to Student*

20. The December 2007 Settlement Agreement provided that the District would provide 24 sessions of vision therapy services to Student, one session per week, for one hour each week. Further, the Vision Enhancement Center, which was also the office of Benjamin Kohn, O.D., would perform a vision assessment every year, and recommend the appropriate vision therapy. Mother was familiar with Dr. Kohn, as he had performed a vision therapy progress evaluation of Student as recently as October 2007, and had prescribed new eyeglasses for him then.

21. By letter dated April 22, 2008, Dr. Kohn advised the District that Student had an appointment on April 4, 2008 for Dr. Kohn's annual examination of Student, but Student did not appear or call to reschedule. The appointment had been confirmed with Mother. By letter dated May 23, 2008, in response to Mother's complaint that Student had not received vision therapy services, Ms. Reed advised Mother that vision therapy services were available to Student. She further advised that District had been informed by Dr. Kohn's office that Mother had not brought Student for his annual examination, and that Mother had not picked up Student's glasses. (In fact, Student refused to wear his glasses.) In other communications with the District, Mother asserted that Dr. Kohn's Vision Enhancement Center only provided examinations, and did not provide vision therapy, and that the District must arrange for Student to receive vision therapy services elsewhere. Mother never checked with the Vision Enhancement Center to verify whether it provided vision therapy services. Nor did she make another appointment for the annual examination with Dr. Kohn. At hearing, based on the evidence presented, Mother conceded that Dr. Kohn's Vision Enhancement Center provided vision therapy services.

*Additional Assessments of Student*

22. No further assessments of Student were contemplated in the February 1, 2008, and February 20, 2008, IEPs. Mother did not request the District to perform any additional

assessments of Student that had not already been mentioned in those IEPs, except for the neuropsychological evaluation that is discussed below.

23. Without the knowledge of the District, on May 15, 2008, Mother arranged for Student to receive a Floor Time Assessment from Intercare Therapy Inc. (Intercare). Floor Time is a methodology that can be used with children with autism to promote their social, emotional, and communicative development. Intercare produced a report of the assessment dated May 19, 2008, which was provided to the District on May 20, 2008. The report concluded that Student needed to work on his complex problem solving, to elaborate on ideas, to expand his range of activities to those that are non-preferred, and to expand on his emotional interest and understanding of his peers and adults. The report recommended that Student receive 11 hours per week of Floor Time services, including supervision, report writing, and direct parent training, and suggested three goals. The report did not reference that any of Student's behaviors had regressed or worsened, except to mention that Parents reported that Student had recently become less interested in interacting with adults and peers. At hearing, this information was contradicted by much evidence that Student's social skills had improved during the 2007-2008 school year. No Intercare representatives testified at hearing. No Intercare representatives appeared at any of the IEP meetings relevant to this matter, although invited to do so on at least one occasion.

24. By phone call on May 16, 2008, and a follow-up letter on the same date, Mother advised Ms. Reed that due to the District's failure to provide SLP services and vision therapy, Student was regressing and having "passive aggressive behavioral issues that are impacting his learning." Significantly, the Intercare report does not mention any "passive aggressive" behaviors, nor does it mention that any behaviors of Student were impacting his education.

25. After the February 2008 IEP meetings, and prior to Mother's phone call and letter of May 16, 2008, the District had no notice that Student's social, communicative, or behavioral needs had changed to any degree that was affecting his ability to access his education at MIR or that warranted an assessment. Mother had not requested District to conduct a behavioral assessment of Student. Mr. Ruhter, Student's case carrier, was a BICM. He had numerous communications with Mother subsequent to February 2008 until May 2008, when he became ill and could not continue as Student's case carrier for the remainder of the 2007-2008 school year. Mr. Ruhter had observed Student at MIR, and had not observed any aspects of Student's behavior that would warrant an assessment. In Mr. Ruhter's opinion, Student would not even appear to the average observer to be a Student with autism. In the opinions of those who had close contact with Student while he was at MIR, such as Ms. Ewing and Mr. Ruhter, Student progressed and developed, academically, behaviorally, and socially, while at MIR during the 2007-2008 school year. He did not demonstrate maladaptive behaviors in class, and he was able to learn and perform in class much like the other students. He participated in field trips, even those that required physical activities, such as rock climbing. He had no problems transitioning when substitute teachers taught the class. Ms. Joyce, the head of MIR, also testified that Student had made academic

and social progress, although she did not believe he had made as much progress as both Ms. Ewing and Mr. Ruther had stated.

26. In March and April 2008, School Options, an OT NPA, conducted an OT assessment of Student. The assessment was performed pursuant to the 2007 Settlement Agreement, as incorporated into the February IEPs, which provided that District would pay for an annual evaluation from School Options. School Options produced a report of the assessment, dated May 9, 2008. The assessment occurred on April 3, 2008, April 10, 2008, and April 24, 2008, in addition to a school observation on March 11, 2008, and a parent interview on March 12, 2008. Other assessment procedures included a records review and a clinical evaluation. The clinical evaluation consisted of observation, structured fine and gross motor activities, primitive reflex testing, the Bruininks-Oseretsky test of Motor Proficiency-Second Edition (BOT-2), the Beery Test of Visual Motor Integration (5th edition), the Beery Test of Visual Perception (5th edition), and the Beery Test of Motor Coordination (5th edition).

27. The evaluators listed on the report, Brooke Demner, OTR/L, and Chris Vinceneux, OTR/L, explained that the purpose of the evaluation was to (1) Determine the extent of Student's difficulty in the areas of sensory processing pertaining to fine motor, organization, attention, and school functioning; (2) Determine the impact of these difficulties on Student's education; and (3) Recommend services to meet Student's needs in those areas.

28. The report contained a lengthy list, obtained from an interview with Mother, of Student's behaviors, personality, habits, preferences, dislikes, concerns, skills, and characteristics, in the categories of general behavior, social/emotional, motor, sensory, academics, play/interests, and self care. The evaluators determined that many of the items reported by Mother indicated a variety of sensory processing difficulties. The evaluators noted that Student's interest were limited and tended to be sedentary, thus decreasing the amount of sensory input his nervous system received.

29. The evaluators reported on the observation of Student at MIR, which lasted for two hours. Their summary of the observation noted that Student had difficulty processing and responding to auditory information, that he had some impairment in visual attention, and showed poor postural organization. He often sought movement input and became distracted. He required intermittent adult intervention to clarify and follow directions. The report also revealed that Student was also able to focus in class, he conversed with his teacher and peers, he participated in some pertinent discussions of the material being taught, he was able to participate in classroom activities, and he was able to learn and understand the classroom lessons. The report does not state whether the evaluators interviewed Student's teachers at MIR, or whether they spoke to the OT who was then providing services to Student.

30. The evaluators reported on the clinic evaluation, which occurred during three different sessions for a total of 4.5 hours. Student made it clear he was not happy to be at the clinic. Transitions into the assessment sessions were somewhat difficult, but he generally transitioned from one activity to another during the assessment. His attention was generally

good. He tended to be more distracted during unstructured time and transitions. He had some difficulty following multi-step directions. He also demonstrated impaired organization skills. He seemed to have difficulty with expressive language. He consistently completed assessment tasks and put forth good effort. He engaged in sensory seeking behaviors, consistently seeking out a therapy ball to bounce and roll on. He occasionally rocked backwards in the chair. He exhibited improved eye contact compared to previous assessments, and a generally improved awareness of safety.

31. Student demonstrated deficits in the integration of primitive postural reflexes, but he had not demonstrated this in previous testing. Therefore, the evaluators considered that it might have been due to sensitivity from recent back surgery. Student also tested positive for associated reactions in both hands. This indicated a difficulty in performing motor tasks automatically. He demonstrated impaired registration of proprioceptive input, and difficulty with motor planning. He demonstrated signs of underregistration of vestibular input, often seeking spinning movement while on suspended equipment. He would seek out deep pressure input throughout the assessment. He expressed slight discomfort with the material of a swing. Student did not express any other discomfort or sensitivity, although Mother had reported that he had preferences for and sensitivities to certain clothing fabrics. Student demonstrated difficulty consistently registering, processing, and responding to auditory information. He did not demonstrate significant difficulty registering visual information, but he did bring his eyes close to picture words on a magazine on a table, indicating some difficulty in registering and processing visual information. He did not wear glasses during the assessment. Student demonstrated poor postural stability, endurance, and organization during a variety of activities.

32. Student also demonstrated poor strength and endurance during many activities during the assessment. Student tended to hold his breath and become out of breath easily during many activities. The evaluators reported that Student's poor breath support was another strong indicator of poor postural stability, endurance, and organization. The report stated that postural difficulties can greatly contribute to attention difficulties during academic tasks.

33. Student demonstrated great difficulty in spatial awareness, self-awareness, and organization. He had difficulty with visual motor integration, and often required verbal direction in addition to visual directions. The evaluators reported that his low scores on the Beery Visual Motor Integration test indicated difficulty with both the individual motor and visual components of tasks, in addition to their integration. (The report listed the scores, but did not explain them.) His ability to use both sides of his body together to produce a motor action was inconsistent. His hand and foot dominance was not clear. The evaluators noted that when hand and foot dominance are not established at an early age, simple activities tend to be more laborious, which could be a possible barrier for Student in school as well as in everyday activities.

34. The evaluators noted that Student's movements lacked fluidity, rhythm, gradation, precision, timing, and accuracy. His movements tended to be rigid and uncoordinated, which the evaluators attributed to poor proprioceptive processing.

35. The report described Student's scores on the BOT-2, which measures a wide array of fine and gross motor skills. All of Student's subtest scores on the BOT-2 were below average, except for his Fine Motor Precision score, which was well below average, and his Fine Motor Integration score, which was well above average. His composite score on Fine Manual Control was average, but his composite scores on Manual Coordination, Body Coordination, Strength and Agility, and his Total composite score were all below average.

36. The report noted Student's difficulties with handwriting, and his proficient typing skills. He demonstrated some difficulty with visual tracking while completing a writing sample, but a formal assessment of eye tracking revealed no deficits.

37. The evaluators concluded that Student had a variety of sensory processing and sensory motor deficits. These deficits "seemed to be a likely contributor" to Student's academic, social, and emotional difficulties. The report noted that Student had improved somewhat since his initial assessment from School Options in 2006, however, his overall abilities remained very similar to those he demonstrated during the original assessment. The evaluators recommended OT services consisting of two weekly sessions of 60 minutes each. The therapy session should be conducted in a room with no other students, and with appropriate sensory integration equipment. The evaluators also recommended a Therapeutic Listening program. In addition, the evaluators recommended OT consultation to the other professionals involved in Student's care, as well as to Parents.

#### *Termination of Student's Placement at MIR and Request for HH Instruction*

38. In late April 2008, Ms. Joyce notified parents of MIR students that MIR would not have a middle school during the 2008-2009 school year.<sup>8</sup> Mother requested that Student repeat sixth grade so that he could attend MIR in the 2008-2009 school year, but MIR refused.

39. On May 16, 2008, after Mother had been advised that MIR would not have a middle school program during the 2008-2009 school year, Mother called the District to discuss the possibility of transferring Student to another school from MIR. Mother did not advise the District that MIR would not have a middle school during the 2008-2009 school year, rather, she stated that Student's teacher would be moving to another school and

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<sup>8</sup> At hearing, Mother denied that she had this knowledge before late May 2008, when she notified the District that Student would not be attending MIR, but her denial is not persuasive. Both of the MIR representatives who testified at hearing testified that parents were notified in late April 2008 that MIR would not have a middle school program during the 2008-2009 school year. These two witnesses, Ms. Ewing and Ms. Joyce, did not testify entirely consistently with each other about other matters, but their testimony was consistent on this point. Therefore their testimony is more persuasive than Mother's.

therefore MIR would no longer suit Student's needs. Mother did not advise District until May 28, 2008, that Student could not attend MIR during the 2008-2009 school year because MIR would not have a middle school.

40. Mother was aware of the availability of HH Instruction, as another of her children had started receiving HH Instruction early in 2008. On May 22, 2008, and subsequent to learning that MIR would not have a middle school in the 2008-2009 school year, Mother took Student to see Dr. Mary Lam, a pediatrician with Loma Linda University Health Care. Dr. Lam had previously treated Student, but she had not seen Student since prior to the time the December 2007 Settlement Agreement was entered into. During the appointment with Dr. Lam on May 22, 2008, Mother advised Dr. Lam that two reports, an OT report and a neuropsychological report, had recommended that Student receive HH Instruction and further, that the regional center would pay for the services. At hearing, there was no evidence of any reports that mentioned HH Instruction, or any recommendation of the regional center for HH Instruction. The most recent OT assessment report at the time, prepared by School Options and dated May 9, 2008, did not mention HH Instruction. Further, José L. Fuentes, Ph.D., the neuropsychologist who prepared a neuropsychological assessment report of Student in July 2008, testified that he had no knowledge at the time of his assessment that Student had sought or was eligible to receive HH Instruction.

41. Based in part upon Mother's misrepresentations to Dr. Lam regarding the OT and neuropsychological assessments, and without reviewing any such assessment reports or speaking to their authors, Dr. Lam signed a Physician Request for Home/Hospital Instruction form. The HH form, which was signed by Dr. Lam on May 22, 2008, specifically stated: "I certify that this student is totally unable to attend school due to the medical reason(s) stated and that he/she requires instruction at home or in the hospital as the only educational alternative." (Emphasis in original.) The form lists the medical reasons justifying HH as "anxiety, joint pain, and autoimmune disorder." Solely based upon Mother's request, Dr. Lam assigned June 16, 2008 as the commencement date for the HH Instruction, which was after the last day of the 2008-2009 term at MIR. The selection of June 16, 2008, as the commencement date for HH Instruction does not make sense in terms of the HH request form and the purpose of HH. It anticipates that Student would be stricken with a health calamity on June 16, 2008 that would prevent Student from attending school, as opposed to having a health condition that would prevent Student from attending school as of May 22, 2008, the date Dr. Lam signed the HH form. At hearing, Dr. Lam admitted that she had not focused on the language of the HH form by which she certified that Student was "totally unable to attend school." The HH form listed December 31, 2008, as the termination date for the HH Instruction.

42. Mother did not advise MIR that Dr. Lam had recommended that Student receive HH instruction. Student continued to attend MIR until the end of the MIR school year, without limitation, including participating in field trips.

43. In May 2008, before Mother took Student to Dr. Lam to obtain Dr. Lam's signature on the HH request, Mother had contacted Kenneth Schmidt, the District's Director of Student Services, and the administrator in charge of the District's HH Instruction, and discussed HH with him. Mother's initial conversation with Mr. Schmidt was the first notice that the District had during the 2007-2008 school year that Student had any health issues that could affect his education. Mother testified at hearing that Student had missed approximately 40 days of school at MIR for health reasons. Student produced no documentary evidence at hearing to support this assertion, and this testimony was contradicted by Ms. Ewing and Mr. Ruhter. More importantly, there was no evidence that the District had knowledge of these alleged absences, so as to have been alerted that Student's health issues may have been affecting his education. In this regard, had Mother permitted the District administration to communicate with MIR, and to have access to Student's attendance records, the District would have been able to learn more about Student's health condition and its relation to his educational needs. School attendance records in particular would have indicated whether Student was having health or other difficulties.

44. During their conversation, Mother told Mr. Schmidt that she did not want HH Instruction during the summer, as she wanted Student to have a break. Therefore, Mr. Schmidt and Mother agreed that Student's HH would commence during the fall semester. On May 22, 2008, the same day as Dr. Lam signed the HH form, Mother faxed the HH form to Mr. Schmidt. In that e-mail, Mother stated that the form did not require HH until after Student's last day of school, based upon Mr. Schmidt's previous statement to Mother that the District would not commence HH Instruction during the last 30 days of the school year.

45. The HH form signed by Dr. Lam specifically provided a release for District personnel to contact Dr. Lam "as needed for clarification." Mother refused to sign the release portion of the form, because, as she wrote to Mr. Schmidt on May 22, 2008, ". . . I do not agree with the statement." Mother never signed the release portion of the form.

46. After providing the HH request to the District, Mother continued to refuse to allow the District access to information about Student, including Student's health information, except to a limited extent. Mother gave a limited release for Mr. Schmidt to speak to Dr. Lam. This release did not include any release of Student's written medical records from Dr. Lam or any other person. Rather, it was simply a release to speak to Dr. Lam to confirm that she ordered HH Instruction. Mother testified that she also gave a release of medical records to Mr. Ruhter. That release, however, which is dated May 28, 2008, is limited, and only included an authorization for Loma Linda University Health Care to communicate with "Ralph Ruther, MVUSD." It did not provide that Mr. Ruhter, or the District, could obtain any documents pertaining to Student. At hearing, Mr. Ruhter denied receiving the release, and Mr. Frazier also denied that the District received the release. Mr. Ruhter never contacted any of Student's medical providers to obtain information from them.

47. Mr. Schmidt contacted Dr. Lam's office to discuss the HH request, but he was only able to communicate with Dr. Lam's staff. Mr. Schmidt learned from Dr. Lam's staff that it was not clear that Student needed to be confined to his home, but Mother had insisted upon it when asking Dr. Lam to sign the HH request.

#### *Attempts to Schedule Another IEP Meeting*

48. Commencing on March 3, 2008, District attempted to schedule another IEP meeting. Mother stated she was available whenever her attorney, Ms. Whiteleather, was available. Ms. Whiteleather advised the District that she was not available until March 31, 2008, at the earliest. However, that date fell during the District's spring break. Thereafter, the District proposed several dates in April, but Ms. Whiteleather was not available until April 30, 2008. Mother agreed and confirmed the date. The District sent a meeting notice for April 30, 2008, but Mother cancelled it as Student was being assessed and assessment reports would not be ready. District continued to try to set an IEP meeting date, but, due to an assortment of reasons outside of the District's control concerning Ms. Whiteleather's availability, parental availability, ongoing assessments of Student, and availability of teachers and the Regional Center representative whom Mother had invited, the District was unable to convene an IEP meeting. Mother also attempted to set an IEP meeting for June 16, 2008, but District personnel were not available.

49. As a result of these difficulties, the IEP meeting did not occur until July 16, 2008.

#### *Neuropsychological Assessment*

50. Subsequent to the February 2008 IEP meetings, Mother requested that the District complete a neuropsychological examination of Student. Such an examination had been commenced by Dr. Fuentes, in autumn 2007, at the District's expense, before the parties negotiated the 2007 Settlement Agreement. The assessment had been interrupted due to various events that arose in Student's family, and had been abandoned when the parties entered into the 2007 Settlement Agreement. District agreed with Mother's request to recommence the assessment after the February IEP meetings, at District's expense, and Dr. Fuentes conducted the assessment in April 2008. On or about July 7, 2008, Dr. Fuentes completed a report of the assessment. Mother refused, from approximately May 2008 through approximately July 3, 2008, to allow Dr. Fuentes to share information with the District, including his assessment results. Mother also limited the amount of medical information that Dr. Fuentes could share with the District.

51. Dr. Fuentes is a licensed clinical psychologist and licensed marriage and family therapist. He was educated at Loma Linda University, from which he received his B.S. in Behavioral Science, his M.S. in Marriage and Family Therapy, his M.A. in Experimental Psychology, and his Ph.D. in Clinical Psychology. He has assessed more than 500 children during his career.

52. The assessment occurred on April 28 and April 29, 2008. During the assessment, Dr. Fuentes spent more than 12 hours assessing and observing Student. The assessment report contains a lengthy summary of background information, and summarized a number of previous assessment reports, including the Intercare report of May 15, 2008, and the School Options report of May 9, 2008, as well some medical records.

53. The assessment occurred at MIR, in what Dr. Fuentes termed an “ideal” room in which to administer standardized tests. Dr. Fuentes’ report noted that Student was cooperative and appeared to engage well in all tasks, however, he was distractible and exhibited low motivation when engaging in tasks that he perceived to be difficult. Dr. Fuentes implemented sensory strategies with frequent breaks, which helped Student maintain a functional level of arousal. Dr. Fuentes noted that the breaks and strategies did not compromise the standardized administration of the tests, but Dr. Fuentes believed that, in the absence of those supports, Student’s performance would have been considerably lower. Dr. Fuentes also noted that Student was upset on the second morning of testing, as he had to miss a school field trip, but he was able to emotionally regulate and engage in testing after 30-45 minutes of discussion with Dr. Fuentes. Dr. Fuentes testified at hearing that Student was anxious regarding school projects that were due by the end of the school year. Dr. Fuentes also reported that Student appeared to have deficits in personal care and hygiene.

54. Dr. Fuentes performed a variety of assessments, including the Behavioral Assessment System for Children (BASC); Behavioral Rating Inventory of Executive Functions (BRIEF) Children’s Category Test, Level 2 (CCT-L2); Comprehensive Test of Nonverbal Intelligence (C-TONI); Continuous Performance Test-II (CPT-II); Dellis-Kaplan Executive Function System (selected subtests) (D-KEFS); Gilliam Autism Rating Scale, 2nd Edition (GARS-2); Motor Tests; NEPSY (Design Copy, Visual Motor Precision); Scales of Independent Behavior-Revised (SIB-R); Woodcock-Johnson Tests of Achievement, Third Edition (Standard) (WJ-III ACH); Woodcock-Johnson Tests of Cognition, Third Edition (Extended) (WJ-III COG).

55. Student’s overall cognitive levels were in the average range, as measured by both the C-TONI and the WJ-III COG. Student also performed in the average range on the CCT-L2, which assesses the cognitive processes required for successful academic achievement. Dr. Fuentes noted that Student’s performance on measures of attention (the DKEFS and the Broad Attention Cluster in the WJ-III Cog) was variable, ranging between the borderline to the above-average range. Student’s cognitive-academic language proficiency (CALP), which is language proficiency in an academic situation, was fluent, as measured by such tests as the WJ-III COG.

56. Student’s performance on objective tests of executive functioning varied from the impaired to the above-average range. However, Dr. Fuentes cautioned that these results should be interpreted carefully. Dr. Fuentes thought these results may suggest problems with attention rather than executive functioning, per se.

57. Dr. Fuentes provided Student's teachers and Mother with the BRIEF rating forms. There were considerable overlaps in the ratings between the teachers, on the one hand, and Mother, but with some notable differences. Dr. Fuentes posited that these discrepancies may reflect the different environments of home and school. Dr. Fuentes summarized areas of concern, as expressed on the BRIEF by Student's teachers and/or parent. One such area was shift, which is the ability to move freely from one situation, activity, or aspect of a problem to another as the circumstances demand. The raters reported that Student had marked difficulties with behavioral shifting, attention shifting, and/or cognitive shifting. This level of difficulty compromised Student's problem-solving abilities. At hearing, Dr. Fuentes testified that Student's shift issues affected his education, and that it was difficult to physically calm him down sometimes. He believed that it would be helpful if those who worked with him had a general awareness of Student's sensory-cognitive issues. He felt that Student was capable of transitioning to a different service provider, but he would probably need preparation of some type. The preparation could involve an advance meeting, or a social story, or a discussion, or other techniques, depending upon the situation and the service provider involved.

58. Emotional control was another area of concern on the BRIEF. Dr. Fuentes also reported that Student's score on the initiate scale suggested that Student had marked difficulties beginning tasks and generating problem-solving approaches.

59. Dr. Fuentes also reported on Student's motor and psychomotor skills, noting that there was some variability in Student's functional use of his dominant and nondominant hands. His performance on motor speed was in the average range for both hands, but his performance on a task of fine motor dexterity was in the impaired range for his dominant hand and in the average range for his nondominant hand. Student's hand strength was in the below average range in both hands.

60. Dr. Fuentes noted that Student exhibited problems with social interaction, emotional self-regulation, and overall adaptive functioning. His motor skills were in the very limited range. On the SIB, Student demonstrated marginally serious problem behaviors, marginally serious internalized maladaptive behaviors, and moderately serious asocial maladaptive behaviors. Dr. Fuentes concluded that Student's results were considerably lower than expected in that Student did not have commensurate levels of cognitive or neuropsychological impairment. At hearing, Dr. Fuentes clarified that Student's behavioral issues affected motivation and doing homework and class work. They did not involve disruptive, acting out behaviors. He considered that Student's behaviors were mild for a child with autism.

61. Dr. Fuentes gave the GARS rating scales to Mother and teachers. The results showed that Student continued to exhibit autistic behaviors, and that he appeared to have more difficulty in the areas of stereotypical behaviors and social interaction, and relatively less difficulty in communication. Dr. Fuentes also noted, based on his records review that Student appeared to have made considerable progress over the years. At hearing, Dr. Fuentes expressed that Student had several strengths that were atypical of children with

autism, such as the ability to understand humor and sarcasm, social awareness, the ability to initiate interactions, and good reading and writing skills.

62. Dr. Fuentes administered the WCJ-III ACH to measure Student's academic functioning. Student's total Achievement scores fell strongly in the average range. Review of individual subtests showed variability. Compared to his cognitive ability, Student demonstrated a relative weakness in math calculation skills. Dr. Fuentes attributed this to Student's deficits in processing speed and cognitive efficiency, as well as his issues with executive functioning. Student also produced approximately half the number of items when he completed the Writing Fluency subtest by hand as compared to when he used a computer. This suggested that Student required accommodations when performing tasks that have high graphomotor demands.

63. Dr. Fuentes summarized his results. He concluded that Student had considerable difficulty, relative to his strengths, performing tasks requiring cognitive efficiency and processing speed. These weaknesses appeared to be exacerbated when Student performed tasks requiring visual-motor integration. Student also had difficulty performing tasks that required efficient retrieval of stored information, quickly forming simple concepts, and performing speeded recall of simple vocabulary. Student also demonstrated difficulty sustaining attention effectively, although this ability improved when information was presented in a multi-sensory format. Student also had problems with impulsivity. Dr. Fuentes suggested that these problems could be ameliorated with appropriate accommodations, such as giving Student additional time and reducing his workload. Since Student had difficulty with organizational skills, planning, and the ability to self-monitor, Dr. Fuentes suggested a structured environment, and one that emphasized Student's ability to work independently. Dr. Fuentes also reported that Student required support in social interaction, adaptive functioning, and organization and planning. Dr. Fuentes recommended that Student's educational program include a smaller education environment with access to typically developing peers and opportunities for mainstreaming, educational support in math and writing, ability to implement sensory strategies to establish and maintain optimal levels of arousal, and social coaching to facilitate peer interaction and adaptive independence. Dr. Fuentes suggested that the eligibility categories of autistic-like behaviors, OHI, and specific learning disabilities be considered.

64. With respect to OHI, Dr. Fuentes observed that the necessity of sensory breaks and strategies, combined with Student's inattention and low levels of arousal, strongly suggested that health issues may be affecting Student's educational experience. Dr. Fuentes testified at hearing that he suspected Student's unspecified autoimmune disorder might be affecting Student's education. He had suggested in or about May 2008 that Parents further investigate Student's autoimmune issues.

65. At hearing, Dr. Fuentes testified that Student had sensory issues, from a neuropsychological, and not an occupational therapist's point of view, that affected Student's education. Student was better at typing than writing, he had comfort level issues with

clothing and touch, and arousal issues. Dr. Fuentes recommended that these be addressed at school, with strategies or other direct intervention.

*IEP Meeting of July 16, 2008*

66. The District convened an IEP meeting on July 16, 2008. The meeting lasted for approximately 14 hours, and was contentious at times. Among those attending were Parents, Ms. Whiteleather (counsel for Student and Parents), Mr. Frazier, Mr. Clarke (counsel for the District), a District program specialist, Patricia Wohanka (a school psychologist), Dr. Fuentes, Terry Thomas (an SLP), Ms. Wheelock (Student's former teacher of from Big Springs School), Mr. Ruhter (whose health had improved and who would again become Student's case carrier), Ms. Linett (occupational therapist), and Mr. Russell (Student's advocate). Not all of the participants were present for the entire meeting.

67. Ms. Ewing, one of Student's teachers at MIR, had planned to be present at the IEP meeting, but a death in her family prevented her attendance at the meeting. She met with Ms. Wohanka several days prior to the IEP meeting for approximately two hours, and provided her recommendations regarding goals. She also provided the District a time at which she could be called to present her input. At the meeting, parents and their counsel expressed concern that Ms. Ewing was not present, and a discussion ensued regarding whether the meeting should go forward. The meeting went forward, and Ms. Ewing was unable to be called at the designated time as Dr. Fuentes was presenting his report then. At various points throughout the meeting, Mother, her attorney, or her advocate protested the meeting going forward without several of the invitees present, and protested Ms. Linett's presence, as Mother and her advocate believed that she was not qualified to present the School Options (OT) report.

68. Also during the meeting, Mother protested the District's use of ENCORE, the computer program the District used to generate its IEPs. Parents threatened to walk out unless the District ceased using ENCORE, and counsel for District advised that, if Parents walked out, the meeting would proceed without them. Mr. Russell prepared and submitted a two-page handwritten dissent which was attached to the IEP, in which parents asserted that the IEP team was not properly constituted and protested the use of the ENCORE program. Parents remained throughout the meeting.

69. The team noted Student's school setting as "Homebound/Hospital," and disabilities of autism and OHI (Other Health Impairment). The team discussed Student's strengths, noting that his cognitive academic language functioning appeared to be a strength, he enjoyed computer technology and creating his own video games, appeared to perform better when information was presented in a multisensory format, and had made progress towards prior goals. Mr. Ruhter presented the Intercare report, and Ms. Linett presented the School Options report. Ms. Linett requested the opportunity to assess Student in his home to determine appropriate accommodations. Ms. Linett also stated there may be a need for a neuro-muscular assessment. Parent declined the requested assessment. The team reviewed Student's present levels of performance, based upon assessment and information from

Student's parent and teacher, and identified needs in the areas of academic/readiness skills, communication skills, motor skills/sensory motor integration, social/emotional behavior skills, pre-vocational/vocational skills, and self-help skills. Previous goals were reviewed, and Mother disputed the results reported. New goals and objectives were discussed and drafted, including goals that were similar to two of the three recommended goals in the Intercare report. Mother and Mr. Russell, Mother's advocate, disagreed with the new goals and objectives. The IEP team noted Mother's desire that Student maintain or exceed grade level activities and receive appropriate support and services to meet his educational needs. The team also noted Mother's comments that Student had a complex medical history which was being monitored by a team of specialists, that he had been diagnosed with reactive arthritis and autoimmune dysfunction not otherwise specified, and that his vision was 20/20 with corrective lenses.

70. The team recommended supports, including highlighted tests, oral tests, reduced paper/pencil tasks, repeated review/drill, shortened assignments, taped lectures and texts, increased verbal response time, extended time for completing assignments and tests, frequent breaks, use of assignment notebooks and study sheets, and note-taking assistance. The team noted that Student required AT. The team specified that Student had a laptop with word processing software, a Therapeutic Listening device with headphones and CD player, and modulated CDs. Parent requested math processing software.

71. As is reflected in the IEP notes, Student has always had a laptop. District initially provided a laptop to Student in or about 2006. It came with many administrative security features, and it was difficult for Mother to add programs to it. Therefore, Mother returned it to the District and bought a new laptop. District reimbursed her for that purchase in early 2008. Sometime thereafter, the laptop Mother purchased became nonfunctional. District could not repair it, and returned it to her. Mother has known at all relevant times that the District has had a replacement laptop available for her to pick up, with all appropriate educational programs on it. Mother has neither retrieved nor accepted the District's laptop.

72. The team noted that Student required interventions in the form of OT services, sensory equipment, BICM services, LAS services, sensory breaks, academic challenges as an intervention, providing chunks of information, giving Student space and time to self-regulate, and not asking him multiple questions. The team agreed that no behavior support plan or functional behavior analysis and behavior intervention plan were required. The team also listed accommodations for statewide testing. A list of "classroom accommodations" was provided to the team and attached to the IEP. It included various accommodations that the team had formally included in the IEP, such as allowing extra time for work, and allowing tape recording. Additionally, the list included a variety of sensory devices, such as adjusting Student's table/chair, providing access to swing, rope climbing, a slant board, and other such devices. Parents represented to the District that the list was formulated by MIR. There was no objective evidence at hearing that that the list was formulated by MIR. Indeed, Student's classroom teacher, Ms. Ewing, testified that she did not prepare the list. Mother never requested any special sensory equipment for Student to use at MIR. The IEP team did not adopt the list of accommodations. There was no evidence at hearing that the District,

through its services providers, had failed to provide any sensory device agreed upon by the IEP team.

73. Parent provided proposed goals, which the team considered. The team formulated goals and objectives in the areas of communication, vocational/pre-vocational, reading, math, social/emotional, and written language. The team agreed upon the following services: OT services, 75 minutes a week to include the Therapeutic Listening program; LAS services, 60 minutes a week; HH instruction for 15 hours per week through December 31, 2008, and behavioral services of 2 hours per month. Student's service providers would also meet for 30 minutes per month. The team also agreed that ESY was necessary to prevent regression of skills. The team agreed that the next triennial review was due in March 2010, and to reconvene before Dr. Lam's HH recommendation expired on December 31, 2008. The team agreed to compensatory education for LAS of 22 hours with the District's SLP. The team noted Parent's request for a modified physical education (P.E.) program, and the team recommended an APE assessment. There was no P.E. component to the Student's HH instruction, but the team recommended the assessment based upon the assumption that Student would return to a general education environment, with P.E., after Student's HH instruction terminated in December 2008. Ultimately, District did not perform the APE assessment recommended by the IEP team, because Student remained in HH, as is described below.

74. The team also noted Parent's request that the educational therapist continue with Student's ESY instruction. The team offered a mental health referral, but Parents declined. The IEP notes reflected that Parents wished to reiterate the importance of consistency and stability for Student. Parents provided a two-page handwritten response to the IEP at the meeting, and agreed to provide a further response by July 18, 2008. Parents ultimately submitted at least 15 pages of notes and comments specifying the areas of the IEP with which they agreed and disagreed. Among many things, they objected that the compensatory LAS services were to be provided by a District SLP, instead of by Ms. Bradshaw. At no time did Parents request a behavioral assessment, a health assessment, or an AT assessment.

#### *Student's HH Instruction from CARE Academy*

75. Mother unilaterally arranged for CARE Academy to provide HH Instruction to Student over the summer. At first, Jill Porras of CARE Academy provided services to Student for 15 hours per week. Ms. Porras was not a special education teacher, but she was a credentialed general education teacher, and she had had training in educational therapy. She also held a M.Ed. in Educational Administration and an M.Ed. in Integrative Studies in Education. There was no evidence that Student required any particular transition assistance when Ms. Porras commenced providing services. Later, in approximately the latter part of August 2008, Ramona Ford, also of CARE Academy, began to teach Student in conjunction with Ms. Porras. Ms. Ford is a credentialed general education teacher, not a special education teacher. She had also had training in educational therapy. Her experience with teaching children with autistic-like behaviors was limited. She had been a substitute teacher

for an autistic child for approximately two and one-half to three weeks, and she had also worked with a child with Asperger's syndrome for approximately six months. Ms. Ford had no training in sensory issues prior to teaching Student. At hearing, Mother testified that Ms. Ford had received "intensive training" in sensory issues from School Options. In contrast, Shannon Schlotman, an occupational therapist from School Options, testified that the training consisted of a single 45-minute meeting on November 13, 2008. Ms. Ford's testimony regarding her training in sensory issues from Ms. Schlotman was consistent with Ms. Schlotman's testimony.

76. Ms. Ford spent the first several weeks of her services becoming acquainted with Student before he was able to perform academic work. Initially, Ms. Ford provided services for 2 hours per week, while Ms. Porras provided the remaining hours. Gradually, Ms. Ford's hours increased, and she eventually provided the remaining 13 hours per week of services. Ms. Ford's hours since she began to teach Student for 15 hours per week were Tuesday, Wednesday, and Thursday, 9:30 a.m. to 2:30 p.m., with a 30 minute lunch each day. Overall, Student had made progress on his IEP goals during the times she has been working with him. District has never paid for any of the services rendered by CARE Academy.

#### *District's Actions After the July 16, 2008, IEP Meeting*

##### *LAS Services*

77. District was prepared to provide the LAS compensatory education pursuant to the July 16, 2008, IEP. Mother did not consent to the services as stated in the IEP. She was concerned about the identity of the person who would provide the services, as she wanted Ms. Bradshaw to provide them, and not a District SLP. She was concerned as to how Student would react to receiving services from yet another provider. She was also concerned that there was no transition plan for the services, and that, Student would be overwhelmed by 2 hours per week of LAS services.

78. The District's school year started on August 13, 2008. Ms. Bradshaw was unavailable to provide services at the beginning of the 2008-2009 school year. Therefore, Sonia Cardenas, another SLP with SenseAbilities, e-mailed Mother on August 29, 2008, to advise that she was ready to provide services on the afternoon of September 8, 2008. Mother never responded to this e-mail.

##### *District's Attempts to Provide HH Instruction*

79. After the July 16, 2008, IEP meeting, Ms. Schmidt's staff commenced the process of locating an HH teacher for Student, so that HH instruction could begin in the 2008-2009 school year. The process included sending mass e-mails to District teachers, advising them of the opportunity to be an HH teacher. The process also included a training session, during which prospective HH teachers were taught policies and practices regarding

HH Instruction. As a result of this process, the District would not, under the best of circumstances, be able to provide HH instruction until two or three weeks into the semester.

80. Ordinarily, HH Instruction are offered for five hours per week, and one hour of HH Instruction is deemed to be the equivalent of one school day, due to the intensive nature of the one-to-one service. Student's IEP team decided, however, that he should receive 15 hours of HH Instruction per week, due to his status as a special education student, and the number of his goals. Additionally, unless there is a documented medical reason to the contrary, HH Instruction are to be delivered either before or after the normal school day, because District teachers are supposed to be engaged in their normal teaching duties during the regular school day, and they are not to charge the District for HH work during that time also. Normal HH hours are from 3:00 p.m.-9:00 p.m. during the week, and all day Saturday. There was no evidence that these hours were not appropriate for Student. Indeed, Dr. Fuentes testified that, although they were not optimal, he was aware of no reason why these hours would not be appropriate for Student. Further, an HH teacher only requires a general education clear credential, even if the HH student is a special education student. Mother was advised of these policies, either through the HH manual Mr. Schmidt provided to her in late August or early September 2008, or directly by Mr. Schmidt.

81. In late August 2008, District selected Nicole Lindemuth to be Student's HH teacher for 7.5 of the 15 weekly hours of instruction. District continued to look for someone who could provide the remaining 7.5 hours of instruction. Mr. Ruhter, who had re-assumed his duties as Student's case carrier and was providing BICM services to Student, introduced Ms. Lindemuth to Student, and Ms. Lindemuth provided a total of 15 hours of instruction to Student from August 25, 2008 through September 8, 2008.

*Mediated Settlement Agreement of September 10, 2008*

82. On September 10, 2008, the parties entered into a mediated settlement agreement of pending due process complaints (Mediated Settlement Agreement). The recitals of the Mediated Settlement Agreement provided that a purpose of the Mediated Settlement Agreement was to "relieve the District from any further obligation to provide Student with an education and/or a free appropriate public education . . . commencing with the date of execution of this Agreement through September 1, 2011 ("Effective Period").<sup>9</sup> The Mediated Settlement Agreement, however, also provided that it was subject to approval by the District's Board of Education (Board). The parties were represented by counsel during the negotiation and signing of the agreement.

83. Immediately after the parties signed the Mediated Settlement Agreement, Mother told Ms. Reed that the District could stop providing services immediately, as she did not want District personnel coming to her home anymore. Based upon this instruction, Ms. Reed immediately contacted the District providers, including Ms. Lindemuth, Student's HH

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<sup>9</sup> A heavily redacted version of the confidential Mediated Settlement Agreement was admitted into evidence at hearing, after the ALJ, on motion of the parties, conducted an in camera review of the entire document.

teacher, and advised them to cease providing services. At hearing, Mother denied telling Ms. Reed to stop services immediately, saying that the District stopped providing services because the Mediated Settlement Agreement provided that services would terminate as of September 10, 2008, the date the Mediated Settlement Agreement was executed. Mother's version of the situation is not as persuasive as Ms. Reed's. The Mediated Settlement Agreement did not require the District to terminate services as of September 10, 2008. Rather, the recitals of the Mediated Settlement Agreement stated that one of the reasons for the agreement was to relieve the District of the obligation to provide services to Student after the date the agreement was executed, which the agreement defined as the agreement's "Effective Date." The Mediated Settlement Agreement still required Board approval. Furthermore, it is difficult to locate and schedule providers of OT, LAS, and HH Instruction. In view of the efforts the District had made to obtain service providers for Student, especially Ms. Lindemuth, the HH provider, it is not likely that the District would simply let them go and gamble that the Board would approve the Mediated Settlement Agreement. Additionally, Mother was not generally a credible witness. For example, she misrepresented facts to Dr. Lam to induce Dr. Lam to sign the HH request form. She misrepresented to the District the time at which she learned that MIR would not have a middle school program. At hearing, Mother did not always answer questions directly. Instead, she offered lengthy, convoluted explanations. Mother's conduct in refusing further services from the District upon execution of the Mediated Settlement Agreement was consistent with her conduct of refusing District services based upon Mother's preference for certain personnel, and her belief that Student was uncomfortable with District personnel coming into his home. Therefore, the District's version of the evidence on this point is more persuasive than Mother's.

84. On September 23, 2008, the Board met and declined to approve the Mediated Settlement Agreement. On September 24, 2008, the District attempted to re-commence its services to Student. Ms. Lindemuth was no longer available to provide HH instruction, so the District continued its efforts to locate a HH teacher. In early October, District selected Arthur Price as a HH teacher for Student. Mr. Price holds special education, learning handicapped, and resource specialist credentials. He has been a teacher for approximately 30 years. He has taught many children with autism during that time, but he had not had any formal training regarding children with autism within the past 10 to 12 years. During the 2008-2009 school year, he taught driver's education and health sciences in the District, and there were two children in his classes that had autistic behaviors. Since health sciences is a required course to graduate, both special education and general education students were enrolled in his classes. He was aware that students use computers and software to do their schoolwork. Mr. Price was qualified to provide HH instruction to Student.

85. Mr. Price advised the District that he would not accept the assignment to be Student's HH teacher unless he could provide the entire 15 hours per week of instruction. When the District assigned Mr. Price to Student, Mr. Price spent two days preparing to be Student's HH teacher. This included meeting with Nancy Penn, a District Administrator, who reviewed Student's IEP with Mr. Price. Ms. Penn advised Mr. Price about Student's curriculum, and told him where to find textbooks and materials.

86. Mr. Price called Mother on October 6, October 7, and October 8, 2009, to attempt to arrange a time on those days to meet Student and commence HH instruction. Each time he called, Mother refused to schedule a time for Mr. Price to see Student. Mother was concerned that Mr. Price did not have sufficient qualifications to teach Student. She felt that his special education experience was not recent enough, that he did not have sufficient computer skills, that, when he called her, he was not familiar with Student's IEP, and that he misstated Student's name and grade. She was concerned that there was no transition plan in place to change services from Ms. Ford to him. She was also concerned because she erroneously believed he would only be available to provide seven and one-half hours of instruction per week, instead of the entire 15 hours. She was also concerned that, by the time he was calling to come over and begin services, Student had already had instruction from CARE Academy that day. (Notwithstanding the HH manual Mother received, and the information provided by the District regarding the hours during which HH instruction could legally be delivered, Mother believed that the District could provide HH instruction during the school day.) After Mr. Price called for the third time, on October 8, 2008, Mother's counsel wrote the District's counsel a letter, authorized by Mother, stating that Student required a teacher who had recent experience in special education and who had some understanding of and training in autism. The letter concluded, "Please ask [Mr. Price] to stop calling [Mother]; this is complete harassment."

87. At hearing, Mother contended that she never rejected Mr. Price. Mother's testimony was directly contradicted by her conduct and by the letter she authorized her counsel to send. Mother's conduct and her attorney's letter constituted a rejection of Mr. Price as Student's HH teacher.

88. District continued its efforts to locate another HH teacher, but was not able to locate someone who was willing to teach Student until approximately February 26, 2009. At that time, Stephanie Brown agreed to be Student's HH teacher, and was available to provide the entire 15 hours per week of HH instruction. Ms. Brown holds a special education credential, and had been a special education teacher for a number of years, including being a kindergarten and first grade Special Day Class teacher. Ms. Brown and Ms. Wohanka, who had succeeded Mr. Ruhter as Student's BICM and case carrier by then, went to Mother's home two times to transition services to Ms. Brown. Ms. Brown had lesson plans and materials, and was ready to teach Student, but Mother and Ms. Brown were unable to agree upon a time for services. Ms. Wohanka and Ms. Brown thought that Mother had agreed that Ms. Brown would provide services outside of school hours, but Mother rejected the proposed schedule. Mother insisted that HH Instruction be delivered during the school day, at a time that was convenient to her and her family. Ms. Brown could not deliver HH instruction to Student during the day. By letter dated March 20, 2009, Mr. Frazier advised Parents that the District would discontinue its search for an HH teacher until Parents were interested in receiving HH instruction during the standard HH times, without limitations or conditions. Consequently, Ms. Ford of CARE Academy, has been the only provider of HH instruction to Student since Ms. Lindemuth ceased providing services in fall 2008. District has not paid for Ms. Ford's services.

*District Attempts to Provide LAS, Behavioral, and OT Services*

89. With respect to LAS services, Mother never responded to Ms. Cardenas's initial inquiry of August 29, 2008, regarding arranging a time to provide LAS services. Following September 23, 2008, when the school board failed to approve the Mediated Settlement Agreement and the District re-commenced services, Ms. Cardenas was unavailable. Therefore, in October 2008, the District assigned another SLP, Janet Wolford, to provide LAS services. Ms. Wolford has a B.A. and an M.A. in Communicative Disorders, a Certificate of Clinical Competence from the American Speech and Hearing Association, and was a licensed SLP for more than 26 years. Ms. Wolford and Mother had difficulty agreeing on a time and place to provide services. For example, on December 10, 2008, Ms. Wolford arrived at Student's home for a previously scheduled LAS session, but nobody was home. Due to these scheduling difficulties, Ms. Wolford was unable to provide services more than once or twice. In December 2008, Ms. Bradshaw, Mother's preferred provider, became available to provide services. Mother and Ms. Bradshaw agreed to a schedule, and Ms. Bradshaw has provided services to Student since then, including Therapeutic Listening services.

90. On October 15, 2008, Ms. Wohanka sent a letter to Mother requesting that Mother contact her to discuss initiating the behavioral services set forth in the July 2008 IEP. Ms. Wohanka has been a school psychologist with the District since July 1999. She holds a B.A. degree in Psychology from University of California, Riverside, and M.A. degrees in Psychology and Educational Psychology from Chapman University. She is a certified BICM.

91. The earliest date upon which the parties could agree for Ms. Wohanka and Mr. Ruhter to meet with Student and Mother to transition behavioral services from Mr. Ruhter to Ms. Wohanka was November 6, 2008, and the meeting indeed occurred on that date. Ms. Wohanka proceeded to provide services to Student regularly thereafter. At hearing, Ms. Wohanka testified that Student has only exhibited typical behaviors, and she was unaware of any record that Student had demonstrated serious behaviors.

*Ms. Linett's OT Assessment and Services*

92. On August 3, 2008, Mother consented to an OT assessment by Ms. Linett, as Ms. Linett had requested at the July 16, 2008, IEP meeting. Mother consented to the assessment because she was familiar with Ms. Linett, and Ms. Linett had agreed that she would not repeat areas on which Student had previously been tested. Ms. Linett holds a B.S. in OT from the University of Southern California, and has a certificate in Therapeutic Listening. She has served as an OT for special education students since 2006, and has been practicing in the field of OT since 1976. Ms. Linett called Mother several times prior to September 5, 2008, to attempt to schedule the OT assessment and services. Mother did not respond, so Ms. Linett sent an e-mail on September 5, 2008. Mother did not respond. Shortly thereafter, at Mother's request, District advised Ms. Linett to cease her efforts, due to the Mediated Settlement Agreement. After the Board declined to approve the settlement, on

September 29, 2008, Ms. Linett sent another e-mail, attempting to set the assessment for October 9, 2008. Mother e-mailed Ms. Linett stating that Student had a doctor's appointment on October 9, and requesting that Ms. Linett provide alternative dates. Ms. Linett did so. Ultimately, Student and Mother became available on October 9, and Ms. Linett conducted her OT assessment on October 9 and October 27, 2008. Ms. Linett commenced providing services to Student in approximately early November 2008.

93. Ms. Linett prepared a report of her OT assessment, dated October 28, 2008. The report stated that the purpose of the OT assessment was to determine whether Student required school-based OT services to address Student's reported reactive arthritis, decreased endurance, and sensory regulation skills.

94. The assessment occurred in Student's home. His home teacher and Mother were present during the first session, and his Mother was present for the second session. Student was able to sit on the sofa or move about the room for testing procedures. Ms. Linett noted he had a therapy ball, bean bag chair, slant board, and fidgets available. Student mentioned that he needed more pencils and erasers. Student was alert and cooperative, provided appropriate verbal interaction and responses, and participated in two-way conversations. He made good eye contact, and followed all directions. Mother reported that he used the Therapeutic Listening headsets throughout the day, but did not specifically follow the associated program at the time of the assessment. During her assessment, Ms. Linett spoke with Student's previous occupational therapist, Saskia de Jong. Ms. de Jong advised Ms. Linett that Student's participation with the Therapeutic Listening program in the past had been inconsistent, and that the headsets and CDs had been lost or misplaced at various times, which prevented Student from fully benefiting from the program.

95. Ms. Linett used the following instruments to assess Student: Chart Review, Clinical Observations, Upper Extremity Range of Motion, a Manual Muscle Test, and the Sensory Processing Measure—Home Form.

96. Ms. Linett reported Mother's comment that due to Student's compromised immune system, Mother did not believe that Student could participate in a general education environment. Mother advised Ms. Linett that she would like him to return to MIR when he was released from HH, as he required the flexibility of the movement breaks, alternative seating arrangement, and the type of classroom environment available at MIR.<sup>10</sup> Mother reported that Student could write for 5 to 10 minutes, and then he would type the rest of his work. Mother believed that due to Student's age and skill level, school accommodations rather than remediation activities would be most beneficial.

97. Ms. Ford, Student's HH teacher from CARE Academy, reported that Student completed his work and was involved in grade-level core curriculum, using the materials that the District uses. Student was attentive, and participated in movement breaks and alternate

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<sup>10</sup> There was no evidence as to why Mother commented to Ms. Linett about MIR as though it were possible that Student could attend MIR for middle school.

seating as needed. Ms. Ford did not report that Student had any difficulties with task orientation or attention. At hearing, Ms. Linett elaborated that Ms. Ford, Student's HH teacher from CARE Academy, reported that Student was doing well academically.

98. Ms. Linett spoke to Dr. Fuentes, and reviewed his neuropsychological report. Dr. Fuentes advised that while Student had sensory processing delays, they may be addressed through accommodations and environmental modifications within his education program. In Ms. Linett's opinion, Dr. Fuentes' assessment revealed no sensory deficits impacting Student's ability to benefit from his education.

99. Ms. Linett also spoke to Mr. Ruhter and Ms. Lindemuth. Mr. Ruhter stated that Student was able to regulate his own sensory needs. Ms. Lindemuth stated that Student was able to complete all grade-level academic work successfully, and often expressed a desire to complete his work, eschewing her suggestions of movement breaks.

100. Ms. De Jong, Student's former occupational therapist, recommended that Student continue with the Therapeutic Listening program, and that Student engage in physical activity and improve core strength and endurance.

101. Ms. Linett evaluated Student's fine motor skills. Student advised Ms. Linett that he wrote with his left hand, but otherwise he switched hand preference depending on the activity. He demonstrated controlled reach, grasp, and release. He transferred objects hand to hand in both directions, and was able to use both hands together for bimanual activities. He would use the non-preferred hand to stabilize objects during activities or writing.

102. Ms. Linett evaluated Student's neuromuscular skills. Ms. Linett reported that upper extremity range of motion was within normal limits bilaterally. Student's right shoulder flexion was limited by approximately five degrees actively, as compared to the left, but that did not compromise function. Student's manual muscle strength was generally 4+/5 on the left, and 5/5 on the right. Ms. Linett considered these to be in the average ranges. Ms. Linett noted that Student tended to slump forward in his seat, and that he reportedly fatigued during lengthy seated activities. He was able to visually attend to tasks, and Student informed Ms. Linett that he not only played video games, but he also wrote and created video games.

103. Ms. Linett assessed Student's sensory processing by administering the Home Form of the Sensory Processing Measure. The Sensory Processing Measure is an integrated system of rating scales that provides a standardized measurement of sensory processing abilities, including sensory processing, praxis, and social participation. Since Student was in HH, Ms. Linett could not have a rater complete the Main Classroom and School Environments forms.

104. Mother rated Student as having some difficulties in the areas of social responses to sensory input and visual processing, as well as body awareness. She rated him

as having significant difficulty in the areas of auditory and tactile processing, as well as balance.

105. Ms. Linett reviewed the OT report dated May 9, 2008, from School Options. Ms. Linett noted the School Options report mentioned a history of ear infections, which Ms. Linett posited might explain why Student had difficulty with some movement. This also led her to suggest the Therapeutic Listening program to improve the flexibility of the tympanic membrane. Ms. Linett agreed with the School Options observation that Student was sedentary, and had poor posture when seated. Ms. Linett believed that Student's body/spatial awareness and postural control/endurance could improve with a more active lifestyle. Ms. Linett observed that the School Options report indicated that Student required prompting for self-care tasks, but Ms. Linett had not observed that, and it had not been reported to her by Mother. The School Options report indicated that Student preferred to tear certain items rather than cut them with scissors, but Ms. Linett observed that Student was able to use scissors. Ms. Linett noted the results of the Bruininks-Oseretsky test, and attributed some of his lower scores to Student's not always demonstrating maximum effort for non-preferred activities, as well as to Student's low average muscle tone, sedentary lifestyle, and decreased endurance.

106. Ms. Linett concluded that Student's motor skills were functional for a school curriculum. His fatigue during longer activities and assignments could be accommodated by movement breaks and alternative sitting arrangements. The sensory processing difficulties reported by Mother could be accommodated within the classroom by such means as changing the lighting, and use of headphones. Since Student was now 12 years old, Ms. Linett believed that remediation activities would not be beneficial, but accommodations were appropriate. When Student returned to a classroom setting, she suggested administering the Sensory Processing Measure ratings questionnaires for the Main Classroom and School Environments might be administered to determine appropriate classroom accommodations for Student. She also concluded that school-based OT was not necessary in Student's HH environment.

107. At hearing, Ms. Linett elaborated upon her recommendations. She stated that she felt that Student had met his goals from the July 16, 2008, IEP. Her assessment revealed no sensory processing issues were affecting Student's ability to benefit from his educational program. Compared to typically developing peers, he acted very much like average middle school boys as far as his sensory modulation skills. She believed that he needed movement breaks, but he could attend in a general education middle school environment, he focused, he made eye contact, and he conversed. Handwriting was laborious for him, but he could type very well. She described a therapy session she had with Student in a fast-food restaurant, at which he acted appropriately and had no sensory modulation or transitioning problems. She has never seen any maladaptive behaviors. She viewed his emotional responses as those of a typical 12-year-old-boy.

108. At hearing, Ms. Schlotman, a supervising occupational therapist from School Options, testified regarding the School Options report and Ms. Linett's report. Ms. Schlotman holds a B.A. in Psychology from San Diego State University and an M.S. in OT from San Jose State University. She has been licensed as an OT in California for approximately six years, and has been working in the OT field since 1996. Ms. Schlotman did not write the School Options report, and was not listed as an evaluator in the report, but she testified that she participated in the clinical portion of the evaluation.

109. Ms. Schlotman testified that the School Options report demonstrated that Student had sensory processing and sensorimotor deficits, and that these would affect his abilities to attend, his ability to follow directions in the classroom, and his need to rely on teacher interventions in performing tasks. She acknowledged that modifications, such as giving directions in different ways, could ameliorate Student's need to clarify teacher directions. She acknowledged that, as of November 2008, Student could attend to a task for 20 minutes, with accommodations. She criticized Ms. Linett's assessment as incomplete, and criticized that Ms. Linett obtained much of the information in the report by interviews and other reports. She acknowledged that talking to the teacher was important during an assessment, while admitting that she did not know whether School Options had interviewed Student's teachers at MIR. She did not believe that Ms. Linett's observations related to Student's sensory modulation skills, and criticized Ms. Linett's OT services, based upon Ms. Linett's notes as being more evaluative than providing therapy. She testified that Student could benefit from OT services, but she was unaware of the legal standard for providing a FAPE, and was not familiar with the term "accessing the curriculum." She also did not know how Student was performing academically at MIR.

110. Ms. Schlotman testified regarding her 45-minute conversation with home teacher Ms. Ford in November 2008. During her conversation with Ms. Ford, Ms. Schlotman did not inquire as to Student's progress on his IEP goals. Mother was present, and did not mention that Student needed additional sensory equipment. Ms. Schlotman did not note at that time that he needed any additional sensory equipment. Student was present briefly, and commented that he liked using the therapy ball or bean bag.

*IEP Meeting of November 13, 2008*

111. On November 13, 2008, the District convened an IEP meeting, to discuss the results of Ms. Linnet's assessment and the School Options report dated May 9, 2008. Participants in the meeting included Mother, the school nurse, Ms. Schlotman, Mr. Ruhter, Counsel for District, Ms. Lindemuth (Student's previous HH teacher from the District), Ms. Ford (Student's privately-retained HH teacher), Ms. Wolford and Ms. Bradshaw (SLPs), Ms. Wohanka (school psychologist), Ms. Linett, Ms. Bailes (a general education teacher), Ms. Petty (the regional center caseworker), and Mr. Ford (Student's advocate).

112. The team noted Student's eligibility categories as autism and OHI, and that he was in the HH setting. Ms. Linett presented her report, and Mother asked questions. The IEP notes reflect that Ms. Schlotman from School Options also gave input, stating that

Student needed to improve his handwriting, so he could perform life skills such as writing checks and filling out job applications. Evidence at hearing revealed that Ms. Schlotman also discussed with Ms. Bradshaw Student's use of the Therapeutic Listening program. Ms. Linett reported that Student did not meet the eligibility requirement for District-provided direct OT services. Therefore, the IEP did not offer any direct OT services except for 30 minutes per month for OT consultation. Other services remained the same as those offered in the July 16, 2008, IEP. At hearing, the parties stipulated that Student consented to these services, with the exception of the OT services. Mother did not request an AT or behavioral assessment at the meeting.

113. The team agreed that Mr. Ruhter would set a time for the LAS provider to come to Student's home to meet Student and transition into providing LAS services.

114. During the meeting, the District requested that a medical assessment of Student be performed. This request was based on Mother having advised the District that Student would be on HH until June 2009, and Parent's report to the occupational therapist that Student's physician had recommended prolonged periods of exercise. Mother refused to sign the assessment plan at the IEP meeting. Mr. Frazier and the school nurse explained the purpose of the assessment plan, and Mother had no questions. The parties dispute whether the assessment plan was given to Mother at the IEP meeting to take home. Regardless of whether such an assessment plan was given to Mother to take home, Mother and her counsel knew the District was requesting an assessment, and the District followed up by providing an assessment form to counsel, and attempting to address Mother's concerns about the assessment. The assessment plan form requested a health assessment, to be administered by "Other Service Provider Medical Doctor" and stated that "A general assessment and/or review of any medically significant conditions that may affect your child's educational performance will be conducted." A box on the form stating "Medical record review/Physical assessment" was checked. The form contained the legally required information regarding the notice of parent's rights.

115. At various times subsequent to the IEP meeting, and through the date of commencement of the due process hearing, District provided further details to Mother about the type of medical assessment requested, the identity and background of the physician the District had selected to perform the assessment, and the need for the assessment. As of the conclusion of the due process hearing, Mother had not executed an assessment plan for a medical assessment, although she had provided the District a three-page preliminary laboratory report of blood test results performed on Student on August 18, 2008. The report contained no explanation of the results; it only provided the numerical results. The only health-related assessment Mother permitted the District to perform was a health screening by the school nurse, which was performed in January 2009.

#### *Student's Medical Condition*

116. As a result of Dr. Fuentes' and Dr. Lam's suggestions that Student's autoimmune disorder be more fully evaluated, on November 26, 2008, Parents consulted

Sudhir Gupta, M.D., Professor of Medicine, Pathology and Laboratory Medicine, and Microbiology and Medical Genetics, as well as the Chief, Division of Basic and Clinical Immunology at the University of California, Irvine. Based upon Student's medical history and laboratory tests, Dr. Gupta concluded that Student had an immune disorder known as hypogammaglobulinemia, characterized by low levels of immunoglobulin. Dr. Gupta testified that Student had probably had this disorder since birth. He prescribed treatment for Student, consisting of infusions of intravenous gammaglobulin (IVIG therapy), which is given periodically. Student had completed two IVIG therapy treatments at the time of the hearing. The second treatment occurred on April 24, 2009.

117. Dr. Gupta testified that Student was able to go to school in November 2008, at the time he first examined him, with certain precautions, such as staying away from actively ill children. Dr. Gupta testified that each child was different, but that Student would probably be more susceptible to infections while receiving the first one to three treatments. Therefore, he would recommend that Student not attend school until after that time. However, in 35 years of practice, he had never had a patient who could not attend regular school. He also testified that Student did not present with a major autoimmune disorder, although he had not ruled it out. Nor did Student present with reactive arthritis, or painful joints. Dr. Gupta did not know Student was on HH.

118. On December 16, 2008, Dr. Lam executed a second request for HH instruction, to extend to August 30, 2009.<sup>11</sup> The diagnoses listed to support the HH request were autism, recurrent joint pain, anxiety disorder, and autoimmune disorder. Dr. Lam testified that she extended the HH request from December 31, 2008, through August 2009 based upon the continued investigation and treatment of Student's immune disorder. On January 15, 2009, the school nurse performed a health screening of Student. She wrote two unidentical reports of the screening, both dated January 20, 2009.

## LEGAL CONCLUSIONS

### *Burden of Proof*

1. The petitioner in a special education due process administrative hearing has the burden to prove his or her contentions at the hearing. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-57 [126 S.Ct. 528].) Student has the burden of proving the issues with respect to his Complaints, and District has the burden of proving the issues with respect to its Complaint.

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<sup>11</sup> On June 30, 2009, the District submitted a Motion to Consider Additional Evidence. The motion contained the declaration of Beth Bartholomew. The ALJ did not review the declaration, but the motion requested that the ALJ consider the declaration because it contained information regarding Mother's alleged alteration of the August 2009 termination date of HH Instruction on the HH request form. The ALJ denies the motion. The evidence is not directly relevant to any issue that is the subject of this Decision.

## *Jurisdiction Over and Implementation of Settlement Agreements*

2. OAH has limited jurisdiction to hear due process complaints to enforce the IDEA and state law, which does not extend to the enforcement of settlement agreements. Pursuant to Education Code section 56501, subdivision (a), a parent or school district may request a due process hearing with respect to the following issues: (1) there is a proposal to initiate or change the identification, assessment, or educational placement of the child or the provision of a free appropriate public education (FAPE) to the child; (2) there is a refusal to initiate or change the identification, assessment or educational placement of the child or the provision of a FAPE to the child; (3) the parent or guardian refuses to consent to an assessment of the child; (4) there is a disagreement between a parent or guardian and a district regarding the availability of a program appropriate for the child.

3. Education Code section 56501, subdivision (a) does not include the issue of a school district's alleged failure to comply with a settlement agreement. Rather, a compliance complaint pursuant to California Code of Regulations, title 5, sections 4600 et seq. is the appropriate means by which a student may address a school district's alleged failure to comply with a settlement agreement. (See *Wyner v. Manhattan Beach Unified School District* (9th Cir. 2000) 223 F.3d 1026.) Specifically, California Code of Regulations, title 5, section 4650, subdivision (a)(4), provides for the filing of such a complaint. However, there is authority that if the school district's violation of the settlement agreement may constitute a denial of a FAPE, OAH has jurisdiction. (*Pedraza v. Alameda Unified Sch. Dist.*, 2007 WL 949603 (N.D. Cal. 2007) (*Pedraza*).)

4. Well-established principles of contract law govern the interpretation and enforceability of settlement agreements. (*Miller v. Fairchild Indus.* (9th Cir. 1986) 797 F.2d 727 at 733.) If a written agreement is not equivocal or ambiguous, "the writing or writings will constitute the contract of the parties, and one party is not permitted to escape from its obligations by showing that he did not intend to do what his words bound him to do." (*Brant v. California Dairies, Inc.* (1935) 4 Cal.2d 128, 134; see also 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 118 ["Ordinarily, one who accepts or signs an instrument, which on its face is a contract, is deemed to assent to all its terms. . . ."])

### *Special Education and Rights to a FAPE*

5. Pursuant to California special education law and the Individuals with Disabilities in Education Act (IDEA), as amended effective July 1, 2005, children with disabilities have the right to a FAPE that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and independent living. (20 U.S.C. §1400(d); Ed. Code, § 56000.) FAPE consists of special education and related services that are available to the student at no charge to the parent or guardian, meet the state educational standards, include an appropriate school education in the state involved, and conform to the child's IEP. (20 U.S.C. § 1402(9).) "Special education" is defined as specially designed instruction, at no cost to parents, to meet the unique needs of the student. (20 U.S.C. § 1402(29).) The IDEA defines specially defined instruction as "appropriately

adapting to the needs of an eligible child . . . the content, methodology, or delivery of instruction.” (34 C.F.R. § 300.39(b)(3) (2006).)<sup>12</sup>

6. California law defines special education as instruction designed to meet the unique needs of individuals with exceptional needs coupled with related services as needed to enable the student to benefit fully from instruction. (Ed. Code, § 56031.) The term “related services” includes transportation and such developmental, corrective, and other supportive services as may be required to assist a child to benefit from special education. (20 U.S.C. § 1402(26).) In California, “related services” are referred to as DIS services. (Ed. Code, § 56363, subd. (a).)

7. In *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982), 458 U.S. 176 [102 S. Ct. 3034] (*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. 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 that 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. (*Rowley, supra*, 458 U.S. 176, 201.)

8. School districts must assess special education students in all areas of suspected disability. (34 C.F.R. §§ 300.303 (a); 300.304(b)(4) & (6); Ed. Code, § 56320, subd.(f).) Reassessments of a child with a disability shall occur if the school district determines that the educational or related service needs of the child warrant a reevaluation, or if the child’s parents or teacher request a reevaluation. (20 U.S.C. § 1414(a)(2).) The school district must provide notice to the parents of a child with a disability, in accordance with 34 Code of Federal Regulations part 300.503, that describes any evaluation procedure the agency proposes to conduct. (34 C.F.R. § 300.304.) The district must obtain informed parental consent prior to conducting an assessment or reassessment of a child with a disability. (34 C.F.R. § 300.300.) Parental consent pursuant to the IDEA requires that the parent has been fully informed of all information relevant to the evaluation, and the parent understands and agrees in writing to the carrying out of the activity for which his or her consent is ought, and the consent describes that activity and lists the records (if any) that will be released and to whom. (34 C.F.R. § 300.9.) If a parent refuses to consent to the proposed assessment, the school district can request a due process hearing to compel the assessment. (Ed Code, §§ 56501, subd. (a)(3), 56506, subd. (e).) California law specifies that a health assessment shall be conducted by a credentialed school nurse or physician who is trained and prepared to assess cultural and ethnic factors appropriate to the pupil being assessed. (Ed. Code, § 56325, subd. (b).)

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<sup>12</sup> All subsequent references to the Code of Federal Regulations are to the 2006 version, unless otherwise indicated.

9. A school district has the right to conduct necessary and appropriate assessments if a student intends to seek the benefits of the IDEA and receive special education and related services from the school district. (*Gregory K. v. Longview Sch. Dist.*, *supra*, 811 F.2d 1307, 1315.)

10. An IEP required as a result of an assessment shall be developed within a total time not to exceed 60 days from the date the District received the executed consent for assessment, unless the parent agrees, in writing, to an extension, not counting days between the pupil's regular school sessions, terms, or days of school vacation in excess of five schooldays. (Ed. Code, § 56344.)

11. An IEP meeting requested by the parent to develop, review, or revise an IEP shall be held within 30 days, not counting days between the Student's regular school sessions, terms, or days of school vacation in excess of five schooldays, from the date of receipt of the parent's written request. (Ed. Code, § 56343.5.)

12. The IEP is a written document for each child who needs special education and related services. The contents of the IEP are mandated by the IDEA, and the IEP must include an assortment of information, including a statement of the child's present levels of academic achievement and functional performance, and a statement of measurable annual goals designed to meet the child's needs that result from his disability to enable the child to be involved in and make progress in the general education curriculum. The goals are based upon the child's present levels of academic achievement and functional performance, and must include, if the child takes alternate assessments aligned to alternate achievement standards, benchmarks or short-term objectives. The IEP must also include a description of how the child's progress toward meeting the annual goals will be measured, when periodic reports of the child's progress will be issued to the parent, a statement of the special education and related services to be provided to the child, a statement of the program modifications that will be provided for the child, and a statement of individual accommodations for the child related to the taking of state and districtwide assessments. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.320.) An IEP must contain the projected date for the beginning of services and the anticipated frequency, location, and duration of those services. (20 U.S.C. § 1414(d)(1)(A)(VII); Ed. Code, § 56345, subd. (a)(7).)

13. For each area in which a special education student has an identified need, annual goals in the IEP establish what the student has a reasonable chance of attaining in a year. (*Letter to Butler*, 213 IDELR 118 (OSERS 1988); Notice of Interpretation, Appendix A to 34 C.F.R. part 300, Question 4 (1999 regulations).)

14. In developing the IEP, the IEP team shall consider the strengths of the child, the concerns of the parents for enhancing the child's education, the result of the most recent evaluation of the child, and the academic, developmental, and functional needs of the child. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. § 300.346(a).)

15. School districts are also required to provide each special education student with a program in the least restrictive environment (LRE), with removal from the regular education environment occurring 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); Ed. Code, § 56031.) A placement must foster maximum interaction between disabled students and their nondisabled peers "in a manner that is appropriate to the needs of both." (Ed. Code, § 56031.)

16. One or both of the student's parents are considered necessary members of the IEP team. (34 C.F.R. § 300.321(a)(1).) To fulfill the goal of parental participation in the IEP process, the school district is required to conduct a meaningful IEP meeting. (*Target Range, supra*, 960 F.2d 1479, 1485.) A parent has meaningfully participated in the development of an IEP when she is informed of her child's problems, attends the IEP meeting, expresses her disagreement regarding the IEP team's conclusion, 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 had 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. ex rel G. v. Vashon Island School District* (9th Cir. 2003) 337 F.3d 1115, 1131.) However, an IEP need not conform to a parent's wishes in order to be sufficient or appropriate. (*Shaw v. Distr of Columbia* (D.D.C. 2002) 238 F.Supp.2d 127, 139 [IDEA does not provide for an "education . . . designed according to the parent's desires."], citing *Rowley, supra*, 458 U.S. at p. 207.) Parents have no right to compel assignment of particular teachers or other education personnel to implement the IEP. Those decisions are within the discretion of the school district. (*Letter to Hall*, 21 IDLER 58, (OSEP 1994); *Rowley, supra*, 207-208.)

17. An IEP is evaluated in light of information available to the IEP team at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) "An IEP is a snapshot, not a retrospective." (*Id.* at p. 1149, citing *Fuhrmann v. East Hanover Bd. of Education, supra*, 993 F.2d 1031, 1041.) The IEP must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*)

18. The issue of whether a school district has offered a FAPE has both procedural and substantive components. States must establish and maintain certain procedural safeguards to ensure that each student with a disability receives the FAPE to which the student is entitled, and that parents are involved in the formulation of the student's educational program. (*Target Range, supra*, 960 F.2d 1479 at 1483.) Citing *Rowley, supra*, 458 U.S. at p. 200, the court also recognized the importance of adherence to the procedural requirements of the IDEA, but noted that procedural flaws do not automatically require a finding of a denial of a FAPE. (*Id.* at 1484.) Procedural violations may constitute a denial of a FAPE if they result in the loss of educational opportunity to the student or seriously infringe on the parents' opportunity to participate in the IEP process. (*Ibid.*) These

requirements are also found in the IDEA and California Education Code, both of which provide that a procedural violation only constitutes a denial of FAPE if the violation (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415 (f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2); *Park v. Anaheim Union High School Dist.* (9th Cir. 2006) 464 F.3d 1025, 1032.)

19. Minor failures by a school district in implementing an IEP should not automatically be treated as violations of the IDEA. (*Van Duyn v. Baker School Dist.* (9th Cir. 2007) 502 F. 3d 811, 821. Rather, a material failure to implement an IEP violates the IDEA.. (*Id.* at p. 822.) "A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP." (*Id.* at p. 822.) This standard does not require that the child suffer demonstrable educational harm. for there to be a finding of a material failure. (*Id.*) However, the child's educational progress, or lack of it, may be probative of whether there been more than a minor shortfall in the services provided. (*Id.*)

20. A district shall provide individual instruction (HH instruction) to a student with a temporary disability which makes attendance at school impossible or inadvisable. (Ed. Code, § 48206.3, subd. (a).) Individual instruction means instruction provided to an individual pupil in the pupil's home, or in a hospital or other health facility, or under other circumstances prescribed by regulations of the State Board of Education. (Ed. Code, § 48206.3, subd. (b)(1).) Temporary disability means a physical, mental, or emotional disability incurred while a pupil is enrolled in school, and after which the pupil can reasonable be expected to return to regular day classes. (Ed. Code, § 48206.3 (b)(2).) A temporary disability shall not include a disability for which a pupil is identified an individual with exceptional needs pursuant to Education Code section 56026. (Ed. Code, § 48206.3, subd. (b)(2).) However, if a student who is eligible for special education sustains a temporary disability, such pupil may receive HH instruction pursuant to Education Code section 48206.3. (Ed. Code, § 56363; Cal. Code Regs., tit. 5, § 3051.4.) HH must be recommended by the IEP team based upon a report from the attending physician certifying that the severity of the condition prevents the pupil from attending a less restrictive placement. (Cal. Code Regs., tit. 5, § 3051.4, subd. (d).) HH instruction may be provided by a regular class teacher, a special class teacher, or a resource specialist teacher, if the teacher or specialist is competent to provide such instruction and services and it is feasible for the teacher or specialist to do so. (Cal. Code Regs., tit. 5, § 3051.4, subd. (e).) The IEP team shall review and, if appropriate, revise the IEP whenever there is a significant change in the pupil's current medical condition. (Cal. Code Regs., tit. 5, § 3051.4, subd. (c).) A special education student may receive DIS or related services at home, as is described in Education Code section 56363 subdivision (b)(1), but the statutory scheme reflects that those services are distinguishable from the medically required HH instruction provided under Education Code, section 48206.3, subdivision (a). HH instruction under that statute, unlike DIS services, is an educational placement designed to provide a temporarily disabled student, regardless of whether the student has special needs, with academic instruction in lieu of attendance at school.

## *Student's Issues*

### *Implementation of IEP Services During the 2007-2008 School Year (Issue 1(a))*

21. Student contends that District failed to provide LAS, vision therapy, and ESY services agreed to in the February 1, 2008, and February 20, 2008, IEPs. He further contends that District failed to reimburse for transportation to and from MIR subsequent to February 20, 2008. District contends that Mother's conduct impeded the District's ability to provide LAS, but that it offered compensatory education. District contends that vision therapy services were always available to Student, and that ESY was not offered by the District because it was not included in the 2007 Settlement Agreement. District further contends that Mother's conduct impeded the District's ability to reimburse for transportation.

22. A material failure to implement the IEP is a denial of a FAPE. (See Legal Conclusion number 19.) With respect to LAS services, the evidence demonstrated that the District attempted to deliver the LAS services contained in the February 1, 2008, and February 20, 2008, IEPs, but that Mother's refusal to permit the District administration to communicate with MIR impeded the ability of the District to deliver services. Nevertheless, in the July 16, 2008, IEP, District agreed to provide 22 hours of compensatory LAS services by a District provider. Parents declined the services, for an assortment of reasons. Parents did not want the services to be provided by a District provider. Rather, Mother wanted a specific SLP, Lisa Bradshaw, to provide the services. Mother did not want Student to be overwhelmed by additional services, and she was concerned that there was no transition plan for the services.

23. None of these reasons justify the Parents' declining the compensatory education services. Student produced no evidence that he required an NPA SLP to receive an educational benefit from the services, rather than a District provider. There was no specific evidence that Student would be overwhelmed by additional LAS services. Nor was there evidence that Student would be unable to transition to an LAS provider as he had transitioned to other providers. He transferred to Jill Porras, the original HH provider, with no particular assistance. He transitioned to various teachers at MIR with no particular assistance. Finally, there was no evidence that a BICM would not assist with the transition, as Mr. Ruhter and Ms. Wohanka did with nearly all of Student's District providers subsequent to the July 16, 2008, IEP.

24. Like the compensatory LAS services, vision therapy services were also available to Student at all relevant times. Mother contends that she did not know the identity of the provider. The first page of the February 1, 2008, IEP states that Mother was to be reimbursed for travel to the Vision Enhancement Center one time per week, and that Student was to receive vision therapy one time per week. These services were also specified on another page in the IEP document. The 2007 Settlement Agreement contains similar language. Ms. Reed orally advised Mother that the Vision Enhancement Center was the provider for vision therapy. Had Mother kept the appointment for an examination with Dr.

Kohn in April 2008, or taken Student for an examination at any time during the school year, Mother would have learned that the provider for vision therapy was Dr. Kohn's Vision Enhancement Center. Mother did not even call the Vision Enhancement Center to verify that it was to provide vision therapy to Student. Mother mistakenly believed that Dr. Kohn's Vision Enhancement Center did not provide vision therapy services, but Mother's mistake was not engendered by any conduct of the District. Under these circumstances, District did not deny Student a FAPE.

25. Student did not meet his burden of proving that District denied Student a FAPE by not providing ESY during the 2007-2008 school years from February 2008 onward. Mother knew that the 2007 Settlement Agreement did not provide for ESY, and that the point of the February IEP meetings was to document the 2007 Settlement Agreement. Mother knew that the Mr. Ruhter had erred in checking the ESY box in the February 1, 2008, IEP. Mother, who has a background in special education advocacy, was at the IEP, and knew that the team had not agreed to ESY. Indeed, Mother had pointed out the error to the District. Student cannot capitalize on this known error and now contend that he is entitled to ESY. Mother has not presented any evidence that Student's condition had changed between the time of the execution of the December 2007 Settlement Agreement to February 2008, so as to override that portion of the Settlement Agreement in which she waived her right to demand additional services from the District. Nor did Student present any specific objective evidence that he required ESY to receive a FAPE. Notably, Dr. Fuentes' neuropsychological report did not recommend ESY. Based upon Findings of Fact numbers 1 through 21, and 50 through 65, and Legal Conclusions numbers 1 through 19, and 21 through 25, District did not deny Student a FAPE with respect to LAS, vision services, or ESY.

26. Student did not meet his burden of proving that District denied Student a FAPE by any failure to reimburse for transportation to and from MIR. Student failed to provide the daily attendance records which the District required to reimburse transportation. This is so regardless of whether transportation was required to be reimbursed for two round trips per day, as Student contended, or for one round trip per day, as District contended. District reviewed the documentation provided by Mother to determine whether Student had attended MIR on a particular day, by noting whether Student had ordered lunch, or whether a field trip was scheduled, and reimbursed for transportation based on that limited information. At hearing, it became apparent that Student had been overpaid by several hundred dollars, because he did not make a field trip to Washington D.C. that District assumed he had made. Not only did Student fail to provide the District with information from which it could accurately determine daily attendance and calculate the amount to be reimbursed, but Student also failed to present any such evidence at hearing.

27. Based upon Findings of Fact numbers 1 through 21, and Legal Conclusions numbers 1 through 21, District did not deny Student a FAPE on these grounds.

*APE, AT, Behavior, Health, and Vision Assessments During the 2007-2008 School Year (Issue 1(b))*

28. Student contends that he was entitled to APE, AT, Behavior, Health, and Vision assessments during the 2007-2008 school year, but the District did not assess him in these areas. The District is not required to assess unless the parent or teacher requests an assessment, or unless the District determines that the educational or related service needs of the child warrant a reevaluation. (See Legal Conclusion number 8.) With respect to the APE, AT, behavior, and health assessments, neither Parents nor teacher requested the District to perform APE, AT, behavior, or health assessments during the 2007-2008 school year. With respect to APE, AT, behavior, and health, Student did not demonstrate that District had any knowledge that Student had any educational or service needs during the 2007-2008 school year that warranted assessment in those areas, prior to the HH request form that Mother submitted to the District toward the end of the 2007-2008 school year. In this regard, Mother's refusal to permit the District administration to obtain information about Student from MIR impeded the District's ability to discover whether Student had any educational or service needs that might have warranted the District to consider assessments. Additionally, the 2007 Settlement Agreement did not provide for APE, AT, behavior, or health assessments. Mother has not presented any evidence that Student's condition had changed between the time of the execution of the December 2007 Settlement Agreement to February 2008, so as to override that portion of the Settlement Agreement in which she waived her right to demand additional services from the District.

29. Further with respect to behavior, the Intercare assessment that Mother obtained without District's prior knowledge did not reveal any maladaptive behaviors that were interfering with Student's ability to access his education. Indeed, Dr. Fuentes testified that he was aware of no maladaptive behaviors that would interfere with Student's education. Mr. Ruhter and Ms. Ewing credibly testified similarly.

30. With respect to a health assessment, Student refused the District's request to provide complete releases for the District to obtain necessary information about Student's health, such as his need for HH Instruction. Student also prevented Dr. Fuentes from imparting information to the District about Student's health. Rather, Mother unilaterally decided what information she would permit the District to obtain. Under these circumstances, even if a health assessment had been warranted during the 2007-2008 school year, it is unclear how the District could have conducted a valid assessment.

31. Finally, with respect to a vision assessment, such an assessment was available to Student at all times from February 2008 onward. Indeed, Mother cancelled Student's April 2008 appointment for a vision assessment with Dr. Kohn, without notice, and never made another appointment.

32. Based upon Findings of Fact numbers 1 through 65, and Legal Conclusions numbers 1 through 18, and 28 through 31, District did not deny Student at FAPE by failing to conduct these assessments.

*Failure to Timely Complete Assessments in APE, AT, Health, and Vision After February 20, 2008, During the 2007-2008 School Year (Issue 1(c))*

33. Student contends that the District violated the procedures of the IDEA and state law and denied him a FAPE, by failing to timely complete assessments in the areas of APE, AT, health, behavior and vision. District did not deny Student a FAPE by failing to timely complete assessments in health, behavior, vision, APE and AT. As was set forth in Legal Conclusions numbers 28 through 31 above, District was not required to conduct assessments in APE, AT, or behavior. As was also discussed in Legal Conclusions number 30, above, Student rebuffed District attempts to obtain health information pertaining to Student. As was also discussed above, in Legal Conclusion number 31, a vision therapy assessment was available from Dr. Kohn at all relevant times, and Student refused to avail himself of it. Based upon Findings of Fact numbers 1 through 65, and Legal Conclusions numbers 1 through 18, and 28 through 33, District did not deny Student a FAPE on this ground.

*Sufficiency of February 1, 2008, and February 20, 2008 IEP Documents (Issue 1(d))*

34. The February 1, 2008, and February 20, 2008, IEP documents contain present levels of performance and goals. Student objects that they do not contain modifications and accommodations.

35. This issue is governed by the terms of the 2007 Settlement Agreement. These IEP meetings were held pursuant to the terms of the 2007 Settlement Agreement, which also prescribed the content of these IEPs. Specifically, the 2007 Settlement Agreement provided that the IEPs would contain present levels of performance and goals. Student presented no evidence that the terms of the Settlement Agreement were not applicable as of February 2008. Consequently, to the extent that this issue may be deemed a request to OAH to enforce the settlement agreement, OAH may not have jurisdiction to do so. However, this issue is alternatively addressed on its merits, in the event that this issue is deemed to involve a FAPE issue to which *Pedraza, supra*, applies.

36. Alternatively, the failure of the February 1, 2008 and February 20, 2008 IEP documents to contain accommodations and modifications did not deny Student a FAPE. A procedural violation only requires a remedy when the procedural violation impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of a FAPE to the parent's child, or caused a deprivation of educational benefits. (Legal Conclusion number 18.)

37. Mother attended both IEP meetings, participated, and criticized the IEPs, but, at the time, she did not criticize them for not containing accommodations and modifications. Testing accommodations were not necessary in any event, as MIR did not participate in statewide or district wide testing. With respect to classroom accommodations, Student presented no evidence of any accommodations or modifications that he required that were

not included as part of his individualized education at MIR. There was no evidence that Student requested MIR to include any modifications or accommodations that they were not already providing. There was no evidence that Student was unable to access his education or obtain a benefit from his education because of a lack of classroom accommodations or modifications. Consequently, District did not deny Student a FAPE by reasons of incomplete IEP documents.

38. Based upon Findings of Fact numbers 1 through 65, and Legal Conclusions numbers 1 through 18, and 36 through 37, Student has failed to meet his burden that the IEP documents of February 1, 2008, and February 20, 2008, taken together, did not conform to the Settlement Agreement or, alternatively, were so incomplete as to deprive him of a FAPE.

*Failure to Hold an Annual IEP Meeting By March 20, 2008 (Issue 1(e))*

39. Student contends that no IEP meeting was held by March 20, 2008, as was required by the 2007 Settlement Agreement and incorporated in to the February 1, 2008 and February 20, 2008, IEPs.

40. A procedural violation only requires a remedy when the procedural violation impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of a FAPE to the parent's child, or caused a deprivation of educational benefits. (Legal Conclusion number 18.) The District held two IEP meetings in February, which set Student's educational program through the 2008-2009 school year. Moreover, in early March 2008, District attempted to schedule an IEP meeting to occur during March, and Student's counsel was not available until March 31, 2008, at the earliest. Student has not presented any evidence that District's failure to schedule an annual IEP meeting by March 20, 2008 denied Student an educational benefit, impeded his right to a FAPE, or impeded Parents' ability to participate in the IEP process. Based upon Findings of Fact numbers 1 through 65, and Legal Conclusions numbers 1 through 18, and 40, District did not deny Student a FAPE on this ground.

*Failure to Timely Convene an IEP Meeting to Review Assessments during the 2007-2008 School Year (Issue 1(f))*

41. Student contends the District deprived him of a FAPE because it did not timely convene an IEP meeting to review the assessment reports of Intercare, School Options, and Dr. Fuentes. A procedural violation only requires a remedy if the violation (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision making process; or (3) caused a deprivation of educational benefits. (Legal Conclusion number 18.) An IEP required as a result of an assessment shall be developed within a total time not to exceed 60 days from the date the District received the executed consent for assessment, unless the parent agrees, in writing, to an extension., not counting days between the pupil's regular school sessions, terms, or days of school vacation in excess of five schooldays. (Ed. Code, § 56344, subd. (a).) An IEP meeting requested by the parent to develop, review, or revise an IEP shall be held within 30 days, not counting

days between the Student's regular school sessions, terms, or days of school vacation in excess of five schooldays, from the date of receipt of the parent's written request. (Ed. Code, § 56343.5.)

42. Student has failed to demonstrate that the District's failure to timely hold an IEP meeting to review assessments deprived Student of a FAPE. First, Student produced no evidence to support his contention that the July 16, 2008, IEP, at which the assessments were discussed, was untimely. For example, Student did not provide evidence as to when he contends any time limits commenced to run with respect to either the School Options assessment or Dr. Fuentes' assessment. On May 20, 2008, when Mother transmitted the Intercare report to the District that she had obtained independently, her cover letter asked that the reports' recommendations be implemented, not that there be an IEP meeting. Assuming that her letter constituted a request for an IEP meeting, Student presented no evidence as to when a "timely" IEP meeting should have occurred. Secondly, the District diligently attempted to set IEP meetings throughout March, April, May, and June, 2008. Many of its attempts to set IEP meetings were thwarted by Mother's schedule, by Student's assessment schedule, and by Student's counsel's schedule. On several occasions individuals that Student requested be present at the IEP meeting could not attend. Consequently, many of the delays in scheduling IEPs were out of the District's control. Furthermore, from May until early July 2008, Mother prohibited Dr. Fuentes from sharing his report with the District. Under these circumstances, it was impossible for the District to hold an IEP meeting to discuss Dr. Fuentes' report until July 2008.

43. Finally, Student has not demonstrated that the failure to set IEP meetings to discuss the assessments denied his parents of the opportunity to participate in the IEP meetings, or denied him an educational benefit, or deprived him of a FAPE. In this regard, the assessments in the 2007-2008 school year were completed towards the end of the 2007-2008 school year. None of the reports recommended ESY services. Also, none of the reports took into account the request that Student be placed on HH, which dramatically changed Student's educational program. Moreover, Mother had advised the District that she wanted Student to take a break from academics and not begin HH Instruction until the new school year began. Based upon Findings of Fact numbers 1 through 74, and Legal Conclusions numbers 1 through 19, and 41 through 43, District did not deny Student a FAPE on this ground.

*HH Instruction During the 2008-2009 School Year Issue (2)(a)*

44. Student contends that the District failed to provide him with HH instruction during the 2008-2009 school year, as provided in the July 16, 2008, IEP. A material failure to implement the IEP violates the IDEA and deprives a student of a FAPE. (Legal Conclusion number 19.)

45. Student did not meet his burden of demonstrating that he was denied a FAPE because the District failed to implement HH instruction during the 2008-2009 school year. The District followed its procedures to locate HH teachers, which included soliciting them

and training them. This process always took at least two weeks at the beginning of the school year. The District located the first teacher, Ms. Lindemuth, in a very timely manner, approximately two weeks after the beginning of the 2008-2009 school year. She was qualified to teach Student, and, although she only was available for seven and one-half of the 15 hours of teaching, the District was continuing to look for a teacher to provide the remaining seven and one-half hours of services. Before it could locate such a teacher, the parties executed the Mediated Settlement Agreement. At that time, September 10, 2008, Mother requested that all services, including HH instruction, cease immediately. District complied with her wishes. When the Board failed to approve the Mediated Settlement Agreement on September 23, 2008, Ms. Lindemuth was no longer available to provide services.

46. Less than two weeks later, however, the District assigned Arthur Price, another qualified teacher, to provide HH instruction to Student. Mr. Price would have been able to provide the entire 15 hours per week of services. He had spent time familiarizing himself with Student's needs in preparation for providing instruction to Student. Mother rejected Mr. Price, sight unseen, even though he had better qualifications to teach Student than did Ms. Ford, the instructor from CARE Academy whom Mother had unilaterally selected to provide HH instruction. Student has no legal right to designate that the District provide a particular teacher or service provider. The selection of such individuals is at the District's discretion, as long as they are qualified. (Legal Conclusion number 16.)

47. The District continued to search for a HH teacher for Student. Eventually, the District found and assigned a third qualified teacher, Stephanie Brown. As was Mr. Price, Ms. Brown was also prepared to instruct Student, and was willing to provide the 15 hours per week of instruction. Mother rejected Ms. Brown because she wanted Ms. Brown to provide instruction outside of the time parameters in which HH instruction could legally be provided. In this regard, the HH instruction which the IEP team had agreed to provide Student was based upon a physician's certification that Student had short-term medical needs that required that he have HH academic instruction instead of academic instruction at school. Therefore, the HH instruction that District had agreed to provide was not simply a DIS or related services that could be provided at any time. Various restrictions applied to HH instruction, including that it could only be provided outside of the regular school day, unless there was a documented medical reason that Student cannot have instruction during those times. Student presented no such medical documentation. Nor did Student present evidence that he could only receive an educational benefit if HH instruction were provided at times that were convenient to Student or his family. Indeed, the evidence at hearing was to the contrary.

48. The evidence reflected that the District found three qualified HH teachers, who were prepared to provide instruction to Student. Mother's conduct in (1) stopping Ms. Lindemuth's services; (2) stopping the District's efforts to find another teacher who could work with Ms. Lindemuth to provide the remaining seven and one-half hours of services; (3) rejecting Mr. Price, without justification, and (4) rejecting Ms. Brown without justification, prevented the District from being able to implement HH instruction. Under these

circumstances, and based upon Findings of Fact numbers 1 through 88, and 116 through 118, and Legal Conclusions numbers 1 through 20, and 44 through 48, the District did not deny Student a FAPE with respect to the implementation of HH instruction..

*Termination of Services to Student on or about September 10, 2008 (Issue 2(b))*

49. Student contends that on or about September 10, 2008, the District terminated all of the services in his July 16, 2008, IEP without justification. The material failure to provide the services set forth in the IEP violates the IDEA and constitutes a denial of a FAPE. (Legal Conclusion number 19.) Student did not meet his burden of demonstrating that the District denied Student a FAPE by terminating services to Student on or about September 10, 2008. Mother requested that the services be terminated, and District complied with Mother's request. As soon as the District learned that the Board had rejected the Mediated Settlement Agreement, the District took the necessary steps to re-commence services. Under these circumstances, the District did not deny Student a FAPE. (Findings of Fact numbers 1 through 118; Legal Conclusions numbers 1 through 20, and 44 through 49.)

*Failure to Address Student's Health Needs During the 2008-2009 School Year (Issue 2(c))*

50. Student contends that the District failed to address the Student's history of significant health problems that Dr. Fuentes mentioned in his report of July 7, 2008. Student contends that the only action the District took with respect to his health was to obtain a health screening of Student by a school nurse on January 15, 2009. Of the two drafts of the nurse's report of the screening, both dated January 20, 2009, one of which did not acknowledge that Student's health needs affected his education.

51. First, the nurse's health screening is of little relevance to this matter. It was not performed until after both District and Student filed their Complaints herein. The nurse's assessment and report were generated before the Student's Second Complaint was filed, but Student did not mention it in the Student's Second Complaint. There was no evidence as to what, if any use, the District made of the nurse's health screening in terms of Student's educational program.

52. Secondly, Student presented no specific evidence as to any health needs and services that (1) adversely affected the Student's ability to access his education and (2) the District had knowledge of and failed to address. In this regard, Dr. Gupta testified that the only specific "need" Student had in a school environment was to stay away from obviously ill children. Since Student was not in a school environment during the 2008-2009 school year, there was nothing the District was required to do to keep him away from obviously ill children.

53. It is also noteworthy that, at all relevant times, including since the District was presented with the HH request form in May 2008, the District requested information about Student's health needs. Mother, who is knowledgeable about special education procedures,

refused to provide the information, or refused to give the District appropriate releases to obtain information about Student's health needs. Mother also refused to give the District permission to conduct a medical assessment. Rather, at all relevant times, the District attempted to obtain complete medical information about Student, and to conduct a medical assessment of Student. District cannot be responsible for failing to address health needs about which it had no information. Based upon Findings of Fact numbers 1 through 118. and Legal Conclusions numbers 1 through 53, District did not deny Student a FAPE on this ground.

*Failure to Provide AT Devices During the 2008-2009 School Year (Issue 2(d))*

54. Student contends that the District did not provide him with a laptop computer, the Therapeutic Listening program equipment, and various sensory devices as stated on a list attached to his July 16, 2008, IEP. A material failure to implement an IEP violates the IDEA and constitutes a denial of a FAPE. (Legal Conclusion number 18.) Student did not meet his burden of demonstrating that the District denied him a FAPE by failing to provide him with AT devices and agreed-upon sensory devices. The July 16, 2008, IEP stated that the Student had a laptop computer, with word processing software, a Therapeutic Listening Device with headphones, and a CD player and modulated CDs. The evidence reflected that the District provided Student with more than one laptop computer, either directly or by reimbursing Mother. Moreover, a laptop computer for Student, with all appropriate District programs on it has been available to Student at all relevant times. Mother contended that the laptop offered by the District had programs on it that were unfamiliar to Student, such as WORD, and that the District did not provide manuals with the computer regarding these programs. The facts reflected that Student was quite proficient with computers. There was no evidence that Student could not learn an unfamiliar computer program even without a manual, either by himself or with the help of his HH teacher or his other service providers.

55. Further, the page attached to the July 16, 2008, IEP, entitled "Classroom Accommodations" which listed various sensory devices, was not agreed to by the IEP team. Indeed, the very origin of the list is unclear. Parents advised the District that the list was formulated by MIR, but there was no objective evidence at hearing that anybody at MIR, or anyone with specialized knowledge of Student's sensory needs, had prepared the list. There was no evidence that the District had failed to provide any specific sensory device that was agreed upon by the IEP team.

56. Based upon Findings of Fact numbers 1 through 110, and Legal Conclusions numbers 1 through 19 and 54 through 55, Student was not denied a FAPE on this ground.

*Failing to Implement LAS, OT, Behavior, and Vision Therapy Services During the 2008-2009 School Year (Issue 2(e))*

57. Student did not meet its burden of demonstrating that the District denied him a FAPE by failing to implement DIS services during the 2008-2009 school year. The law requires that the failure to implement DIS services in the IEP must be material. Materiality

means that there must more than a minor discrepancy between the services the school district provided and the services required by the IEP. (Legal Conclusion Number 18.) The amount of educational progress the child achieved may be probative of whether there has been more than a minor shortfall in the services provided. (Legal Conclusion Number 18.)

Additionally, the District cannot be expected to provide services when the Parents' conduct prevented the school district from providing the services.

58. With respect to LAS services, within two weeks of the beginning of the school year, Ms. Cardenas, a District SLP, attempted to contact Mother to schedule services. Mother did not respond. Less than two weeks after the unsuccessful attempt to contact Mother, Mother executed the Mediated Settlement Agreement and requested that services cease. After the school board rejected the Mediated Settlement Agreement and the District recommenced providing services, the original SLP was no longer available. In October 2008, District located another SLP to provide services, Ms. Wolford. However, Mother did not cooperate in scheduling services with this SLP. Finally, in December 2008, District assigned Ms. Bradshaw to provide LAS, and she has provided services consistently since that time.

59. Mother's conduct was largely responsible for the failure of Student to receive LAS services until December 2008. While there were short periods of time between such events as the beginning of school and the time that Ms. Cardenas first contacted Mother, and the time after the school board refused to approve the Mediated Settlement Agreement, when services were not provided, these time periods were not substantial, amounting to approximately four to six hours of services missed. Furthermore, some portion of those four to six hours can be excused. Delays in providing services are routine at the very beginning of the year, or, as here, when Mother requested that services be stopped and the District must locate and schedule another provider when services are to recommence. Student did not demonstrate that he has failed to make progress on his LAS goals such that the District's failure to provide LAS services for a few weeks was material and deprived Student of a FAPE.

60. A similar analysis applies to OT services. Shortly after the beginning of the school year, Ms. Linett attempted to schedule a time to assess Student and provide services. Mother did not respond. Then, after she executed the Mediated Settlement Agreement, Mother requested that services cease. After the school board failed to approve the Mediated Settlement Agreement, Ms. Linett again attempted to schedule a time to assess Student and provide services, and Mother and Ms. Linett had several communications regarding scheduling. Ms. Linett completed her assessment in October, and in early November Ms. Linett had begun to provide services. Again, there were short periods of time between such events as the time of the school board's decision and the time that Ms. Linett and Mother managed to coordinate their schedules, when services were not provided, but these time periods were not substantial. Student did not demonstrate that he has failed to progress on his OT goals such that the District's failure to provide OT services was material and deprived Student of a FAPE. Rather, the evidence demonstrated that Student had progressed on his OT goals.

61. The analysis with respect to the BICM services is only slightly different. Mr. Ruhter commenced providing services when school started in August. Services ceased, at Mother's request, upon the execution of the Mediated Settlement Agreement, and recommenced after the school board did not approve the Mediated Settlement Agreement. There was a slight delay in transferring services from Mr. Ruhter to Ms. Wohanka, because both of them had to coordinate their schedules with Mother. That delay, of less than a month, was not substantial, especially because BICM services were only to be provided on a monthly basis (two hours per month). Student did not demonstrate that his behaviors deteriorated to any degree such that the District's failure to provide the BICM services was material and deprived him of a FAPE.

62. The analysis with respect to vision therapy services is the same as set forth above with respect to the 2007-2008 school year. District has, at all relevant times, made vision therapy available. Student has failed to avail himself of the services, due to Mother's unilaterally mistaken belief that Dr. Kohn's Vision Enhancement Center did not provide the services. The District was not responsible for Mother's mistaken belief regarding the Vision Enhancement Center's ability to provide services.

63. Consequently, based upon Findings of Fact numbers 1 through 118, and Legal Conclusions numbers 1 through 62, District did not deny Student a FAPE on these grounds.

*Failure to Provide OT Services as Recommended by the School Options Report During the 2008-2009 School Year (Issue 2(f))*

64. Student contends that the District denied Student a FAPE because the District was obligated under the 2007 Settlement Agreement to implement the recommendations of the School Options report. The ALJ concludes that OAH may not have jurisdiction to determine this issue, since, as presented by Student, this issue directly concerns the enforcement of a term in the 2007 Settlement Agreement. However, the issue is alternatively addressed on its merits, in the event that this issue is deemed to involve a FAPE issue to which *Pedraza, supra*, applies.

65. First, the 2007 Settlement Agreement does not provide that the District must follow the recommendations of School Options as to the level of OT services to provide to Student. Nevertheless, Student has not demonstrated the District's failure to follow the recommendations of the School Options report denied him a FAPE.

66. The School Options report recommended two hours of OT clinic services, based upon its report that Student had numerous sensory processing and sensory motor deficits. It also recommended the Therapeutic Listening Program. The IEP team considered the School Options report at the July 16, 2008, IEP meeting and at the November 13, 2008, IEP meeting. The law requires that special education students receive related services, such as OT, when they are required to assist the student to benefit from his education. At the time of the report, Student was receiving 45 minutes of OT services a week, and he was

progressing in his OT skills. The evidence reflected that Student could participate and learn in class, could participate in activities at school and on field trips, and that he acted appropriately in class. The classroom observation described in the OT report also demonstrated that Student could participate in class discussions, could attend and learn, could work on projects in class, and could behave appropriately in class. There was no evidence that Student's sensory processing or sensory motor issues required additional OT to access his curriculum or to receive some benefit from his education. In this regard, Ms. Schlotman, the OT from School Options who testified regarding the need for two hours of clinic services, was not familiar with the phrase "access the curriculum," and was unaware of the standard for providing related services such as OT under the IDEA. Her opinion as to Student's OT needs was primarily directed at clinical concerns, rather than whether Student required additional OT services to benefit from his education. For example, the School Options assessment only involved a classroom observation, but did not include any interviews with Student's teachers.

67. Finally, the evidence demonstrated that, at all relevant times, the District had been providing the Therapeutic Listening program to Student. Based upon Findings of Fact numbers 1 through 17, 26 through 37, 50 through 76, and 92 through 115, and Legal Conclusions numbers 1 through 20, 21 through 27, and 54 through 67, the District did not deny Student a FAPE by failing to provide the level of OT services recommended by the School Options report.

*Failure to Timely Hold an IEP Meeting to Review the OT Assessment During the 2007-2008 School Year (Issue 2(g))*

68. Student contends that District did not timely hold an IEP meeting to discuss Ms. Linett's OT assessment.

69. A procedural violation only requires a remedy when the procedural violation impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of a FAPE to the parent's child, or caused a deprivation of educational benefits. (Legal Conclusion number 18.) An IEP required as a result of an assessment shall be developed within a total time not to exceed 60 days from the date the District received the executed consent for assessment, unless the parent agrees, in writing, to an extension., not counting days between the pupil's regular school sessions, terms, or days of school vacation in excess of five schooldays. (Ed. Code, § 56344, subd. (a).)

70. Mother signed the assessment plan for Ms. Linett's assessment on August 3, 2008, before the commencement of the 2008-2009 school year on August 13, 2008. Under normal circumstances, the IEP meeting, to discuss the assessment, therefore, should have occurred approximately 31 days thereafter (making allowance for the holiday of Labor Day), or by approximately October 12, 2008. However, Mother did not return Ms. Linett's telephone calls in late August and/or early September to attempt to schedule the OT assessment. Shortly thereafter, Ms. Linett was advised to cease her efforts, due to Mother's

request at the time the Mediated Settlement Agreement was executed. When the District recommenced Student's services, and on September 29, 2008, Ms. Linett again attempted to schedule the assessment, and she and Mother went back and forth regarding scheduling. Consequently, some of the delay in setting the IEP meeting to discuss Ms. Linett's report is attributable to Mother.

71. The IEP meeting occurred on November 13, 2008, at which time the team recommended reducing Student's OT services. Since Mother did not consent to the reduction in services, the District continued to provide services at the level provided in the July 16, 2008, IEP, throughout the 2008-2009 school year. Therefore, the delay in holding the IEP meeting did not harm Student.

72. Student did not meet his burden of demonstrating that the delay in holding the November 13, 2008, IEP meeting deprived Student of an educational benefit, impeded his right to a FAPE, or impeded his parent's ability to participate in the IEP process. Based upon Findings of Fact numbers 1 through 17, 26 through 37, 50 through 76, and 92 through 115, and Legal Conclusions numbers 1 through 20, 21 through 27, and 54 through 72, District did not deny Student a FAPE on this ground.

#### *District's Issues*

##### *Whether the District Offered a FAPE in the November 13, 2008, IEP (Issue A)*

73. District contends that the November 13, 2008, IEP provided a FAPE. The November 13, 2008, IEP, provides the same educational program as the July 16, 2008, IEP except that it diminishes the OT services offered in the July 16, 2008, IEP from 75 minutes per month of individual OT, to 30 minutes per month of OT consultation. Student's only criticism of the November 13, 2008, IEP was the level of OT services provided.

74. As was set forth above with respect to Student's issues, an IEP must offer services which address Student's unique needs and which provide Student with some educational benefit. Whether an IEP provides a FAPE is evaluated in terms of what the IEP team knew at the time of the IEP. The IEP is a "snapshot," and it is not judged in hindsight. (Legal Conclusions numbers 7, 12 through 14, and 17.)

75. District has met its burden of proving that the November 13, 2008, IEP provided a FAPE, and that Student did not require OT services beyond the consultative services set forth in the IEP. Ms. Linett, the District's OT expert, has 30 years of experience as an OT. She credibly testified that Student's sensory deficit did not prevent him from accessing his education, and that he did not require OT services to benefit from his education. She testified that his sensory deficits could be managed through accommodations. When Ms. Linett assessed him, Student had reached, or nearly reached, all of his OT goals from his July 16, 2008, IEP. He could focus, he could attend to his lessons, he could participate in social situations in the community, he could use his computer proficiently, and he acted much like a typical peer. Her observations were confirmed by Ms. Ewing, Student's

teacher at MIR. Dr. Fuentes testified that he could not evaluate whether Student required OT services. However, his observations as to Student's sensory issues were consistent with Ms. Linett's, in that he felt that they could be ameliorated with accommodations.

76. Ms. Schlotman's criticisms of Ms. Linett's report were not well-taken. Ms. Schloman criticized Ms. Linett's assessment for relying to a great extent on a records review and on interviews with other providers, as opposed to actually testing Student. However, Mother had conditioned the assessment on Ms. Linett not repeating tests that previous assessors had administered to Student, and Ms. Linett had complied with that limitation. Additionally, Ms. Schlotman has only been a certified OT for six years, and in the OT field for 10 years, as opposed to Ms. Linett's 30 years of professional OT experience. Ms. Schlotman's experience has been in the clinical setting, and she demonstrated very little knowledge of the standards for OT in the school setting. In contrast, Ms. Linett has been actively providing school based OT since at least 2006. In short, Ms. Linett was better qualified than Ms. Schlotman to render opinions as to Student's need for school-based OT. Under these circumstances, Ms. Linett's opinions are more persuasive than are Ms. Schlotman's.

77. Based upon Findings of Fact numbers 1 through 118, and Legal Conclusions numbers 1 through 20, and 64 through 76, the IEP of November 13, 2008, addressed Student's unique needs, and was reasonably calculated to provide Student an educational benefit.

*Whether the District is Entitled to a Medical Assessment of Student (Issue B)*

78. District requested a medical assessment of Student at the November 13, 2008, IEP. District contends that it is entitled to a medical assessment of Student, as Student had been placed on HH instruction as of June 2008, and, at the IEP meeting on November 13, 2008, Mother informed the IEP team that Dr. Lam would be extending Student's HH instruction. Student contended that it was not presented with an assessment plan to sign that included information as to the type of medical assessment as to the assessor. Student also contends that the health screening performed by the nurse in January 2009 constituted a medical assessment, and that Mother has provided various medical records to the District by which it can conduct an assessment.

79. A school district is entitled to an assessment if it can demonstrate that Student's educational needs warrant an assessment. The district must provide notice to the parents that describes the evaluation procedure that the district is proposing, and must obtain informed consent to the assessment. Informed consent meant that parent has been fully informed of all information relevant to the evaluation, and the consent describes the activity which comprises the evaluation, and lists the records (if any) that will be released and to whom. A health assessment shall be conducted by a credentialed physician, who is trained and prepared to assess cultural and ethnic factors appropriate to the student. If a parent refuses to consent to the proposed assessment, the school district can request a due process hearing to compel the assessment. (Legal Conclusion number 9.)

80. Student plans to attend school outside of the District during the 2008-2009 school year. Yet, Student may decide to re-enroll in the District, or seek special education services from the District at any time. In view of the contentious relationship between the parties, this issue is capable of repetition, and is not moot. (*Sacramento City U.S.D. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1403.) Furthermore, the “snapshot” rule governs, such that the determinations of the issues raised by the District’s Complaint are made as of the time of the November 13, 2008 IEP.

81. Student first presented the District with a request for HH Instruction in May 2008, to expire on December 31, 2008, and gave the District a limited opportunity to speak to Dr. Lam or her staff to ascertain the necessity of HH Instruction. Mother has provided very scant information to the District regarding Student’s health, and has refused to execute any but the most limited releases for the District to obtain Student’s medical information.

82. At the IEP on November 13, 2008, the District learned that Student was to be on HH Instruction throughout the remainder of the 2008-2009 school year and into the summer. An HH service is among the most restrictive educational environments, and the District has an obligation to educate Student in the least restrictive environment. Under these circumstances, District was warranted in attempting to learn as much as it could about Student’s condition, and about the type of educational environment Student required. Indeed, as Dr. Gupta’s and Dr. Lam’s testimony demonstrated, Student’s medical conditions are complex and somewhat mysterious. His autoimmune deficiency has not yet been identified, and there is a question as to whether it exists. His immune condition affects each individual in different ways, and the IVIG treatment for it also affects each individual in different ways. District must determine for itself Student’s medical condition, to determine whether Student actually belonged in a very restrictive environment for such a lengthy period of time, and to determine whether the services he was being provided met his needs. District cannot rely on the scant and selective medical information that Mother has provided to make such an importation determination. Nor does the nurse’s one page health screening report provide the information the District needs for such a significant determination. District requires the Student’s complete medical records, as well as permission to speak to Student’s physicians.

83. Student contends that Mother was not given the medical assessment plan at the November 13, 2008, IEP meeting, and therefore she was not given the opportunity to consent to the assessment. The evidence was conflicting as to whether Mother was given the assessment plan at the meeting, but that conflict need not be resolved in this Decision. There was no conflict in the evidence that Mother stated that she wanted her counsel to review the assessment plan. District had sent the assessment plan to Mother’s counsel, with whom District had long corresponded about the matters involved in these consolidated cases. Under these circumstances, giving the assessment plan to Mother’s counsel is equivalent to having given the assessment plan to Mother. Additionally, the District has since provided Mother with the assessment plan. Further, the District has consistently sought Mother’s consent to the assessment. Mr. Frazier and the school nurse discussed the assessment and the

reasons for it at the November 13, 2008, IEP meeting, and Mother had no questions regarding it at that time. Since the meeting, the District has provided Mother further information about the assessment. Yet, through the time of the hearing, Mother has not consented to the medical assessment.

84. Based upon Findings of Fact numbers 1 through 118, and Legal Conclusions numbers 1 through 21, 30, 50 through 53, and 79 through 83, the District is entitled to a medical assessment.

#### ORDER

1. Student's claims for relief are denied.
2. District's November 18, 2008, IEP provided Student a FAPE.
3. Prior to Student receiving any further special education services from the District after this Decision, District may obtain a medical assessment of Student as described in the assessment plan referring to a "Medical Doctor" and dated November 4, 2008, as follows:
  - (a) The assessment shall be conducted by Gerald Saks, M.D., and/or other credentialed physician selected by the District whom the District determines is qualified under California Education Code section 56325 subd. (b);
  - (b) Within fifteen days of a request by the District, Parents shall execute and provide the District with releases of information permitting the District to obtain the information deemed necessary by Dr. Saks or other physician selected by the District to perform the assessment; and
  - (c) Parents shall make Student available for the assessment during the District's regular school days and hours, at a location or locations determined by the District within 75 miles from Student's residence.

#### PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. District prevailed on all of the Student's issues, and on all of District's issues.

