

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

In the Matter of:

STUDENT,

Petitioner,

v.

SAN FRANCISCO UNIFIED SCHOOL
DISTRICT,

Respondent.

OAH CASE NO. N2006100345

DECISION

Administrative Law Judge (ALJ) Deidre L. Johnson, Office of Administrative Hearings, Special Education Division (OAH), State of California, heard this matter on February 27 and 28, March 1, 2, 5, 6, and 7, 2007 in San Francisco, and April 11 and 12, 2007, in Oakland, California.

Petitioner, Student (Student), was represented by Roberta S. Savage, Attorney at Law. Student's mother (Parent) attended the hearing. Student did not attend the hearing.

Respondent San Francisco Unified School District (District) was represented by Lenore A. Silverman, Attorney at Law, School and College Legal Services of California. Present for most of the hearing as the District's designated representative was David Wax, Ph.D., Special Education Services Director of the San Francisco Special Education Local Plan Area (SELPA). Carol Kocivar, SELPA and District Ombudsperson, was present on various days in Dr. Wax's absence.

Student's original request for a due process hearing was filed on October 6, 2006. Student's second amended request for a due process hearing (referred to herein as the complaint) was filed on November 22, 2006. A continuance was granted on January 9, 2007. Following the evidentiary portion of the case, the parties presented oral closing arguments. The record was held open for the submission of supplemental written closing briefs on or before April 19, 2007. On April 18, 2007, the parties requested an extension until April 20, 2007, to file their closing briefs. The briefs were timely filed, the record was closed, and the

matter was submitted on April 20, 2007. The parties stipulated to continue to extend the time within which to render a decision until May 18, 2007.

ISSUES¹

1. Did District fail to assess Student² in all areas related to his suspected disability of autistic-like behavior for the 2003-2004 school year (second grade),³ the 2004-2005 school year (third grade), the 2005-2006 school year (fourth grade), and the 2006-2007 school year (fifth grade) as follows:

- A. Failure to assess Student's behavior needs (all years), including failure to conduct a functional behavior analysis assessment for the 2003-2004 and 2004-2005 school years?
- B. Failure to conduct a neuropsychological or psychoeducational assessment of Student for the 2004-2005 and 2005-2006 school year?
- C. Failure to assess Student's communication, sensory and motor needs (all years except the 2004-2005 school years), attention, reading, and academic weakness needs (all years except the 2003-2004 school year), auditory processing needs (all years except the 2003-2004 and the 2004-2005 school years), and social skills needs (all years)?

2. Were District's communication, sensory motor, and auditory processing assessments appropriate?

3. Was District's functional behavior assessment for the 2005-2006 school year appropriate and timely?

4. Did District deny Student a free appropriate public education (FAPE) for the 2003-2004 school year (second grade), 2004-2005 school year (third grade), the 2005-2006

¹ For purposes of clarity and organization, the ALJ reorganized Student's issues. The specific contentions of the parties with respect to each issue are set forth in the Factual Findings.

² Parent's complaint and Clarified Statement of Issues phrased the issue as District's failure to "appropriately assess" in the targeted areas. In the absence of evidence that assessments were done during the relevant years, the first issue has been reframed as whether District should have assessed. For those areas where assessments were done, the second issue has been reframed as whether the assessments were appropriate.

³ The problems relating to the 2003-2004 school year do not predate October 6, 2003, the cut-off date for the three-year statute of limitations applicable to this case. (Ed. Code § 56505, subd. (l).) The code section was amended effective October 9, 2006, changing the statute of limitations to two years in conformance with the minimum federal statute of limitations in IDEA 2004. All references herein to "fifth grade" refer to about one month of the 2006-2007 school year to October 6, 2006.

school year (fourth grade), and the 2006-2007 school year (fifth grade), by failing to provide him with appropriate education and related services to address his unique needs related to autism, as follows:

- A. Failure to develop requisite annual goals in the following areas of need: communication, sensory and motor, attention, reading, academic weakness, auditory processing, and social skills (all years)?
- B. Failure to offer or provide an IEP that included appropriate designated instruction, services and supports, as follows: social skills training, speech and language therapy, behavior support, a trained aide, occupational therapy, and music therapy (all years), and academic skills intervention (all years except 2003-2004)?
- C. Failure to make a clear written offer of placement for speech and language therapy (2003-2004 school year), integrated play groups (2003-2004 school year), and the 2004, 2005, and 2006 extended school years (ESY)?
- D. Failure to provide prior written notice of District's refusals to initiate assessments or to initiate or make changes to Student's placement in response to Parent's requests (all years)?

PROPOSED RESOLUTIONS

As a result of the violations claimed in Issues 1 through 4 above, Student seeks reimbursement for the following parentally obtained services over the relevant years: Quest Therapeutic Camps with Dr. Robert Field; speech and language therapy from Floria Fung; neuropsychological assessment by Dr. Victor Nunno; social and play skills therapy from Dominique Baudry; occupational therapy assessment by Tiffany Martin; behavior consultation with Ben Kauffman; neuropsychological assessment by Dr. Tina Guterman; Lindamood-Bell oral and written language remediation; music therapy from Susan Rancer; and interactive metronome occupational therapy from Lora Harris.

FACTUAL FINDINGS

Background and Jurisdictional facts

1. Student was born in January 1996, and is eleven years old. He resides with his mother (Parent) in San Francisco, California, and is currently in the fifth grade at Alamo Elementary School (Alamo), a public school within the boundaries of the District. Student has attended Alamo since kindergarten in 2001.

2. Student is eligible for special education and related services under the primary category of autistic-like behaviors. Student has also been diagnosed with attention deficit hyperactivity disorder (ADHD), and with a specific learning disability.

Failure to assess behavior needs (all years), including failure to conduct a functional behavioral assessment for the 2003-2004 and 2004-2005 school years

3. Student contends that District failed to assess his inappropriate behaviors during his second, third, fourth and fifth grade years. Student contends that District failed to conduct a functional behavioral assessment (FBA) to address his escalating negative behaviors after Parent requested it. District contends that it had no need to assess Student's behaviors in any years, as it was well aware of his behavior problems and functions of behavior, had a behavior support plan in place, modified the plan appropriately from year to year, and was not legally obligated to conduct an FBA.

4. A school district must initially assess a child in all areas related to a suspected disability. A reassessment shall be conducted if the school district determines that the educational or related services needs, including improved academic achievement and functional performance, of the student warrant a reassessment, or if the student's parent or teacher requests a new assessment. For a reassessment, the IEP team must review existing data, including prior assessments, and identify whether additional data is necessary to determine present levels of performance and educational needs, and whether any additions or modifications to the IEP are needed to enable the student to meet the measurable annual goals, and to participate in the general curriculum.

5. An assessment plan must be given to the parent within 15 days of the parent's request. The parent has 15 days from the receipt of the proposed assessment plan to sign and return the assessment plan. The school district has 60 days from receipt of the signed assessment plan within which to complete the assessment and convene an IEP meeting to discuss the assessment results.

6. A failure to properly or timely assess may be a procedural violation if it significantly impeded the ability of the parents to participate in decisions regarding the student's education, or if it deprived the student of an educational opportunity.

7. When a student's behaviors impede his or her learning, or that of other students, the IEP team must consider the use of positive behavioral interventions, supports, and strategies to address that behavior. A behavioral assessment may be an appropriate tool to provide the IEP team with analytical data regarding the undesirable behavior, and to provide the team with proposed or tested interventions and strategies. If a student has an existing behavior support plan (BSP), the team may determine whether modifications or further information are necessary. In the event of a serious behavior problem, a behavior intervention plan must be developed and must be based on a functional behavior analysis or assessment (FBA).

2003-2004 school year (second grade)

8. Student's unique needs and behaviors in kindergarten and first grade are relevant to evaluate his second grade behaviors. In kindergarten (2001-2002 school year), Student was placed in an inclusion placement in a general education classroom. Student was described as "bright and curious," had difficulty following oral directions, and often noncompliant. The kindergarten IEP had a BSP in place to address temper tantrums. Student had about 15 temper tantrums between the end of August 2001 and March 2002, or about twice a month, with medium to high intensity, for ten to 30 minutes. During these tantrums, Student yelled, cried hysterically, kicked, pushed and pulled on people and doors, laid on the floor, and occasionally spit.⁴ Predictors of Student's negative behaviors in the 2002 BSP included any transitions or changes in his schedule, and sensory over-stimulation. The BSP called for a visual schedule to provide predictability, time out space in a quiet place, and a menu of reinforcers with token rewards. A mental health referral also indicated that Student had difficulty in social interactions with peers and adults approximately 20 to 25 times daily.

9. Student's second grade IEP (2003-2004 school year) was developed in March 2003. The March 2003 IEP included a BSP which addressed Student's refusal to do school work, and tantrumming, which had increased (in first grade) to three to 15 major episodes per week, and five to 10 minor episodes per day. Student's behavior impeded his learning because "of time away from class activities, incomplete/missed work." A common predictor of negative behavior was Student's arrival to school late or beginning his work late, a problem that persists to the present. Student has a sleeping disorder and often Parent cannot get Student to go to bed at a reasonable hour. Parent has tried many different methods to solve the sleeping problem, but occasionally has to let Student sleep late in the morning. The March 2003 BSP provided specific teaching strategies, supports, and adaptations to deal with Student's behaviors, including earning rewards as activity reinforcers, such as computer or television time. The strategies included use of a class schedule and frequent checks and prompts for understanding, planning for transitions, and use of social stories to teach Student appropriate behaviors. The plan expressly recognized Student's need for brief, specific, visual directions.

10. Student's second grade teacher was Dorothy Williams, a general education teacher with 34 years of experience, and who has taught second grade at Alamo for over 24 years. Ms. Williams relied on Michelle Wong, the special education Inclusion teacher, for directions to implement the March 2003 IEP. Ms. Williams also met frequently with Parent, considered her recommendations, and implemented those she thought were appropriate.

11. In second grade, Ms. Williams became concerned about Student's escalating negative behaviors that involved tantrums and disruptive outbursts. Student contends that his increased negative behaviors were the result of the District's failures to meet his needs, and

⁴ District had implemented written behavioral supports as part of Student's IEPs, and refers to them as behavioral support plans (BSPs).

that District should have conducted an FBA. District contends that Student's increased negative behaviors were "caused by" Parent's removal of Student from school for extended weeks to travel to see her family in Hong Kong.⁵ Parent went to Hong Kong three times, from November 7 through 18, 2003, December 8 through 12, 2003, and from February 20 through March 4, 2004, because her father was very ill. The withdrawal of Student from the structured, scheduled classroom environment for those trips disrupted Student's routines, and was a factor impacting Student's negative behaviors. Student had to relearn routines upon his return. However, as found in Factual Finding 9 above, Student's increase in negative behaviors predated Parent's withdrawal of Student for trips out of the country.

12. Ms. Williams consulted with Ms. Wong about strategies to help reduce Student's negative behaviors. Ms. Wong collaborated with Priya Sodhi, District's Autism Content Specialist, who recommended revising Student's BSP. Ms. Wong informed Ms. Williams and Parent in late 2003 or early 2004 that an FBA assessment might be considered at a later date as District wanted to see if revising Student's BSP would work.

13. On January 20, 2004, the IEP team met to consider modification of the BSP to address Student's troublesome behavioral issues. Student's negative behaviors included tantrums, throwing objects, and throwing his body onto the floor one to two times daily, from mild to intense, for a duration of ten minutes each. A new BSP was created as an addendum to the March 2003 IEP. The modification of the BSP complied procedurally with the law requiring the IEP team to consider interventions, supports and strategies to address behavior that was impeding Student's learning, as well as that of the other students in the class.

14. The January 2004 BSP listed the predictors of Student's behaviors as: "when teacher places demands on him - to complete work, follow routine." The team hypothesis of why the behavior occurred was: "avoidance of tasks, seeking attention - peers & adults, seeking control over environment, expression of frustration." The January 2004 BSP included strategies to teach Student to recognize when he needed a break, to request one, and to use the break to calm himself, as well as to use a journal to express his feelings. No specific calming strategies were listed in the plan. Positive reinforcement continued to involve rewards of preferred activities in the classroom. The team agreed to implement the BSP and meet again in early February. The intent of the modified BSP was to intervene with Student before his behaviors escalated, and teach him how to calm himself down. Most of the responsibility for implementing this plan was placed on the classroom teacher, Ms. Williams, with some unspecified assistance of the Inclusion teacher.

15. On February 2, 2004, the IEP team met to continue discussing Student's behaviors, described as "grunting, rocking, tapping and temper tantrums." The January 2004 BSP was not working. Ms. Williams expressed her concerns for both Student's safety and her ability to teach the class due to Student's behavior, which had become disruptive to the

⁵ District also contends that Parent and Student's father divorced, which played a role in Student's behaviors. Parent candidly informed District staff of her divorce, Student's father's subsequent remarriage, and certain visitation difficulties.

other students. Parent had requested positive behavioral intervention, a trained aide in the classroom, and a behavioral assessment. The team agreed that District would have a behaviorist observe Student and provide assistance as necessary; that the classroom teacher would implement a visual schedule for Student; and that the IEP team would develop another BSP. The comments noted the impression that Student was “managing in crisis” due to “changes in his life,” and that: “[a]t this current time, many other strategies have already been exhausted, including decrease in demands, adaptations of school materials and assignments & help with social activities.”

16. To fulfill District’s commitment to have a behaviorist observe Student, the Autism Content Specialist, Priya Sodhi, observed Student at some time after the February 2004 IEP meeting.⁶ District did not intend her observation to be an “assessment” to trigger statutory time requirements, no formal assessment plan was presented to Parent, and no assessment report was ever issued. Ms. Sodhi had participated in the development of the January 2004 behavior support addendum. Ms. Sodhi believed that Parent’s removal of Student during second grade for trips to Hong Kong was directly related to his escalation in negative behaviors.

17. At hearing, Ms. Sodhi was unable to provide any specific analysis of what she observed or when. Ms. Sodhi did not keep a written record of any data and did not write a report. Aside from the general theory that Student’s behaviors were caused by family trips, Ms. Sodhi was not able to describe any specific antecedent events in the classroom prior to Student’s outbursts. Ms. Sodhi recommended that Student should receive additional support in the classroom, and selected paraprofessionals to send in to the class beginning in mid-February, 2004.

18. On February 11, 2004, the District’s IEP team members, along with Alamo’s Principal, Gina Ferrante, informed Parent that they believed Student should be immediately transferred to an SDC class at Yick Woo Elementary School. Ms. Wong testified that she believed that Student’s behavior was dangerous during this period.

19. On February 13, 2004, Ms. Williams reported that Student “physically attacked” her. Student had been running in and out of the class and a paraprofessional, just assigned to work with Student in the classroom, had been unsuccessful in getting him to calm down. Ms. Williams informed Student that if he did not come into the class and sit down, she would have to call the office. Student refused, and Ms. Williams proceeded to a telephone, where Student grabbed her and pushed her away from the phone. Student grabbed her arm and tried to take the phone away from her. Ms. Williams completed the call, and the office called Parent to come to the school to pick Student up.

⁶ Ms. Sodhi obtained a Bachelor of Science degree in Psychology in 1999 from the University of California, Los Angeles, and a Master of Science in Administration and Counseling with an Option in Behavior Intervention Case Management in 2002. Before becoming an Autism Content Specialist with the District in 2003, she worked as an autism specialist for West San Gabriel Valley SELPA, as an interventionist at Autism Spectrum Therapies, and as a special education teacher.

20. On March 16, 2004, and continuing on May 5, and May 18, 2004, Student's annual IEP was conducted. Parent submitted a lengthy letter with a list of questions for the IEP team. Parent's letter expressed her concern that Student was depressed, had very low self-esteem, and had no friends. Parent again requested that Student needed intensive positive behavioral intervention and an appropriately trained adult to assist and support him inside the classroom as, until mid-February 2004, District had previously provided adult support only at recess, lunch and on the schoolyard.

21. From February through mid-May, 2004, Parent feared that District was going to move her son into a lower functioning SDC class because of his behavioral issues, and sought professional assessment information. In April and May 2004, Parent consulted with Victor L. Nunno, Ph.D., a licensed psychologist, who conducted a neuropsychological assessment of Student. At the May 18, 2004, IEP team meeting, Parent verbally reported the results of Dr. Nunno's assessment, but she did not yet have the formal written report. Of significance, Dr. Nunno recommended an inclusion program in a general education classroom because of Student's cognitive abilities, and a full time aide for Student's autistic and maladaptive behaviors.

22. At the May 18, 2004 meeting, District agreed that Student should not be disrupted and moved to a more restrictive placement, and that he needed a full-time aide in the classroom. District also offered to develop another BSP for Student "before conducting an FBA." The IEP team understood that a request from Parent for an FBA was made. The team also understood that Ms. Sodhi's informal observation of Student did not constitute an FBA.

23. The May 2004 BSP noted Student's daily interfering behaviors as "constantly seeks attention, pushes rules, outer limits & refusal to do work," involving moderate to severe intensity of varying and unspecified duration. This BSP was vague and devoid of much information. There was no mention of temper tantrums as an identified, targeted maladaptive behavior in the BSP.⁷ There was no information about how many times a day or week each of the described behaviors occurred. Stating the duration of behavior "varies," failed to provide any clue about whether Student's disruptions lasted one minute or one hour. The proposed plan described that Student's conduct impeded learning because it became so disruptive that Student needed to leave the room, but it failed to say how often that occurred. There were no baseline levels of performance shown for how often, daily or weekly, Student was removed from the room, or for how long. The behavior plan referenced four new related annual goals, and strategies including a "calm down" period with a paraprofessional. The BSP did include a plan for teaching Student specifically listed calming techniques such as counting to 10, expressing feelings, taking a time out, and other measures. The plan proposed that unidentified "staff" would "offer meaningful choices, immediately recognize positive behaviors, present tasks that are slightly challenging & worth doing, clear & firm limits &

⁷ The only reference to temper tantrums was in the body of the proposed IEP describing "interfering behavior," which was vague.

directions.” The proposed IEP offered adult support in the classroom, cafeteria, and on the school yard, and acknowledged that Student needed daily adult support to follow the behavior plan and stay on task.

24. District’s narrow focus on the hypothesis that Student’s behavioral problems were caused solely by his family and travel situations prevented them from taking a closer look at the dynamics of the second grade general education class, and to question why the BSP was not more effective. Ms. Sodhi’s informal review of Student’s behavior needs was based on anecdotal information from District’s staff, and her unknown observations that were nowhere reduced to writing. Neither Ms. Wong nor Ms. Sodhi assessed how or whether the second grade classroom teacher was or was not actually addressing Student’s autistic behaviors, need for simple directions, need for redirection, and the behavior plan, with minimal classroom support while attending to the rest of the class. They did not assess what the immediate antecedent issues were prior to tantrum incidents, and whether Student received the necessary close attention and constant redirection that he needed to access the classroom lessons.

25. During Student’s second grade year, Parent asked specifically for an FBA several times between January and April 2004. For the third quarter of second grade, Student’s attendance, refusals to do the school work, and disruptive behaviors were so problematic that Ms. Williams was unable to grade Student for any subject.⁸ The inability to grade Student for the third quarter of second grade was logged on his report card and reflected that Student’s behaviors impeded his learning. District knew within two weeks of the January 20, 2004 modifications to the BSP that they were ineffective. District’s proposal in February 2004 to immediately remove Student to an SDC classroom reflected a deteriorating situation, involving the inability to grade Student, physical aggression against the teacher, and escalating disruptions, which warranted an FBA in the spring of 2004. District’s decision not to conduct an FBA was not explained in the May 2004 IEP documents.

26. District had direct knowledge of Student’s significant behavioral problems in second grade. Although the IEP team met on January 20 and February 2, 2004, to consider interventions, supports and strategies, the team acknowledged that they had already exhausted most approaches. Because Student exhibited a serious, pervasive behavior problem, District was obligated to determine whether additional data was necessary to assist in evaluating Student’s level of functional behavioral performance. Even if Student’s maladaptive behavior was not serious enough to qualify as a “serious behavior problem,” District should have sought additional data to address the problem in an objective, systematic way. In addition to Parent’s request for a behavioral assessment, Student’s intensified level of negative behaviors at school warranted an assessment. District failed to conduct an FBA

⁸ As of June 4, 2004, Ms. Williams reported that “not a day” had gone by since December 2003 without a “major disruption” in her classroom.

assessment during the 2003-2004 second grade year, at a time when District's BSP approaches were ineffective.

2004-2005 school year (third grade)

27. Student began the 2004-2005 school year (third grade) with no agreement between the parties regarding District's March-May 2004 IEP offer, except for the placement and the aide. The last agreed upon IEP was Student's March 2003 IEP.

28. On August 31, 2004, Parent sent a letter to Student's third grade teacher, which included a copy of Dr. Nunno's May 2004 report, and provided current information about Student's needs, along with suggestions for District staff to consider.⁹ Student had attended Quest Therapeutic Camp (Quest Camp) for eight weeks that summer for behavior modification intervention. Parent included two pages of Quest Camp's August 2004 evaluation, and two of Student's behavioral contracts with the camp.

29. Student had behavioral episodes through the fall of 2004, but the frequency and duration are unknown. On September 7, 2004, Parent provided some suggestions for what the teacher could do when Student became upset and was unable to express himself. In late September 2004, Student spit on another pupil and the aide had to remove him from class. Parent sent the District staff a 5-point Listening Scale being used by Student's private social skills therapist, Dominique Baudry, and requested that it be placed on Student's desk. In November, Parent emailed District staff more behavioral intervention information and requested that the classroom aide reinforce the concepts the private therapist was using with Student.¹⁰ At no time in the fall of 2004 did District call an IEP meeting to discuss Student's behavioral support plan.

30. Parent withdrew Student for one trip to Hong Kong from December 30, 2004 to January 18, 2005. Student was often late or tardy to class due to his sleeping disorder. As of January 2005, Student was still in need of significant adult support to attempt class assignments. At the beginning of the 2004-2005 school year, Student's needs were primarily behavioral, but by June 2005, Student's maladaptive behavioral issues were for the most part resolved.

31. In preparation for Student's triennial review, District's school psychologist Barbara Blood-Walker mailed Parent an assessment plan on January 4, 2005. District proposed that no assessment was needed for Student's triennial review.

32. An IEP meeting was held on March 23, 2005. Parent did not consent to the IEP, but took it home to review. On the same date, Parent asked for a modification to Student's proposed BSP to attach the 5-point Listening Scale and an Anger Control Scale.

⁹ Parent first sent the District a copy of Dr. Nunno's assessment report on about June 7, 2004.

¹⁰ During this time, Parent never asked District to fund the home social skills therapy.

On March 24, 2005, Parent conditionally consented to the IEP. The IEP identified Student's interfering behaviors as not following directions, getting out of his seat, avoiding work, and throwing his body around the classroom. The frequency of the targeted behavior was once a day of mild intensity for a duration from five to 20 minutes. Temper tantrums were not a targeted negative behavior in the BSP. Compared to Student's behaviors for the previous two years, there was a significant reduction in the type and intensity of Student's negative behaviors.

33. On May 6, 2005, an addendum IEP meeting was held. Parent was dissatisfied with District's failure to assess, and felt they had ignored Dr. Nunno's 2004 report. At this meeting, Parent again requested a FBA for Student. A follow-up IEP meeting was scheduled for May 25, 2005. When the IEP team met on May 25, 2005, no record was made of any discussion about assessments. Ms. Sodhi, who was at the May 25, 2005 meeting, testified that District informed Parent it agreed to conduct an FBA.

34. Based on District's agreement on May 25, 2005, to conduct an FBA, District had 15 days, until Thursday, June 9, 2006 within which to give Parent a written, proposed assessment plan. The last day of the regular school session was June 10, 2005. School psychologist Blood-Walker was informed of District's agreement to conduct an FBA, and met with Parent on June 7, 2005. Ms. Blood-Walker did not believe Student's behaviors were serious enough to require District to conduct an FBA. Ms. Blood-Walker stated that District agreed to conduct an FBA only because Parent requested it. Ms. Blood-Walker informed Parent on June 7, 2005, that the FBA would be conducted in the fall of 2005, after Student had settled in to his fourth grade class. Ms. Blood-Walker did not present Parent with an assessment plan for signature on June 7, 2005, and failed to present an FBA assessment plan to Parent within 15 days of District's agreement and referral for assessment.¹¹ Ms. Blood-Walker did not have Parent sign an assessment form on June 7, 2005, because she believed that would have started the statutory time running. District had 60 days from parental consent to complete the assessment. Since school ended on June 10, 2005, there was insufficient time until the fall school year began within which to complete the FBA. Ms. Blood-Walker sent a letter to Parent on June 13, 2005, which reflected that District and Parent "agreed" to wait until the fall to do the FBA so that Student's new teachers could have the opportunity to get to know him.

35. As established by District's March 2005 IEP, including the BSP, Student no longer manifested maladaptive behaviors that called for additional data to assess his functional behavioral levels to assist the IEP team to further modify his behavioral support. District was not obligated by law in the spring of 2005 to conduct an FBA assessment. However, District committed a procedural violation when it failed to give Parent an assessment plan within 15 days of District's agreement to conduct an FBA assessment. Because no FBA was legally required, Parent did not establish that Student suffered any loss of educational benefit by the delay until the fall of 2005, and the delay is harmless error.

¹¹ Ms. Blood-Walker waited until June 8, 2005, the day after she met with Parent, to prepare an assessment plan.

2005-2006 school year (fourth Grade)

36. Student contends that District failed to assess Student's behavioral needs for the 2005-2007 school year (fourth grade). For the fall of 2005, Student's March 2005 IEP and BSP indicated that Student still engaged in occasional problematic behaviors such as not following directions, getting out of his seat, and avoiding work, of mild intensity, for five to 20 minutes. Qualitatively, Student still occasionally called out or lay on the ground.¹² There was no evidence of temper tantrums or major disruptive behaviors. Student still needed adult support to interact with others, and the BSP listed calming strategies including having him make meaningful choices, repeat instructions; keep a structured work area, and other strategies. Student made significant progress in eliminating and reducing maladaptive behaviors.

37. Student did not establish that Parent requested reassessment of his behavioral needs during fourth grade. Nor was it established that Student's behaviors warranted reassessment. District was not required to reassess his behavioral needs in fourth grade.

2006-2007 school year (fifth grade)

38. Student contends that District failed to assess Student's behavioral needs for the 2006-2007 school year (fifth grade). For the fall of 2006, Student's March 2006 IEP and BSP indicated that Student still had interfering behaviors about five to eight times a day, of mild to moderate intensity, of not participating in all academic areas, identified as "lack of motivation to complete assignments." The targeted behavior occurred five to eight times per day, of mild to moderate intensity, for up to 30 minutes. There was no evidence of temper tantrums or major disruptive behaviors. Student still needed adult support to interact with others, and the BSP listed strategies including showing Student the "exact expectations of what following directions means." Student would be shown how data would be collected regarding his behavior. Student would be given social stories with visual and written descriptions of following directions, and a checklist with 20 minute increments of "yes" and "no" if directions are followed or not. Student would be rewarded with "whole body reinforcement" at school and at home.

Student did not establish that Parent requested reassessment of Student's behavioral needs in fifth grade. Nor was it established that Student's behavior warranted reassessment. District was not required to reassess his behavioral needs.

Failure to conduct a neuropsychological or psychoeducational assessment

39. Dr. Nunno's May 2004 report had recommended that no further evaluations of Student were then necessary. Dr. Pamela Mills, Ph.D., District's Supervisor and Program Administrator, is also a child and adolescent psychologist with many years of assessment and therapy experience, and an adjunct professor at the University of San Francisco. Dr. Mills

¹² Although the BSP stated these behaviors occurred only once a day, it is not clear what that meant.

supervises the District's staff of psychologists, behaviorists, learning specialists, paraprofessionals, and speech therapists, and oversees services to 130 school sites. She translated Dr. Nunno's clinical medical evaluation into educational information. Dr. Mills stated that when District conducted Student's triennial review in the spring of 2005, it would have been inappropriate to conduct another battery of psychological assessments on Student without the passage of further time. Dr. Mills's testimony was persuasive in that it was consistent with best practices for psychological assessment testing.

40. Parent was dissatisfied with District's use of Dr. Nunno's report, and failure to more fully assess her son.¹³ On May 6, 2005, Parent asked District to conduct a neuropsychological assessment. District staff explained to Parent that "neuropsychological" assessments are clinical medical assessments that District does not perform. At the May 25, 2005 IEP meeting, District verbally agreed to conduct a "psychoeducational" assessment.

41. Ms. Sodhi wrote a letter to Parent on June 14, 2005, confirming: "SFUSD has offered to conduct a comprehensive psychoeducational evaluation. We believe this type of assessment will provide optimal information regarding [Student's] cognitive, processing and educational functioning. An assessment plan will be sent for your approval and upon your consent will be conducted in the fall."

42. District thereafter failed to follow through, failed to send an assessment plan to Parent, and failed to conduct any kind of psychological assessment. There is no evidence that District has conducted a psychoeducational assessment to date. District was not obligated to conduct a neuropsychological assessment. District's failure to conduct a psychoeducational assessment after agreement to do so, constituted a procedural violation. Dr. Mills was not aware at hearing that Ms. Sodhi had committed the District to conducting the assessment. Dr. Mills's testimony that it would be contrary to best practices to conduct a comprehensive battery of tests on Student again after Dr. Nunno's evaluation is credible and consistent with the District's own decision not to conduct another psychological evaluation on Student in the spring of 2005. Student did not establish any loss of educational benefit thereby, and the violation was harmless in light of the other evidence in the case.

¹³ In fact, Parent believed that District "ignored" Dr. Nunno's report, a conclusion she arrived at because District did not implement everything Dr. Nunno recommended.

Failure to assess communication, sensory and motor needs; attention, reading, and academic weakness needs; auditory processing needs, and social skills needs.

*Communication needs*¹⁴

43. Student contends that District failed to assess his communication needs in second, fourth and fifth grade. Student contends that he had difficulty understanding nonverbal communication or instructions, and that those needs should have been reassessed. District contends that it complied with the law to reassess Student at least once every three years, that Parent did not request a reassessment of Student's communication needs in those years, that District was aware of and addressed Student's communication needs, that District did conduct a speech and language (SL) assessment in third grade, and that District had no knowledge of information that would have put it on notice that it should reassess those needs in any other year.

44. During kindergarten for the 2001-2002 school year, District conducted a triennial review. District school psychologist Karen Benjamin conducted a psycho-educational review of Student and issued a report dated March 18, 2002. District speech and language specialist Katie Young conducted a triennial SL reassessment of Student and issued a report dated February 26, 2002. Student contends that District considered or relied on the 2002 triennial assessments to address Student's communication needs for the 2003-2004 school year (second grade), and that District should have known it was relying on outdated or inappropriate information, or should have otherwise known by Student's second grade levels of performance that new communication-related assessments were necessary.

45. During second grade, Student had pull-out SL services, and two communication goals, one for improving expressive language skills, and one for improving social language skills.¹⁵ By the spring of 2004, Student's SL teacher, Heather Graham, reported to the IEP team that his progress was limited due to frequent absences and behavioral problems. Ms. Graham recommended shifting Student's goals to target his behaviors, and proposed three new communication goals for self-help, improving his behavior during SL sessions, and improving his ability to follow complex verbal directives. Ms. Graham did not recommend a new communication-related assessment, and Parent did not ask for one. Ms. Graham did not testify.

¹⁴ Student failed to define or describe what he meant by "communication needs" other than to list failure to assess communication needs in the same paragraphs in which Student's lack of friends, lack of appropriate interaction with peers and adults; and difficulties focusing and understanding nonverbal communication, social engagement skills, and instructions in class; and focusing in class were all included with a broad brush.

¹⁵ The goals included using appropriate sentence structure to describe a picture sequence without perseverating; using spatial, quantity and location concepts; using pronouns, third person singular, and irregular past-tense verbs in complete sentences; answer "wh" questions; demonstrating turn-taking skills with peers or the SL teacher, focusing when following written rules/instruction; and choosing the appropriate action/response to social scenarios from a field of written answers.

46. District received Dr. Nunno's 2004 neuropsychological assessment report in June 2004. Dr. Nunno's assessment contained no criticism of District's 2002 triennial evaluations. Nothing in Dr. Nunno's report constituted information that should have led District to determine that a reassessment of Student's areas of communication needs was warranted. For the 2004-2005 school year (fourth grade), Parent disagreed with District's proposed communication goals because they did not contain enough information in them to be measurable. However, Parent did not disagree with the subject matter of the goals, and never asked for a new communication assessment.

47. District conducted a triennial review in March 2005 that took Dr. Nunno's assessment into consideration, and included a new SL assessment. As set forth in Factual Findings 72 to 75, 136, and 137, District's 2005 SL assessment was inappropriate. For the 2005-2006 (fourth grade) school year, District provided reduced SL services, by reducing the services from 90 minutes per week, to 60 minutes per week, based on an inappropriate assessment.

48. Student failed to establish any new changes, incidents, or information related to his communication needs that required a further communication-related assessment in second or fifth grade. Student established that District should have conducted a new SL assessment for fourth grade because of the inappropriate assessment.

Sensory and motor needs

49. Student contends that District failed to assess his sensory and motor needs for the second, fourth, and fifth grade years. District contends that it complied with the law to reassess Student at least once every three years, that Parent did not request a reassessment of Student's sensory and motor needs related to his disability in any of those years, and that District had no knowledge of information that would have put it on notice that it should have reassessed those needs.

50. As of second grade, District had generally assessed Student's sensory and motor needs as part of his 2002 triennial assessment. Sensory and motor skills relate to how Student takes in, processes, and reacts to the variety of external and internal stimuli in his daily environment, and includes gross motor skills related to the body's major movement functions, such as balance, coordination, and walking. In addition, the skills involve timing, sequencing, planning, and many other skills.

51. Parent did not request an assessment of Student's sensory and motor needs for Student's second grade year. Dr. Nunno's 2004 report found that Student showed poor bilateral coordination and poor balance, was uncoordinated, was lost in terms of being oriented to his "body in space," and should have direct occupational therapy (OT) services to address those deficits. Dr. Nunno did not testify at hearing.

52. District received Dr. Nunno's report in June 2004. Student failed to establish that District knew or should have known during second grade that Student's levels of sensory

and motor skills related to his disability should have been reassessed. After review of Dr. Nunno's report, District conducted an OT assessment of Student in February 2005, and thereafter the IEP team offered OT consultation services. District's 2005 OT assessment was deficient, as set forth in Factual Findings 76 to 80. Student has therefore established that District should have conducted another OT assessment in either fourth or fifth grade. District should conduct a new comprehensive OT assessment of Student, including his sensory and motor needs.

Attention, reading, and academic weakness needs

53. For Student's third, fourth, and fifth grade years, Student contends that District failed to assess his attention, reading, and academic weakness needs. District contends that it complied with the law to reassess Student at least once every three years, that Student did not request a reassessment of his attention, reading, and academic weakness needs related to his disability in any of those years, that District was aware of and addressed Student's needs, and that District had no knowledge of information that would have put it on notice that it should reassess those needs.

54. District's IEP documents for the third, fourth and fifth grade school years all noted Student's attention difficulties which are attendant with his disabilities of autism and ADHD. Student failed to establish that he had any new or different reading deficits which District should have known about but failed to reassess. While Dr. Nunno's report noted a reading disorder, that finding was not explained by the bulk of his report, which found that Student read "well and with comprehension (about middle fourth-grade level)," when Student was in second grade. Student read at or above grade level and his areas of weakness, including reading comprehension, were known. District was aware of Student's needs in the academic areas of ability to see the whole picture and concept imagery, and addressed those areas of weakness in the academic setting (math and reading), during SL sessions, social skills lessons, using social stories and other methods, and in the annual goals. Student did not establish that District knew or should have known of information that warranted reassessment in those areas.

Auditory processing needs

55. For Student's fourth and fifth grade years, Student contends that District failed to assess his auditory processing needs. District contends that it complied with the law to reassess Student at least once every three years, that Student did not request a reassessment of his auditory processing needs related to his disability in those years, that it was aware of and addressed Student's auditory processing needs, and that District had no knowledge of information that would have put it on notice that it should reassess those needs.

56. Dr. Nunno's 2004 assessment found that Student had auditory processing deficits. In March 2005, as part of Student's triennial review, District considered Dr. Nunno's report, and also conducted its own auditory processing assessment. District's

assessment confirmed that Student had an auditory processing deficit, and needed classroom information to be short, clear and concise, as set forth Factual Findings 81 to 84.

57. Since second grade, Student's IEP annual goals addressed Student's needs for attention, focusing, and short, simple step directions. For the 2005-2006 school year (fourth grade), Student's receptive communication goal addressed following two to three step directions; and for the 2006-2007 school year (fifth grade), the goals addressed attending to instruction with visual and peer support, and interaction skills for listening.

58. Student did not present any evidence of any new changes, incidents, or information regarding Student's auditory processing needs during fourth or fifth grade. Student failed to establish that District should have conducted any further assessment of Student's auditory processing skills in fourth or fifth grade, because he failed to establish that District knew or should have known that that further auditory processing reassessment was warranted.¹⁶

Social Skills

59. Student contends that District failed to assess his social skills needs for his second, third, fourth, and fifth grade years. District contends that it complied with the law to reassess Student at least once every three years, that Student did not request a reassessment of his social skills needs related to his disability in any of those years, that District was aware of and addressed Student's social skills needs, and that District had no knowledge of information that would have put it on notice that it should have reassessed those needs.

60. In 2002, District conducted a triennial assessment in which social skill needs were addressed, and litigation of the appropriateness of that assessment is beyond the statute of limitations. Student contends that District should not have relied on the 2002 triennial assessments to address Student's social skill needs for the 2003-2004 school year (second grade), because District should have known it was relying on outdated or inappropriate information, or that District should have known by Student's second grade levels of performance that a new social skills assessment was necessary.

61. At all times, District was aware of Student's unique needs in the area of social skills, and addressed them. Student had difficulty initiating and joining play, resolving conflicts, and understanding pragmatic verbal and nonverbal social language, among many other areas. District's IEP documents for the second, third, fourth and fifth grade school years all noted and addressed Student's social skills deficits, including difficulties with peer and adult relationships, and contained social skill goals, including pragmatic communication and nonverbal cues, as set forth in Factual Findings 59 to 63, 95 to 104, 110 to 123, and 126 to 135.

¹⁶ While Student's private psychologist, Dr. Tina Guterman, conducted a neuropsychological assessment of him in June 2005, and found auditory processing deficits, District never received Dr. Guterman's report until January 2007.

62. Student began private social skills therapy with Dominique Baudry in September 2004, when he was in third grade. Ms. Baudry worked with Student individually for one hour per week after school until December 2005. While Parent occasionally mentioned the private therapy to District staff, she never asked for District to fund the therapy, or to conduct a new social skills assessment. The areas that Ms. Baudry worked on with Student privately were the same or similar to those District addressed, including initiating or sustaining a conversation, requesting help, active listening, staying focused, processing nonverbal cues, making inferences, predicting, perspective taking, and developing the ability to see the whole picture. Ms. Baudry was in contact with Student's classroom teachers and paraprofessionals, and they exchanged information. Ms. Baudry did not inform Parent or District of any new changes, incidents, or information about Student's social skill needs that suggested a need for a new assessment.

63. Student did not present any evidence of any new changes, incidents, or information regarding Student's social skills needs during third, fourth or fifth grade. The evidence did not establish that District knew or should have known of any new changes, incidents or information regarding Student's social skills deficits that would have warranted a reassessment.

Inappropriate communication, sensory motor (occupational therapy), and auditory processing assessments.

64. In conducting assessments, the school district shall not use any single measure or assessment as the sole criterion, and must use technically-sound assessment tools for purposes for which they are valid and reliable. Assessment materials and procedures must not be racially or culturally biased. Personnel who administer assessments must be knowledgeable about the assessment tools and Student's disability. The district must administer assessments in the language and form most likely to yield accurate information on what a student knows and can do academically, developmentally, and functionally, unless it is not feasible.

65. Student contends that District did not appropriately assess Student's communication, sensory motor, and auditory processing needs, and that District's 2002 psychoeducational and SL assessments, and its 2005 SL, OT, and auditory processing assessments of Student were inappropriate. District contends that the issue of the appropriateness of the 2002 assessments is beyond the statute of limitations, and that the 2002 and 2005 assessments were appropriate.

Communication related assessments

66. As set forth in Factual Finding 44, District conducted a triennial review in 2002, when Student was in kindergarten. School psychologist Karen Benjamin conducted a psychoeducational review of Student over three dates in February and March 2002, and issued a report dated March 18, 2002. District speech and language specialist Katie Young

conducted a triennial SL reassessment of Student and issued a report dated February 26, 2002.

67. Litigation of the appropriateness of the 2002 assessments should be barred because the assessments occurred beyond the three year statute of limitations applicable to this case. However, because Student contends that District considered or relied on the 2002 triennial assessments to address Student's communication needs for the 2003-2004 school year (second grade), and argues that District should have known it was relying on inappropriate information, the appropriateness of the 2002 assessments will be examined.

68. For the 2002 triennial review, District agreed to have a battery of assessments done by Ms. Benjamin at Parent's request. The tests were administered in English, and Student did not contend that he was not fully proficient in English.¹⁷ The tests were selected and administered so as not to be racially or culturally biased, and were valid and reliable. Ms. Benjamin administered the Cognitive Assessment System (CAS), the Bender test, the Woodcock-Johnson III, the Adaptive Behavior Scale, and the Gilliam Autism Rating Scale. The tests were selected for their validity and reliability and standardized procedures were utilized during administration. Ms. Benjamin concluded that the test results pointed to a learning disability due to a severe discrepancy between Student's intellectual ability and his academic achievement in four areas. Ms. Benjamin reported that the findings of a learning disability were compromised because of Student's autistic spectrum disorder. The report found communication-related deficits in the areas of listening comprehension and written expression. Ms. Benjamin's assessment was an educational assessment that focused on Student's cognitive, academic, and functional skills. Ms. Benjamin did not testify.

69. Although Student challenges the appropriateness of the 2002 psychoeducational assessment, Student did not present any evidence that Ms. Benjamin was not qualified; or that the assessment instruments used, as listed in Factual Finding 68 above, were not technically sound, valid or reliable; or that District relied on a single measure or instrument; or that Ms. Benjamin did not administer the tests consistent with their purposes. Rather, Student's private evaluator, Dr. Tina Guterman, a licensed psychologist and specialist in pediatric neuropsychology, testified that Ms. Benjamin's report failed to adequately "discuss or evaluate" Student's core areas that comprise Student's autism symptoms: social skills, communication, and odd, stereotyped and excessive behaviors.¹⁸ Dr. Guterman did not criticize the assessment tests or the administration of them, and her criticisms do not render District's 2002 psychoeducational assessment inappropriate under the applicable legal criteria. Ms. Benjamin's report did discuss Student's behaviors, and assessed all

¹⁷ In the home both Cantonese and English were spoken.

¹⁸ Dr. Guterman was also critical that Ms. Benjamin came to the wrong conclusions about Student's cognitive abilities, and believed they were above average, not average as Ms. Benjamin reported. However, Student's cognitive abilities are not at issue in this proceeding

70. Ms. Young's 2002 SL assessment involved five tests, the Test for Auditory Comprehension of Language, the Clinical Evaluation of Language Fundamentals (CELF), the Fisher-Logemann Test of Articulation Competence, the Structured Photographic Expressive Language Test, and the Pragmatics Skills Checklist. District's speech specialist reported that Student exhibited behaviors during the tests that may have lowered the scores, and made it difficult to assess his true abilities. Student's receptive language functioning skills ranged from the average to below average and was lowest (9th percentile) on the vocabulary subtest. Ms. Young rated Student's highest receptive language score (50th percentile) was on elaborated sentences subtest. For expressive language, the range was similar. Student's strongest score (37th percentile) was on the formulated sentences subtest, and his weakest score (5th percentile) was on the word structure subtest, where Student's deficits included problems with morphemes (plurals, past tense, infinitives). For oral motor skills, Student's spontaneous speech was "generally intelligible" with errors regarding the R, Th, and Ng sounds. In pragmatics, Ms. Young noted Student's deficits observed in the classroom as to maintaining appropriate eye contact, taking turns, and greeting. Student was eligible for continued SL services in the areas of pragmatics, morphology, and articulation. Ms. Young did not testify.

71. Although Student challenges the appropriateness of the 2002 SL assessment, Student did not present any evidence that Ms. Young was not qualified, or that the assessment instruments used, as listed in Factual Finding 70 above, were not technically sound, valid or reliable, or that Ms. Young did not administer them consistent with their purposes. Dr. Guterman did not review or testify about Ms. Young's report. Dr. Guterman testified that someone, either the school psychologist or the SL pathologist, should have administered the Test of Problem Solving, because it is a routinely accepted assessment for pragmatic skills, and pragmatics is one of Student's deficits associated with his disability. Dr. Guterman was under the mistaken impression that District failed to assess Student's pragmatic levels in 2002. As noted above, the SL assessment did address pragmatics.

72. As part of District's 2005 triennial assessment, a SL pathologist, Menting Shieh, assessed Student's then-present levels of SL functioning and issued a report on March 23, 2005.¹⁹ Ms. Shieh obtained a Master of Science degree in Speech-Language Pathology in June 2004. She worked for a nonpublic agency that provided SL services under contract to the District. Ms. Shieh was doing a year of clinical fellowship that required supervision. Ms. Shieh administered the CELF-Fourth Edition (CELF-4), the Goldman-Fristoe-2 Test of Articulation, the Expressive Vocabulary Test (EVT), and the Receptive One-Word Picture Vocabulary Test.

73. During the 2005 assessment, Student produced age-appropriate speech sounds. The tests and subtests were reported with both scaled scores and age-equivalents. Student received a scaled score of 1 and an age equivalent of 4.9 on a CELF subtest for "concepts and following directions." A language sample was taken by having Student take a topic and expand verbally on it. The topic was a Harry Potter story and Student spoke in

¹⁹ The report was misdated March 23, 2004.

grammatically correct sentences with appropriate gestures and facial expressions. Student ranked average on the EVT; however, on the expressive vocabulary subtest of the CELF, he was a year below his age level. Student rated a year below his age level in formulating and recalling sentences. Student was rated age equivalent on other subtests such as sentence assembly. For pragmatic communication, no data was reported. However, since the report stated Student was two years older than he really was, it is unknown what the scores mean. Ms. Shieh reported that while Student performed in the average range on most of the CELF subtests, Student had “poor attention constantly throughout all the subtests. He became a distraction to himself...”

74. Dr. Guterman was critical of District’s March 2005 SL assessment, in part because Ms. Shieh reported Student’s birthdate as February 23, 1994, instead of his true birthdate in January 1996, which called into question whether the scoring results, that correlated to age levels, were wrong. Dr. Guterman was also critical because Student’s autism was never mentioned in the report. Of significance, Dr. Guterman credibly testified that Harry Potter is one of Student’s most perseverative topics, which explained why he appeared verbally competent: Dr. Guterman reported: “It is well known that children with autism can speak volumes about their special areas of interest, which has literally no bearing on his actual pragmatic language skills, which are in fact extremely deficient. There is no other discussion of [Student’s] pragmatic language skills, and pragmatics are not even mentioned in the summary and recommendations.”

75. Dr. Guterman’s opinion was persuasive. Ms. Shieh had only a few years of college clinical experience at the time she conducted this assessment. Ms. Shieh’s testimony about the assessment was limited and did not cure the deficiencies. The unreliability of the test scores, which occurred from using an incorrect birthdate, was not resolved and rendered the assessment results invalid. In addition, Ms. Shieh failed to recognize Student’s autistic perseverative verbal communication (or obsession) with Harry Potter and made a material mistake in her evaluation of Student’s verbal abilities. Student’s pragmatic language skills were never addressed in the assessment. Although an annual goal in pragmatic communication was offered with Student’s March 2005 IEP, it was not based on objective assessment information because the assessment was inappropriate. District’s 2005 SL assessment was inappropriate and failed to adequately assess Student’s levels of SL functioning. There was no evidence that District has assessed Student’s SL functioning since the March 2005 assessment.

Sensory motor (occupational therapy) assessment

76. In September 2004, Parent requested an OT assessment because Dr. Nunno’s report found sensory and motor deficits and recommended OT services. In February 2005, the third grade classroom teacher, Ms. Bohorquez, and the Inclusion teacher, Ashley Emling, referred Student for evaluation “due to poor visual perceptual skills, fine motor skills and difficulties with writing.” District’s occupational therapist, Tammie Winter, conducted an initial OT evaluation of Student, and issued a report dated February 24, 2005.

77. Ms. Winter administered the Developmental Test of Visual Perceptual Skills, and the Bruininks-Oseretsky Test of Motor Proficiency, and conducted observations. The report noted Student's scores on the standardized tests but did not discuss them. Student's fine motor and gross motor coordination were functional. Student had deficits in the area of visual motor integration and coordination. Ms. Winter did not testify.

78. As part of the assessment, Ms. Winter tested Student's sensitivity to "environmental stimuli" by observing Student during the testing and during classroom observation as "increased periods of loud music" was generated. Ms. Winter reported that Student was not overly sensitive to environmental stimuli, and "was able to concentrate without much difficulty." No information was provided as to how this test was performed or whether it was a standardized test with national scoring samples. Contrary to Dr. Nunno's report, Ms. Winter did not note any postural deficits. Ms. Winter recommended that Student did not need direct occupational therapy services, but should have consultation services to provide support, but failed to articulate how.

79. Dr. Guterman was critical of District's February 2005 OT assessment because Ms. Winter did not "adequately assess or provide recommendations for [Student's] apparent sensory integration deficits" due to his autism. Dr. Guterman considered the "loud music" observation or test inappropriate, in that it lacked standardized measures, and failed to address other sensory areas of sensitivity such as tactile, kinesthetic or visual stimulation. Dr. Guterman was critical of the lack of discussion in District's assessment of the significant variability in Student's three overall composite scores on the DTVPS test administered by Ms. Winter. Dr. Guterman noted the extremely high discrepancy between Student's superior motor-reduced visual perception (127), and his visual-motor integration (55). Dr. Guterman recommended that Student needed a comprehensive sensory integration assessment by an occupational therapist experienced in assessing and treating sensory integration disorders in children with autism.

80. The District's 2005 OT assessment of Student was inappropriate because it was incomplete, did not sufficiently assess or address Student's sensory integration deficits, used an unknown or inappropriate test, and failed to address Student's significantly variable scores.

Auditory processing assessment

81. Student contends that District's 2005 assessment of Student's auditory processing deficits was inappropriate. District contends that the assessment was appropriate.

82. District Inclusion teacher Emling assessed Student's auditory-perceptual, memory, thinking and reasoning skills and issued a report on March 7, 2005.²⁰ Ms. Emling conducted the Test of Auditory-Perceptual Skills-Revised (TAPS-R), with seven subtests

²⁰ The report was misdated March 7, 2004.

Student scored in the significantly below average range on most of the subtests, showing his difficulty processing and retaining verbal information. The assessment confirmed and supplemented Dr. Nunno's 2004 finding that Student had a deficit in auditory processing, and therefore needed classroom information to be short, clear and concise.

83. Dr. Guterman was critical of Ms. Emling's assessment, in large part based on a typographical error that was easily explained at hearing. The report stated:

[Student] will need to be primed before being given important information and he will need to repeat what was asked to clarify his total understanding of the information. [Student] should have information presented to him in dual modalities to increase his ability to retain and understand the information. This means that information should [not] only be presented in an auditory manner, but instead should be paired with a visual picture or word.

The word "not" was left out of the last sentence. The typographical error in leaving a word out of the last sentence did not render the auditory processing assessment inappropriate, in that the meaning was made clear by the recommendation to pair auditory information with visual information. In addition, Dr. Guterman objected to the lack of discussion in the report about how Student's auditory perceptual skills appeared in his day-to-day functioning within the classroom. Dr. Guterman also criticized the lack of discussion about the discrepancy between Student's cognitive abilities and the low TAPS-R scores, but there is no factual dispute that Student has a specific learning disability in addition to autism.

84. District's 2005 auditory processing assessment was appropriate, as it did not stand alone and supplemented Dr. Nunno's report.

Appropriateness and timeliness of functional behavior analysis

85. An assessment plan must be given to the parent within 15 days of the referral. The parent has 15 days from the receipt of the proposed assessment plan to sign and return the assessment plan. The school district has 60 days from receipt of the signed assessment plan within which to complete the assessment and convene an IEP meeting to discuss the assessment results.

86. Student contends that the FBA assessment District conducted in the fall of 2005 was inappropriate and untimely. Student contends that the statutory time within which to complete an assessment and hold an IEP meeting began to run in June 2005 when Parent and the school psychologist met. District contends that the FBA assessment was appropriate and timely, and that time began to run when District received Parent's written consent for the assessment plan in October 2005.

87. In the absence of a serious behavior problem, neither California nor federal law specifies requirements for an FBA. An FBA should include basic behavioral

information addressing the “ABCs” of behavioral analysis: the immediate antecedent events associated with inappropriate behaviors, the context of the behaviors, and analysis of the consequences following the display of the behaviors. In addition, it should address proposed interventions, supports and strategies, and methods to determine when or whether the selected approaches are effective or need to be modified.

88. As set forth in Factual Findings 33-35, District agreed to the FBA and referred Student for assessment on May 25, 2005. Parent met with the school psychologist on June 7, 2005. Having agreed to do the assessment prior to the meeting, District should have presented the FBA assessment plan to Parent for signature. District had 15 days, until Thursday, June 9, 2005, within which to give Parent a written, proposed assessment plan. The last day of the regular school session was June 10, 2005. Ms. Blood-Walker informed Parent on June 7, 2005, that the FBA would be conducted in the fall of 2005, after Student had settled in to his fourth grade class. Ms. Blood-Walker did not present Parent with an assessment plan for signature on June 7, 2005, and failed to present an FBA assessment plan to Parent within 15 days of District’s agreement and referral for assessment.²¹ Ms. Blood-Walker did not have Parent sign an assessment form on June 7, 2005, because she believed that would have started the statutory time running. Ms. Blood-Walker sent a letter to Parent on June 13, 2005, which reflected that District and Parent “agreed” to wait until the fall to do the FBA so that Student’s new teachers could have the opportunity to get to know him. Parent’s acquiescence to District’s announcement that the FBA would be conducted in the fall did not constitute informed consent to the delay.

89. Ms. Blood-Walker conducted an FBA of Student’s behavior in October 2005. The assessment plan was dated June 8, 2005, and also October 12, 2005. Parent signed on an unknown date, and Ms. Blood-Walker wrote “received 10/27/05” on the bottom of the signed plan. Since District did not submit the assessment plan to Parent until October 12, 2005, the plan was untimely. Even if the summer vacation tolled the time within which to give Parent the plan, District should have given it to her within 15 days of the commencement of the regular fall school program, which began in late August 2005.

90. The assessment plan provided that the school psychologist would conduct the following assessments: cognitive development/thinking strategies, and perceptual development. Both the school psychologist and a behaviorist would assess Student’s social/emotional development. The school psychologist, a physical therapist, and an adapted physical education teacher would assess Student’s motor development.

91. District’s FBA report was dated November 21, 2005. The school psychologist identified Student’s behaviors that were known to interfere with school success, and summarized Parent’s concerns from their June 2005 meeting. Ms. Blood-Walker did not believe Student’s behaviors were serious enough to require District to conduct an FBA. Ms. Blood-Walker stated that District agreed to conduct an FBA only because Parent requested it.

²¹ Ms. Blood-Walker waited until June 8, 2005, the day after she met with Parent, to prepare an assessment plan.

Ms. Blood-Walker conducted a review of records, interviewed Student's classroom and inclusion teachers and Parent, observed Student twice, and conducted the Behavior Assessment System for Children-Second Edition (BASC-II). Ms. Blood-Walker observed Student once in class at the beginning of the school year; and once during a lunch recess in November 2005. Ms. Blood-Walker attempted to observe Student on two other occasions but both times he was working with his paraprofessional in the hallway. Student was in the hallway one of those times due to a disruptive nose-blowing episode in the classroom. Ms. Blood-Walker's observations of Student for purposes of a functional behavior analysis assessment were patently insufficient.

92. On the BASC-II scores, Parent's scores rated Student in the clinically significant range for depression, attention problems, and functional communication, where Ms. Cheung rated Student in the average range in those areas. Because it was a new school year, Student's classroom teacher Ms. Cheung had only known Student for one and a half months at the time she filled out the BASC-II survey. No other school staff participated in the BASC-II survey. Ms. Blood-Walker did not conduct the BASC-II survey with Student's prior third grade teacher or his prior Inclusion teacher, who had both known him for a year, or his new Inclusion teacher, Ms. Long. Contrary to the assessment plan, no other professionals participated in the assessments with Ms. Blood-Walker.

93. District's FBA was untimely, incomplete and inappropriate. However, the defective FBA did not result in a denial of educational benefit for Student, and the violation was harmless error. As set forth in Factual Finding 35, District was not required by law to conduct an FBA regarding Student in his fourth grade year because he no longer had a serious or pervasive behavior problem that was not effectively dealt with by other strategies and interventions. Student failed to present any evidence that during his fourth grade year, Student's behaviors impeded his learning or that of others, for which prior IEP efforts and BSPs had not been effective, and which required further data to warrant an FBA.

Annual goals

94. A student's IEP must contain a statement of measurable annual goals that are: (1) designed to meet the child's needs related to the disability to enable the child to be involved in and make progress in the general education curriculum, and (2) to meet other educational needs. Annual goals are to be evaluated in light of the information available at the time the goals were developed, and are not to be judged in hindsight.

95. Student contends that District failed to develop "appropriate" annual goals for each of Student's areas of need at issue in this case. Student contends that District failed to include goals to meet his unique needs regarding his abilities to: interact successfully with peers and adults, learn appropriate verbal and nonverbal communication, increase his attention span, follow directions, improve motor skills, group and learning skills, appropriate classroom behaviors and play behaviors with peers, understand the perspective of others, and monitor his own behavior. Student contends that many of the annual goals were not capable of objective measurement. Finally, Student contends that because District failed to

appropriately assess Student in the areas of need at issue in this case, District's annual goals were based on absent or flawed assessments.

96. District does not disagree with Student's statement of his areas of unique needs, and contends that the annual goals contained in Student's IEPs for each year addressed his needs related to his educational progress, and were measurable. District contends that it was not required to develop separately identifiable goals for every need Student had, and that many of his goals addressed multiple needs. District contends that in each school year it collaborated with Parent and took her requests into consideration.

Goals for 2003-2004 (second grade)

97. For the 2003-2004 second grade school year, Student had unique needs regarding his abilities to interact successfully with peers and adults, learn appropriate verbal and nonverbal communication; increase his attention span; follow directions; improve group skills, learning skills, appropriate classroom behaviors and play behaviors with peers; understand the perspective of others; and monitor his own behavior. Student's unique needs also included needs for adult support in the classroom, for completing work, transitions, and changes in routine, and, as of mid-year, strategies to address his negative behaviors.

98. Student's annual goals were developed at the March 2003 IEP. Whether these annual goals complied with the law should be examined as of the time that they were adopted by the IEP team in March 2003. The appropriateness of the 2003 goals may not generally be litigated in this proceeding because the March 2003 IEP is beyond the three-year statute of limitations applicable in this case. However, if, after October 6, 2003, while implementing the March 2003 goals, District knew or should have known of any new changes, incidents, or information that called into question the appropriateness of the goals in place, District would have been obligated to re-examine the goals.

99. For the 2003-2004 second grade year after October 6, 2003, Student's annual goals were: (1) independent work skills (following visual directions, completion of classroom work, visual and adult cues, class schedule, repeating directions, ending work, and learning social stories on targeted classroom behaviors); (2) social interaction (socially and age appropriate behaviors to interact with peers in indoor and outdoor play opportunities, fading adult support, using words to express needs in conflict situations, sharing, turn-taking, joint action, and using social stories to build an understanding of social interaction); (3) expressive language communication (targeting perseveration, difficulty with sentence structure, grammar, staying on topic with fading prompts or cues, using spatial, quantity, location concepts, pronouns, irregular past tense verbs, answering "wh" questions from a story); (4) social language skills and communication (understanding appropriate verbal reactions, attention, following rules, turn-taking, focusing); and (5) communication: following complex verbal directions (following classroom directions more appropriately, from one-step to two-step verbal directives, and distractions). Goal 1 was identified as part of Student's BSP as his behavioral goal.

100. As set forth in Factual Findings 8 to 26, during second grade Student had problems with maladaptive behaviors that impeded his education and that of other students in his class. District convened an IEP meeting on January 20, 2004, and modified Student's BSP. The modified BSP still referred to Goal 1 as its related goal. At no time during the hearing did Student contend that District should have modified Goal 1. Since it has been found that District's BSP was ineffective, and that District should have conducted an FBA, it is reasonable to conclude that Goal 1 was also ineffective as it related to Student's behaviors. Goal 1 from March 2003 was not appropriate for Student during second grade.

101. Student failed to establish that District should have re-examined any other of Student's second grade goals.

Goals for 2004-2005 (third grade)

102. For third grade, Student had unique needs regarding his ability to interact successfully with peers and adults, learn appropriate verbal and nonverbal communication, increase his attention span, follow directions, improve motor skills, group skills, learning skills, appropriate classroom behaviors and play behaviors with peers, understand the perspective of others, and monitor his own behavior. In addition, Student's unique needs included needs for adult support in the classroom, for completing work, transitions, and changes in routine, and to address his negative behaviors. The goals were adjusted accordingly.

103. For the 2004-2005 year, Student's annual goals were developed in the March-May 2004 IEP. The 2004 annual goals were: (1) independent work skills (following directions, completion of classroom work with adult monitoring, visual supports and adult cues, class schedule, structured work task checklist, activity reinforcers, and learning social stories on targeted classroom behaviors); (2) social interaction (socially and age appropriate behaviors to interact with peers in indoor and outdoor play opportunities, fading adult support, using words to express needs in conflict situations, sharing, turn-taking, joint action, and using social stories to build an understanding of social interaction); (3) self-help communication with peers and adults (negative behaviors such as grabbing, pushing, or leaving, difficulty expressing himself, lack of understanding, asking questions, and asking for adult help); (4) communication to improve Student's behavior during SL sessions (addressing optimizing his learning, difficulty with transition, attention, focus, following rules, prompts, resistance, and interrupting); and (5) communication: following complex verbal directions (following classroom directions more appropriately, from one-step to two-step verbal directives, and distractions).

104. Student's 2004 IEP goals addressed Student's unique needs. The May 2004 BSP provided that Goals 1, 2, 3, and 4 were related to Student's behavior support. Goals 3, 4 and 5 addressed Student's communication needs. Goal 2 addressed Student's social skills deficits (as did the communication goals). Goals 1, 4 and 5 involved Student's attention, reading, and auditory processing needs. Goals 1, 4 and 5 also provided support for academic progress. All of the goals addressed following directions and learning appropriate individual

and group skills. Parent believed that Student's social skills were that of a three or four year old, and that he was depressed because he had no friends. The 2004 goals addressed Parent's concerns for lessons about social peer interaction, and pragmatic communication skills.

105. Student contended that the third grade goals were not measurable. Some of the 2004 goals had generalized "baseline" information, instead of specific information reflecting Student's present levels of performance. For example, the level of performance for the social interaction goal was "difficulty interacting with peers" without any data about how often Student had difficulty per day or week. However, Student's difficulties in peer interactions were well documented, described in all his IEP documents, and discussed among the team members. The goal had a measurable progress criteria, that would be "4/5 opportunities by observation with fading adult facilitation."

106. Student contended that the third grade communication goals were not appropriate to meet his needs. In 2000, Parent had hired a SL pathologist, Floria Fung, to work with Student at home on Student's needs related to his autism. Ms. Fung has been employed as a speech therapist with the District since 1998, and had met Student in a kindergarten class. Ms. Fung provided home therapy only, and had no knowledge how or whether the work she did with Student generalized over into the school setting. Ms. Fung thought that District's third grade communication goals for Student did not cover everything she was then working with Student on, including sequencing (understanding the reasoning of a story), inferences, expressing thoughts in a sentence, and predictions.

107. Ms. Fung's testimony did not establish that District's 2004 communication goals were inadequate, or did not address Student's needs. District's written goals show that elements she claimed were missing were in fact addressed, although not labeled as such. The social stories involved sequencing skills (as did Student's grade level reading and math progress), and the goals for learning social interaction, to express needs in conflict situations, and for self-help involved opportunities for learning inferences and expressing thoughts in a sentence. Moreover, Ms. Fung testified that District's 2004 goals were appropriate and designed to provide Student with educational benefit.

108. Both Michelle Wong, Student's second grade Inclusion teacher, and Ashley Emling, Student's third grade Inclusion teacher, gave persuasive testimony that the 2004 communication goals were appropriate, were based on Student's unique needs arising out of his autism, and helped him progress in the classroom. Ms. Emling obtained a Bachelor of Arts degree in psychology in 2001, and a Master of Arts degree in special education in 2006, and has over seven years of experience teaching autistic children. Ms. Wong obtained a Bachelor of Arts degree in both elementary and special education in 1996, a Master of Arts degree in special education, mild/moderate disabilities, in 2006, and has over eleven years experience in teaching.

109. The 2004 goals were measurable, designed to meet Student's needs related to his disability, and were designed to enable Student to be involved in and make progress in

the general education curriculum. Student did not establish that the 2004 annual goals were in violation of the law.

Goals for 2005-2006 (fourth grade)

110. For the 2005-2006 school year (fourth grade), Student had unique needs regarding his abilities to interact successfully with peers and adults, learn appropriate verbal and nonverbal communication, increase his attention span, follow directions, improve motor skills, group and learning skills, appropriate classroom behaviors and play behaviors with peers, understand the perspective of others, and monitor his own behavior. Student's unique needs included needs for adult support in the classroom, for completing work, transitions, and changes in routine.

111. Student's annual goals were developed at the March-May 2005 IEP. Parent wrote a letter before the March meeting requesting goals to address Student's social cognitive deficits regarding his lack of awareness of other people's feelings of him, and lack of self regulation. She asked for a goal in reading comprehension, and a goal about initiating interactions with peers. Parent's concerns were addressed in the goals that were developed.

112. The 2005 annual goals were: (1) reading comprehension (distinguishing main ideas and supporting details in expository passages with minimal adult support), (2) writing: organization and focus (composing a paragraph including a topic sentence, supporting sentences and a concluding sentence with minimal adult support), (3) math: computation of whole numbers (simple multiplication word problems, information needed to solve the problem, and computing the correct answer independently), (4) social interaction (socially and age appropriate behaviors to interact with peers in indoor and outdoor play/social opportunities, fading adult support, inappropriate social behaviors such as chasing, teasing, cutting in line, waiting to take a turn, joint attention to games, following directions, initiating interactions, and being flexible); (5) social perspective taking (learning strategies for becoming aware of himself and his feelings, verbalizing his feelings, and becoming aware of other people's feelings and their thoughts about him); (6) communication: receptive language (age appropriate levels of receptive language in structured language activities, answering yes/no questions and "wh" questions in complete sentences with appropriate rationales, following two to three step directions and predicting/infering what the given target of the speaker might be), and (7) communication: pragmatics (age appropriate levels of pragmatic skills in structured language activities, and identifying and describing his feelings and the feelings of others expressed in structured role play). Parent consented to all of the goals except the "communication and language skills goals." These goals addressed Student's unique needs.

113. Student contends that all of the 2005 goals were inappropriate because they did not contain enough information to be measurable. All of the goals, except the communication goals, had generalized statements of Student's present levels of performance. For example, the reading comprehension goal said Student "needs significant adult support and frequent prompting and forced choice to answer the question." Student's contention that

such a description of Student's present level of performance was too general to be measurable is rejected because "significant adult support" is reflected in the IEP's determination that Student still needed an adult aide in the classroom, at lunch, and at recesses on a daily basis. District staff, who were responsible for the goals, other than the communication goals, testified they could understand and implement them. There was no showing that any staff had difficulty with the goals or that Student was harmed by any loss of educational benefit due to general performance level descriptions.

114. The two communication goals, Goals 6 and 7, were deficient. Student's March 2005 receptive language communication goal was: "[Student] will improve his receptive language to more age appropriate levels in structured language activities with 80% accuracy." Student's pragmatic communication goal was: "[Student] will improve pragmatics skills to a more age appropriate level in structured language activities with 80% accuracy." In contrast to the other goals, neither of the communication goals provided any statement of Student's present levels of receptive and pragmatic language performance. Without Student's baseline performance level described, the two communication goals were not measurable.

115. Kimberly Long has been District's Inclusion teacher for Student since fourth grade. Ms. Long obtained a Bachelor of Arts degree in psychology in 1992, has continued in advanced multiple subject and mild/moderate special education credential coursework from 2001 to 2006, and has worked in inclusion programs for five years. Ms. Long testified that Student's 2004-2005 academic and social goals were appropriate. As to the communication goals, Ms. Long testified that even though Parent did not consent to them, District staff, including the new SL pathologist, Betsy Lance, worked collaboratively with Parent on the general areas of receptive and pragmatic communication. Parent visited Ms. Long's office at least once a week that school year. Student made progress and was able to attend to fourth grade by the end of the year without prompting. Parent wanted the pathologist to use a listening chart, District agreed to use it, and it worked well. As to pragmatics, even though Parent had not consented to the goal, Parent worked collaboratively with District staff on the substantive needs, helping Student learn to identify and describe his feelings and the feelings of others as expressed in structured role play.

116. The two 2005 communication goals were materially flawed and inappropriate because they were not measurable. Student did not establish that any of the other 2005 annual goals were inappropriate. Student did not establish that he suffered any loss of educational benefit because of the defective 2005 communication goals. Parent and District collaborated to ensure Student progressed toward his communication goals.

Goals for 2006-2007 (fifth grade)

117. For the 2006-2007 fifth grade year, Student had unique needs regarding his abilities to interact successfully with peers and adults, learn appropriate verbal and nonverbal communication, increase his attention span, follow directions, improve motor skills, group skills, learning skills, appropriate classroom behaviors and play behaviors with peers,

understand the perspective of others, and monitor his own behavior. Student's unique needs included diminishing needs for adult support in the classroom, for completing work, transitions, and changes in routine. Student's annual goals were developed in the March 2006 IEP.

118. The March 2006 annual goals and the unique needs they addressed were: (1) reading comprehension and analysis of grade-level appropriate text (formulating predictions using prior knowledge, topic sentences, key words and cues, finding the main idea and supporting details), (2) writing: organization and focus (multiple paragraph compositions including introduction, topic sentence, supporting paragraphs with details, and summary following teacher-led pre-writing activities), (3) mathematical reasoning (math word problems, approaches and operations needed to successfully complete the problems), (4) attention (attending to instruction across groupings with visual and peer support, sustaining focus, fading adult support); (5) pragmatics: paralinguistic behaviors (volume, appropriate vocal intonation and understanding the meaning of facial expressions) for himself and with others); and (6) pragmatics: interaction skills for listening and turn taking (interacting with others in conversations, active listening such as eye contact, body language, and responses, and taking turns).

119. Student's annual 2006 IEP goals addressed Student's unique needs in all areas, including the areas of behavior, communication, social skills, sensory motor, attention, reading, auditory processing and academic weakness. Goals 1, 2, and 3 addressed reading and academic needs. Goals 4, 5, and 6 supported Student's behavioral, communication, social skills, sensory motor, attention, and auditory processing needs.

120. Student's March 2006 goals all contained descriptions of Student's baseline levels of performance. The increased levels of subject matter for each goal reflected Student's prior progress. Ms. Long did not recall any significant discussion about the annual goals at the March 2006 IEP meeting, and Parent consented to the IEP and the goals. Parent contends the March 2006 annual goals are not appropriate as none of the goals was measurable.

121. For the pragmatic social interaction goal (Goal 6), Student contends that the description of his present level of performance was too general to provide sufficient information to meet the criteria of a measurable goal. The annual goal was that by March 9, 2007, Student would demonstrate appropriate pragmatic skills for interacting with others during conversations. Student's March 2006 baseline level of performance for Goal 6 was described as follows: "[Student] needs help with listening to speaker and with taking conversational turns appropriately." The annual goal was "4/5 [i.e. four out of five] opportunities during structured and unstructured conversations with peers and adults as measured by language samples and pragmatic checklist over 3 days." As with all the goals every year, District's one-page form has three short term objectives or benchmarks that progressively lead up to the annual goal end date. The short term objectives are supposed based on progressive dates and progressive skill achievements from the date of the IEP meeting in March 2006 to the annual goal date to the annual goal date of March 9, 2007.

There are no short term progressive dates for this goal as they all display March 9, 2007, the annual end date.

122. Setting aside the date error and assuming progressive dates from March 2006 to March 2007, Goal 6 is sufficiently measurable, and District staff had no problem implementing it. Since Student's annual goal was to accomplish both increased active listening and taking turns conversationally in four out of five trials over a three-day period, it is reasonable to infer that Student's initial level of performance in March 2006 was significantly less. District's professional staff determined that meeting the goal was a valid annual objective. While the short term objectives did not specify how much Student was then listening or how much of an increase in listening time would count, the goal expressly stated that progress toward the objectives would be measured by language samples and pragmatic checklists with the SL pathologist. The goal therefore contained a description of how progress toward meeting Goal 6 would be measured.

123. The 2004 goals were measurable, contained descriptions of how progress toward meeting the annual goals would be measured, were designed to meet Student's needs related to his disability, and to enable Student to be involved in and make progress in the general education curriculum. Student did not establish that the 2006 annual goals were inadequate.

124. Student's only other specific complaint about the 2006 goals was with respect to the goal for reading comprehension and analysis of grade-level appropriate text (Goal 1). Student did not complain that the goal was not capable of measurement, but criticized the way District reported periodic progress towards the goal, in its "Attachment G" progress reports. Student's due process request does not contain a problem about District's failure to appropriately implement the IEP goals or report progress; it only stated a problem about the appropriateness of the annual goals themselves. Accordingly, no claim regarding implementation of the 2006 IEP goals is at issue in this proceeding.

Failure to offer or provide appropriate DIS services and supports

125. "Related services" under the IDEA are those that are required to assist the child in benefiting from special education. In California, related services are called "designated instruction and services" (DIS), which must be provided if required to assist the child in benefiting from special education. The DIS services offered by the District must be evaluated at the point in time they were offered by the IEP team, as part of the annual IEP, and not by hindsight. Student contends that District failed to offer or provide appropriate DIS services in seven specified areas.

Social skills training

126. Student contends that additional, supplemental services and supports were necessary to address his social skills needs, that they were not otherwise addressed by District's programs, and that failure to provide the additional services and support within the

District's IEP resulted in a denial of FAPE. District contends that its annual IEPs provided Student a FAPE for each relevant year without the need for additional services or supports to address Student's social skills needs.

127. For the 2003-2004 school year (second grade), Student contends that he needed a separate social skills program, and that District's March 2003 IEP agreed to provide him with the opportunity to participate in "Integrated Play Groups as school district funding and staffing permit." The appropriateness of District's March 2003 offer may not be litigated in this proceeding as it is beyond the statute of limitations, unless new changes, incidents, or information would have put District on notice to re-examine its offer. During second grade, Student's maladaptive behaviors called for behavior interventions and strategies. Student has failed to establish that District should have re-examined its social skills services in view of Student's behaviors.

128. For the 2004-2005 school year (third grade), Student contends that District failed to make Student "an offer for social skills training." Goal 2 in the 2004 IEP was a social interaction goal. The goal addressed socially and age appropriate behaviors to interact with peers in indoor and outdoor play opportunities, fading adult support, using words to express his needs in conflict situations, sharing, turn-taking, joint action, and using social stories to build an understanding of social interaction. In addition, the Inclusion teacher, and the full-time paraprofessional assigned to Student, addressed his social skills deficits in the classroom, at lunch, and at recesses on the schoolyard, with prompts, cues, and lessons, as well as in a group SL session.

129. For the 2005-2006 (fourth grade) and 2006-2007 (fifth grade) school years, Student also contends that District failed to provide appropriate social skills services. District addressed Student's social skills deficits and needs through annual goals, with adult support for peer interactions, and in the SL sessions. In addition to the annual goals, District provided ongoing Inclusion support and consultation services every year. Inclusion teachers and paraprofessionals have been with Student for lunch and recesses at all time on the school yard, providing support for social interaction to teach Student how to play a game in a group, and to facilitate turn-taking, an area of difficulty for Student. District has continually worked with Student in the area of pragmatics, in the natural environment of daily school life. Kim Long, Student's Inclusion teacher for the past two years, credibly testified that Student has made meaningful progress and can play more age appropriately with minimal supports, although he still needs that support.

130. District's speech and language pathologist Elizabeth Lance worked with Student on his social interaction goals, and expressive, receptive, and pragmatic communication skills, including taking turns, learning what nonverbal cues mean (facial expressions, for example), and social perspective taking. Ms. Lance obtained a Bachelor of Arts degree in speech pathology in 1982, and a Master of Arts for Teachers in speech pathology in 1984. She has been a speech and language pathologist with the District since 1985, with many years of experience providing individual and group SL therapy and diagnostic evaluations for children, including autistic children. Ms. Lance came to Alamo in

the fall of 2005, and provided services to Student for fourth and fifth grade. Ms. Lance testified that Student has made great progress on his goals and in his social skills abilities.

131. Student's contention that the District did not appropriately address Student's social skills needs is rejected. Student appears to contend that District should have offered a special social skills class, like the after school program Parent enrolled Student in at Quest Camp, beginning in third grade, or like the after school social skills therapy Parent provided. Student did not establish that District's services to address his social skills needs in the context of his educational program were inappropriate. To the extent Student may have benefited during those years from his private therapeutic after-school camp program, in the area of social skills, Student failed to establish any deficiency in District's program that would have required further services in order for Student to benefit from his special education program.

Speech and language therapy

132. Student contends that District failed to provide appropriate SL therapy services. Student contends that additional, supplemental services were necessary to address his SL needs, that they were not otherwise addressed by District's programs, and that failure to provide the additional services and support resulted in a denial of FAPE. District contends that its annual IEPs provided Student a FAPE for each relevant year without the need for additional services to address Student's SL needs.

133. When Student was in kindergarten, Parent was not satisfied that Student was receiving sufficient speech and language services, and, as set forth in Factual Findings 106 to 109, hired Floria Fung in 2000 to provide Student with supplemental speech and language services at home. Ms. Fung has provided "home therapy" to Student from 2000 to March 2006 on an individual basis not related to her employment with the District.

134. Ms. Fung testified at hearing that Student's speech and language services provided by the District were sufficient from year to year to provide Student with educational benefit, without her services. During each school year, Ms. Fung's provision of speech and language therapy to Student was only a part of her services, and the majority of her services during the school years (estimated by Ms. Fung to be about 60 percent of her time) were devoted to helping Student with his homework.

135. District provided Student with speech and language services as part of his IEP each year. For second grade, Student had direct and consult speech and language services for 90 minutes per week, and had two communication goals. For third grade, Student's speech and language services were provided at the same level. Student did not establish that District's speech and language services for second or third grade were inappropriate or insufficient to provide Student with educational benefit. The mere fact that Student received additional speech therapy at home is irrelevant, in that Student failed to establish that District's program was inappropriate when Parent hired Ms. Fung during each of those school years.

136. With respect to Student's 2005-2006 school year (fourth grade), Student established that the 2005 SL assessment, conducted by Ms. Shieh, an inexperienced speech and language pathologist, was inappropriate, as set forth in Factual Findings 72 to 75. Based on that assessment, and Ms. Shieh's recommendation, the IEP team reduced Student's SL services by one-half hour per week for Student's fourth grade year (to the March 2006 IEP).

137. Because District reduced Student's SL services for the 2005-2006 school year based on an inappropriate assessment, Student is entitled to reimbursement for compensatory SL services for that school year. The reduction of one-half hour per week for a 35 week school year, resulted in a loss of 17.5 hours of SL services. Ms. Fung charged Student \$100 per hour. Accordingly, District should reimburse Parent for compensatory SL services for the fourth grade school year in the sum of \$1,750.

138. For Student's 2006-2007 school year (fifth grade), to October 6, 2006, or about one month of schooling at issue in this case, the SL services were reviewed by District's speech and language pathologist Elizabeth Lance. Ms. Lance drafted Student's SL goals for the fifth grade school year, thinks Student has made significant progress, and her testimony is persuasive. Student failed to establish that District's SL services for one month of the present school year were insufficient such that further services were required in order for Student to benefit from his special education program.

Behavior support

139. Student contends that additional, supplemental services were necessary to address his behavior needs, that they were not otherwise addressed by District's programs, and that failure to provide the additional services and support resulted in a denial of FAPE. District contends that its annual IEPs provided Student a FAPE for each relevant year without the need for additional services to address Student's behavior needs.

140. Student's behavioral supports for second grade, 2003-2004, and at least half of third grade, 2004-2005, were deficient, as set forth in Factual Findings 8 to 35. District failed to conduct an FBA regarding Student's negative behaviors in second grade, as set forth in Factual Finding 26. In February 2005, District provided Student with a full time classroom aide. District failed to provide Student with further behavior intervention services until May 2005, when it offered to again modify the BSP, and Parent rejected the offer.

141. Pursuant to Factual Findings 11 to 26, District failed to provide appropriate behavior support services at a time when District's approaches specified in the IEP for negative behaviors were ineffective. This denial of FAPE supports a finding that District should reimburse Parent as compensatory behavior intervention for Student's 2004 Quest Camp summer program placement. Student did not establish that District's behavior support services for any other year were inappropriate.

Trained aide

142. Student contends that District failed to provide an aide for the first half of second grade, and failed to thereafter provide a trained aide in all relevant years, and that failure to provide a trained aide resulted in a denial of FAPE. District contends that, after February 2005, it provided Student with a classroom aide for each school year, and that the aides were appropriately trained.

143. For the 2003-2004 school year (second grade), Parent requested a full time trained aide many times during the year. District's provision of adult support by the Inclusion teacher or a paraprofessional at lunch or at recess was insufficient. Student needed a full time classroom aide to help him focus, attend to the teacher, follow directions, access the curriculum, transition, complete work, interact with peers, and other needs. District failed to provide an aide in the classroom until February 2004, as set forth in Factual Findings 11 to 22.

144. In February 2004, District assigned a classroom aide, and Parent questioned the new paraprofessional's training and experience. The aide informed Parent that she had worked as a paraprofessional with autistic children for many years. Parent observed the aide as the class continued, and observed that the paraprofessional did not redirect Student from a preferred activity, reading, to attend to Ms. Williams directions, and failed to redirect Student throughout Parent's visit. This isolated incident is insufficient to establish that the aide was not trained.

145. District conceded to Parent that the first two paraprofessionals assigned were not a "good match" for Student's needs. District assigned a different paraprofessional, in the spring of 2004, who worked better with Student. In third grade, District staff thought that Student was too dependent on his aide, and brought in other aides. District continued to provide a full time classroom aide until March 2006, when the IEP team agreed it was time to fade Student's adult aide support in favor of increasing his independence. For the fifth grade school year from August 2006 to the present, Student no longer has an aide and is doing well in his classrooms and on the school yard.

146. District's failure to provide a classroom aide for Student from October 2003 through about half of February 2004, or for less than five months of second grade, denied Student a FAPE during that time period. The absence of a classroom aide prevented Student from meaningful functional access to the classroom. Student's behavioral problems needed the immediate intervention of an adult aide to help him deal with his emotional self regulation, to attend and focus, to understand multi-step directions, to follow directions and rules, and to interact with appropriate responses to the teacher and his peers. This failure is a further equitable reason why District should reimburse Student for Student's behavioral intervention program at Quest Camp for the summer of 2004. District thereafter provided a classroom aide. Student failed to establish that further compensatory services should be ordered.

Occupational therapy

147. Student contends that District failed to provide appropriate occupational therapy services in all relevant years, resulting in a denial of FAPE. District contends that its annual IEPs provided Student a FAPE for each relevant year with occupational therapy consultation services for fourth and fifth grades.

148. District failed to assess Student's sensory and motor needs for his second grade year, but Student failed to establish that District should have assessed him that year. District did conduct an OT assessment in 2005 as part of the triennial assessment. As a result of that assessment, District found Student needed occupational therapy services on a consultation basis.

149. District's 2005 OT assessment was inappropriate as it did not address Student's sensory integration needs, as set forth in Factual Findings 76 to 80. While the assessment was inappropriate, Student has not established that he needed direct occupational therapy services. Student's sensory and motor needs should be reassessed by an occupational therapist to determine his present levels of functional performance and needs.

Music therapy

150. Student contends that District failed to provide music therapy services, resulting in a denial of FAPE. District contends that its annual IEPs provided Student a FAPE for each relevant year.

151. Parent privately retained the services of Susan Rancer, a registered music therapist, when Student was four years old, and continues providing him music therapy through the present. Ms. Rancer has a Bachelor of Arts degree in music therapy, has about 30 years of experience providing music therapy to preschool and special needs children, including hundreds of autistic children. The music involves teaching piano, guitar or violin playing. Music therapy is used to address sensory, motor and processing skills such as attention, directionality, following directions, hand-eye coordination, motor planning and visual tracking.

152. District's annual IEPs addressed Student's deficits regarding attention, directionality, following directions, hand-eye coordination, motor planning and visual tracking. Student is good at drawing, math and reading, all of which involve skills in these areas. District's programs addressed his weaknesses regarding attention span, focus, and following directions. Student has not established that he needed direct music therapy services.

Academic skills intervention

153. Student contends that District failed to appropriately address his academic weaknesses or academic skills intervention needs during third, fourth, and fifth grade,

resulting in a denial of FAPE. Student contends that he needed additional services such as the Lindamood-Bell Visualizing and Verbalizing program. District contends that its annual IEPs provided Student a FAPE for each relevant year without the need for additional services to address Student's academic needs.

154. During third, fourth, and fifth grade, Student was regularly at or above grade level in academic subjects. Parent refused to allow District to provide modifications on Student's third, fourth or fifth grade academic tests. Student performed competently and made educational progress for each of those years.

155. In the 2004-2005 (third grade) school year, Student ended the first quarter being graded as "needing improvement" in 30 out of 31 topics, except visual and performing arts, in the following areas: reading, written language, listening and speaking, history and social science, mathematics, science, health and physical education, and personal responsibility. By the end of the school year, Student received grades of "competent performance" in almost every area. He received a grade of "needing improvement" in five areas, including reading fluency and completing homework in a timely manner. In June 2005, the teacher reported that Student had shown great improvement that year.

156. In the 2005-2006 (fourth grade) school year, Student began the year with grades primarily in the low competent performance range, and by the end of the school year, his grades were all solidly in the competent performance range for academic subjects (and lower on personal responsibility topics). The teacher reported that Student did very well with math and social studies.

157. For the first two quarters of the 2006-2007 (fifth grade) school year, Student has received grades that are primarily in the "outstanding performance" range, with only a few scores in the competent range. The teacher reported that Student had managed to adjust to the "rigorous curriculum" of fifth grade.

158. Student has taken the California Standardized Testing and Reporting (STAR) exam every year. In third grade, Student scored in the "basic" range on both the English language arts and math components of the STAR test, but just missed the "proficient" range. In fourth grade, in the spring of 2006, Student scored in the "proficient" range on both components.

159. District's Program Administrator, Dr. Mills, reviewed Student's school records, including his report cards, for the second, third, fourth and fifth grade school years. Dr. Mills saw nothing to indicate that Student needed additional services not provided for in the school program in order to obtain academic benefit. Dr. Mills spoke with Student's teachers and was satisfied with Student's annual achievements. The fact that Student still had areas of weakness such as pragmatics and lack of understanding of social cues in the classroom does not mean that District failed to address those needs. Rather, they are areas of Student's unique needs arising out of his autistic disability. District's services, supports and

goals annually dealt with Student's needs in pragmatics, reading comprehension, problem solving, and story construction.

160. In May 2005, Student was privately assessed in a "pretest" at Lindamood-Bell Learning Process (LMB). LMB is a certified nonpublic agency that works with children with learning disabilities, and provides reading-based remediation programs addressing oral and written language skills. Jody Gilles, the LMB representative who testified, obtained a Bachelor of Arts degree in Psychology in 1997, and has been with LMB since 2000, starting as a clinician, and worked her way to regional director. LMB administered selected portions of standardized tests, found that Student could work on his oral and written expressive language, comprehension, and problem solving skills, and recommended an intensive program.²² Student thereafter received private services from LMB in 2005 and 2006.

161. Dr. Mills reviewed the LMB 2005 test results as well as a November 2006 progress report. Dr. Mills stated that Student's May 2005 scores on the LMB tests were all in the average range or above, and the scores did not suggest that Student needed extra private services. She saw a low score on one subtest on pragmatics. Dr. Mills verified with Student's teachers that any pragmatics deficit did not interfere with Student's academic achievements at school. District was already aware of Student's unique needs regarding pragmatic communication. Dr. Mills was critical of the selected tools used in the LMB pretests, that the qualifications of the assessor were unknown, and that the LMB reports contained no detailed analysis of the scores. Dr. Mills' testimony is entitled to great weight, given her years of special education assessment experience.

162. Student did not establish that District's services to address his academic skills deficits were inappropriate for the third, fourth and fifth grade school years.

Failure to make a clear written offer of placement for speech and language therapy, integrated play groups, and extended school years

163. The IEP for a student must contain a clear written offer of placement. This must include a statement of the special education and related services, and supplementary aids and services, including program modifications or supports. This must include a statement of the anticipated frequency, location and duration. The offer should contain sufficient information so that the level of the district's commitment of resources is clear, but may be stated in a range if the IEP team determines that a range of service meets the needs of the child.

164. Failure to provide a clear written offer, if proved, is a procedural violation that does not necessarily result in loss of FAPE. To constitute a denial of a FAPE, procedural violations must be found to have impeded the child's right to a FAPE, significantly impeded

²² The pretest contained no analysis of any of the test results and was signed by a clinic director who did not administer the tests.

the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE, or caused a deprivation of educational benefits.

Offer for speech and language therapy

165. Student contends that District failed to make a clear written offer for Student's 2003-2004 (second grade) SL therapy. District's offer was made in March 2003. Whether the offer was clear must be evaluated at the time it was made. This is a separate issue from whether District should have re-examined Student's SL services during second grade. Litigation of this offer is barred by the three year statute of limitations applicable in this case.

Offer for integrated play groups

166. Student contends that District failed to make a clear written offer for integrated play groups for the 2003-2004 (second grade) school year. District's offer was made in March 2003. Whether the offer was clear must be evaluated at the time it was made. This is a separate issue from whether District should have re-examined Student's social skills opportunities during second grade, as set forth in Factual Finding 130 to 135. Litigation of this offer is barred by the three year statute of limitations applicable in this case.

Offers for summer ESY

167. Extended school year (ESY) services shall be provided to students who have handicaps which are likely to continue indefinitely or for a prolonged period, and where interruption of the student's educational programming may cause regression. The ESY offer must be comparable to the Student's school year IEP program. If during the regular academic year, a student's IEP specifies integration in the regular classroom, a school district is not required by law to meet that component of the IEP if no regular summer school program is offered.

2004 ESY

168. District offered an ESY program for the 2003-2004 ESY during the March-May 2004 IEP. The initial written offer at the March 2004 IEP meeting failed to state what type of ESY services would be offered, and did not describe a type of class or a location. At the May 5, 2004 IEP meeting the offer was clarified in writing as an SDC placement for Student at Starr King Elementary School. District IEP team members explained to Parent that District did not operate general education summer school for elementary school children. Since there was no general education summer school classroom within which to include Student, the offer was to place Student with other students with disabilities at similar levels of functioning and academics. District assured Parent verbally that Student would not be placed in an SDC class with lower functioning students.

169. The details of the written offer were explained verbally to Parent, and there was no evidence that Parent did not understand the offer or was confused. Parent provided

written notice to District of her unilateral placement of Student at Quest Camp's summer program instead, and the letter stated to the school principal that Parent had "carefully considered" the offer.

170. District's written offer was sufficiently clear in stating the name of the school location and the class. District substantially complied with the requirement to make a clear written offer for the 2004 ESY placement.²³

2005 ESY

171. District offered an ESY program for the 2004-2005 ESY during the March-May 2005 IEP. The initial written offer in the March 2005 IEP meeting failed to state what type of ESY services would be offered, and did not describe a type of class or a location. Parent consented to the IEP on March 24, 2005, except for some of the annual goals. At the May 25, 2005 IEP meeting, District clarified the ESY offer in writing in the IEP as "placement in a 4 hour a day, 5 days a week, for 4 weeks of ESY. Placement will be at Lafayette Elem. in a special day class for 3rd grade. There is no general education summer school for 3rd grade thus inclusion students will be placed in a special day class at the appropriate grade level."

172. The details of the written offer were explained verbally to Parent, and there was no evidence that Parent did not understand the offer or was confused. On May 18, 2005, Parent provided written notice to District of her unilateral placement of Student at Quest Camp's summer program instead, and stated to the school principal that Parent had "carefully considered" the offer.

173. District's written offer in the May addendum was sufficiently clear in stating the name of the school location, the class, and the duration. District complied with the requirement to make a clear written offer for the 2005 ESY placement.

2006 ESY

174. District offered an ESY program for the 2005-2006 ESY at the March 2006 IEP. The written offer in the March 2006 IEP meeting failed to state what type of ESY services would be offered, and did not describe a type of class or a location. During the IEP meeting, Parent attempted to write on the IEP that District would pay for Student's ESY at Quest Camp instead of a public school. District staff informed Parent that District would not pay for Quest Camp's summer program, and the provision was crossed out.

175. Parent consented to the IEP on March 21, 2006. The details of the 2006 ESY offer were explained verbally to Parent during the IEP process, and there was no evidence

²³ Student is incorrect in his contention that the appropriateness of District's ESY offers each summer is an issue in this proceeding. Student's Clarified Statement of Issues under "failure to provide an appropriate program" for each year contains no mention of ESY.

that Parent did not understand the offer or was confused. On June 8, 2006, Parent provided written notice to District of her unilateral placement of Student at Quest Camp's summer program instead, and stated to the school principal that Parent had "carefully considered" the offer.

176. On June 16, 2006, Autism Content Specialist Priya Sodhi wrote a letter to Parent stating that the District "continues to offer placement at Francis Scott Key Elementary school in a special day class for 'inclusion' students. These students are all within the inclusion program and are at the same level as [Student]." Ms. Sodhi further described the academic, social, and DIS services for the ESY placement.

177. The March 2006 IEP contained no written description of the ESY program offered. It did not contain the name of the school location, or the type of class, or the duration. For the 2006 ESY offer, District failed to comply with the requirement to make a clear written offer because the only written description, in Ms. Sodhi's June 2006 letter, occurred almost three months later. This procedural error did not deny Student a FAPE because Parent understood and considered the offer.

Failure to provide prior written notice of District's refusals to initiate assessments or to initiate or make changes to Student's placement

178. "Prior written notice" under the IDEA is required whenever the public agency proposes or refuses to initiate or change the identification, evaluation, educational placement, or the provision of FAPE. The written proposal or refusal must include a description of the action proposed or refused by the district, an explanation, a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action, an advisement of procedural rights, a description of other options considered by the IEP team and the reason why they were rejected, and a description of the relevant factors. Failure to provide prior written notice, if proved, is a procedural violation that does not necessarily result in loss of FAPE. Procedural errors in the IEP process do not automatically require a finding of a denial of a FAPE. Procedural violations may constitute a denial of FAPE only if the procedural inadequacies impeded the child's right to a FAPE, caused a deprivation of educational benefits, or significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of FAPE.

179. Student's due process complaint failed to specify what particular "refusals" were at issue in this case. The following contentions became clear during the hearing.²⁴ Student contends that District failed to provide written notice as to why it would not fund Student's Quest Camp services for all summers. Student contends that District failed to

²⁴ Parent's contention at hearing that the District "ignored her participation in the development" of Student's IEPs, and blaming District's "complete disregard" for "denying her a meaningful opportunity" to participate is false, and not based on the evidence. Parent's attempt to insert a claim for denial of parental participation as a separate IDEA violation fails, as it was never raised in the complaint, and is not an issue in this proceeding.

provide written notice every time Parent submitted “requests for services and questions regarding [Student’s] program.”²⁵ Student contends that District failed to provide written notice when it denied Parent’s 2004 requests for urgent positive behavioral intervention, for a behavioral assessment, and her 2004 and 2005 requests for a comprehensive neuropsychological assessment in second and third grade. District contends that its responses, proposals, refusals, and explanations about ESY and other questions and requests were provided in the IEP documents and verbally at the IEP meetings, and that it provided other written notices.

Written Notice of Refusal for 2004 Privately Obtained Services

180. As found in Factual Findings 168-170, District’s proposed ESY placement was sufficiently identified in writing in the March-May 2004 IEP documents. Parent verbally asked for placement at Quest Camp for that summer at the May 18, 2004 IEP meeting. Written notes of that meeting reflected District’s impression that Parent “shared” her summer plans for Student with them. District failed to understand that Parent was proposing alternative services. However, District’s refusal to change placement was made in the written placement offer for ESY at a public school. The IEP contained all required elements for prior written notice, including advisement of procedural rights.

181. On June 9, 2004, Parent gave District written notice of her unilateral placement of Student at Quest Camp from June 21 to August 13, 2004; in a social skills program with Michelle Garcia Winner from July 18 to August 20, 2004; and in a speech therapy program with Floria Fung during June, July and August 2004. Parent expressed her concern that District’s program did not address Student’s needs, and indicated she would seek reimbursement at the appropriate time. Parent’s statement that she would seek reimbursement gave District notice that Parent believed District should have funded the summer placements.

182. Since District had already refused to change the 2004 ESY placement from a public school to Quest Camp in the IEP, District was not obligated to again refuse to change the ESY placement. However, District should have provided written notice of refusal to fund the additional social skills and speech therapy programs. District’s failure to do so was a procedural violation. The violation was harmless error, because it did not impede Student’s right to a FAPE or deprive him of educational benefits, or impede Parent’s participation in the IEP process.

Written Notice of Refusal for 2005 and 2006 Privately Obtained Services

183. As set forth in Factual Findings 173-179, District’s proposed ESY placements for 2005, and 2006 were part of the IEPs for each year. District’s refusal to change

²⁵ Student’s Clarified Statement of Issues, pg. 5, #G. There is no factual basis to support the contention that Parent’s written questions to District about its programs and the qualifications of its staff required a written letter of refusal, when the questions were annually addressed verbally during the IEP process.

placement was made in the context of the written placement offer for ESY at a public school each year.

184. On May 18, 2005, Parent sent District a letter giving notice of Student's unilateral placement at Quest Camp for its summer program from June 27 to August 19, 2005; in an after school program with Lindamood-Bell from May 25 to June 24, 2005; and in a speech therapy program with Ms. Fung during May, June, July and August 2005. On June 8, 2006, Parent sent District a letter giving notice of Student's unilateral placement at Quest Camp for its summer program from June 26 to August 18, 2006; in a Lindamood-Bell program for the months of June and August, 2006; and in a music therapy program with Susan Rancer during June, July, and August, 2006. In both letters, Parent expressed her concern that District's program did not address Student's needs, and indicated she would seek reimbursement at a later time.

185. Since District had already refused to change the summer ESY placement from a public school to Quest Camp in the 2005 and 2006 IEPs, District was not obligated to again refuse to change the ESY placement. However, District should have provided written notice of refusal to fund the additional programs. District failed to provide any written notice of refusal of the Lindamood-Bell and speech therapy programs in 2005. On June 16, 2006, Ms. Sodhi sent Parent written notice of refusal to fund Quest Camp and Lindamood-Bell, but omitted any mention of the music therapy program. District committed procedural violations in both years by failing to provide the requisite written notices of refusal. The violations were harmless error, because they did not impede Student's right to a FAPE or deprive him of educational benefits in either year, or impede Parent's participation in the IEP process.

Written Notice of 2004 and 2005 neuropsychological and FBA assessment Refusals

186. District failed to provide prior written notice of its refusals to assess Student's behavioral issues in 2004. As set forth in Factual Findings 22 to 26, District delayed responding to Parent's requests for an FBA until the May 18, 2004 IEP meeting. The written IEP comment that the team was going to defer an FBA did not constitute written notice of refusal to conduct an FBA because it did not contain all of the required elements of prior written notice to inform the parent. In addition, it did not address the request for a psychological assessment. District's May 2004 BSP constituted a written response to the request for positive behavioral intervention, although it did not explain why nothing further was offered. District's failure to provide written notice of refusal constituted a procedural violation that contributed to the denial of FAPE in the spring of 2004. This procedural violation constitutes a further equitable reason to order reimbursement of the costs of Student's placement in the summer 2004 Quest Camp program.

187. In the spring of 2005, District provided prior written notice of its refusal to conduct a neuropsychological assessment and an FBA. District's Autism Content Specialist, Ms. Sodhi wrote a letters to Parent on June 14, 2005, setting forth District's refusal to conduct a neuropsychological assessment, and confirming District's agreement to conduct an FBA and a psychoeducational assessment. Ms. Sodhi's letter referred to the IEP, explained

the reasons for the District's decisions and offers, and enclosed a copy of the procedural safeguards, and substantially complied with the written notice requirements.

Student's proposed resolutions for reimbursement for parentally obtained services

188. Parents may be entitled to reimbursement for the costs of placement or services they have procured for their child when the school district has failed to provide a FAPE, and the private placement or services were appropriate under the IDEA and replaced services that the district failed to provide.

189. Student contends that because District's special education program and services were inappropriate and did not meet his unique needs, he is entitled to reimbursement for private parentally obtained services and assessments, in a total sum of over \$121,000. Student contends that Parent was required to pay for private behavior intervention services, social skills therapy, SL services, Lindamood Bell services regarding oral and written expression deficits, weekly music therapy services, and interactive metronome services. Parent has characterized the private services she obtained for Student during the summers, and after school during the school years, as "intensive intervention" to address Student's autistic and maladaptive behaviors, because Parent believes that the District did not provide sufficient services to address his needs from year to year.

190. District contends that its special education program for Student and related services met the applicable legal standards to provide educational benefit, and that the requests for reimbursement should be denied. In addition, District contends that Student did not inform the District that he claimed there was something wrong with its program and services, and, with some exceptions, did not request reimbursement at the times the supplemental services were obtained. District contends it was entitled to notice in order to have had an opportunity to evaluate its program and make an offer whether to add a needed service or fund Student's supplemental services.

Summer 2004 Quest Therapeutic Camp with Dr. Robert Field

191. Parent declined to consent to District's offer for an ESY placement for the summer of 2004. On June 9, 2004, Parent informed the District that she intended to place her son at Quest Therapeutic Camp from July 18, 2004 to August 20, 2004. Parent stated: "Alamo School is aware that [Student] needs immediate intensive behavior modification, social cognitive skill training and speech therapy." Parent concluded with notice that she intended to seek reimbursement from the District at the appropriate time.

192. Dr. Robert Field, a licensed psychologist, is the director of Quest Therapeutic Camp (Quest Camp), which he founded in 1992. Dr. Field obtained his Ph.D. in 1977 from the California School of Professional Psychology, Fresno Campus. In 1978, Dr. Field became the director of Quest Family Guidance Center, responsible for the assessment and treatment of children, adolescents, and adults. Dr. Field has been in private practice for over 29 years, providing psychological assessments, consultation, and therapy. Quest Camp

operates an eight-week summer program (five days a week), as well as an after school program one day a week during school years. The targeted clients for the camp are ages six to 18 years old, with disabilities in the high-functioning autistic, Aspergers Syndrome, and ADHD ranges. Approximately 60 percent of the attendees are high functioning ADHD disabled. Many school districts contract with Quest Camp for services that are included in IEPs for students.

193. In April 2004, Dr. Field screened Student for admission to the 2004 summer Quest Camp program. Dr. Field had reservations about accepting Student because Student's levels of functional behavior were more severe than the mild-to-moderate ranges usually allowed, and Student had significant behavioral problems. Dr. Field rated Student's levels of functioning as in the moderate to severe range. Dr. Field admitted Student into the program.

194. Quest Camp's 2004 summer program involved individual therapy, group therapy, development of individual behavior goals with a contract between the student and the counselors, and a weekly rating system by which each student was rated by himself, his peers, and the staff. Group dynamics emphasized resolving conflict and providing positive narrative feedback. Points for positive behavior resulted in rewards which stimulated Student to cooperate. Activities included games, sports, swimming and other activities. Quest staff focused on basic lessons with Student, such as standing in line, eye contact, and following directions. Student's behavioral contract required Student to select the first of 10 listed goals for the summer, and Student chose: "Follow directions & listen better." By the end of the summer, Student was compliant 75 percent of the time and could participate with peers, albeit with little interaction. Quest Camp staff wrote that Student made "tremendous progress."

195. Dr. Field did not see Student in his classroom setting at Alamo. Dr. Field's opinion was that Student's behavioral improvement during the summer of 2004 was directly related to the therapy provided by Quest Camp and not the random result of family or other external environmental factors. Dr. Field's testimony was persuasive. Dr. Field's experience includes evaluation of autistic students in classroom settings and he has performed many assessments of autistic children for Regional Centers. Dr. Field credibly testified that in his experience, deficits attributed to autism are consistent across environments and that he believed the negative behaviors Student exhibited when he began at Quest Camp in July 2004 were very likely to be those the District experienced during the 2003-2004 school year.

196. Parent is entitled to reimbursement for the 2004 summer program as compensatory behavior modification intervention. District failed to assess Student's behavior needs in the spring of 2004 or to conduct an FBA to find modifications to his BSP that would be effective, as set forth in Factual Findings 11 to 26. District offered an ESY educational program for ESY 2004, and the appropriateness of that offer is not an issue. Nevertheless, because Student suffered a denial of FAPE due to the behavioral issues, it is equitable to order reimbursement for Student's summer behavioral intervention at Quest Camp. The evidence supports a finding that when Student returned from Quest Camp in the fall of 2004, for the third grade school year, his negative behaviors had undergone a dramatic

improvement, as set forth in Factual Findings 27 to 35. Parent established that Student's experience at Quest Camp in the summer of 2004 made a material difference in significant reduction of his negative behaviors.

197. Parent paid \$125 for Quest Camp's April 2004 screening evaluation, and \$3,885 for Quest Camp's summer 2004 program, and requests reimbursement for \$3 per day for bridge tolls, and for round-trip mileage at 68 miles per summer school day. Parent is entitled to reimbursement.

198. Student failed to establish that District's third, fourth and fifth grade educational programs during the school years and ESYs did not meet his behavioral and social skill needs to enable him to obtain educational benefit. Therefore, no further reimbursement for Quest Camp services is warranted.

Speech and Language Therapy

199. Student established that District reduced Student's SL services for the 2005-2006 (fourth grade) school year based on an inappropriate assessment, and Student lost 17.5 hours of SL services, as set forth in Factual Findings 72 to 79, and 136 to 140. Accordingly, District should reimburse Parent for compensatory SL services for the fourth grade school year in the adjusted total sum of \$1,750.

200. Student did not establish that District's SL services were insufficient for the second, third, and fifth grade school years such that additional services were required to assist Student to obtain educational benefit. Therefore no further reimbursement is warranted.

Neuropsychological evaluation by Dr. Victor Nunno

201. A parent is entitled to an independent educational evaluation (IEE) of a child from a qualified specialist, at public expense, if the parent disagrees with the assessment obtained by the school district, unless the district shows at a due process hearing that its assessment was appropriate.

202. Student contends that he is entitled to reimbursement for the costs of a private neuropsychological evaluation by Dr. Nunno in 2004. District failed to assess Student's behavior needs in the spring of 2004 or to conduct an FBA to find modifications to his BSP that would be effective. However, Parent did not request the District to conduct a psychoeducational assessment in 2004, at the time she consulted with Dr. Nunno, nor did Parent notify District of any disagreement with its assessments. District is not legally obligated to reimburse Parent for Dr. Nunno's assessment under the IEE procedures, because Student did not disagree with an assessment conducted by the District. Instead, District failed to conduct any assessment.

203. Because Student suffered a denial of FAPE in the spring of 2004 due to District's mishandling of the behavioral issues, as set forth in Factual Findings 11 to 26, and 193 to 199, it is equitable to order reimbursement for Dr. Nunno's April 2004 neuropsychological assessment. Parent paid \$3,165 for Dr. Nunno's assessment, and is entitled to reimbursement.

Social and play skills therapy with Dominique Baudry

204. Student contends that he is entitled to reimbursement for the costs of social skills therapy with a private therapist, Dominique Baudry, from September 2004 (third grade) to December 2005 (fourth grade). Student failed to establish that District's second, third and fourth grade educational programs during the school years were insufficient to meet his social skill needs, such that additional services were required for Student to obtain educational benefit, as set forth in Factual Findings 59 to 63, 95 to 104, 110 to 123, and 126 to 135. Therefore no reimbursement is warranted.

Behavior consultation with Ben Kaufman

205. Student contends that he is entitled to reimbursement for a behavioral consultation with Ben Kaufman in the spring of second grade. At some point in the second half of the 2003-2004 school year, Parent informed Ms. Wong that she was having problems with Student's behavior at home, and asked for a referral to a behaviorist. Ms. Wong discussed the request with Ms. Sodhi, who agreed to provide a referral to Parent, with the understanding that District was not responsible to provide home therapy services. Ms. Wong provided Parent with the name of a private behavior therapist, Ben Kaufman, and informed Parent that District was not responsible to provide home therapy services.

206. Parent called Mr. Kaufman, met with him in her home for one consultation, and paid him \$60. Parent's testimony that she thought Mr. Kaufman worked for the District, and did not understand why she had to pay him directly, was not credible. Parent's attitude and demeanor while testifying on this point, was hesitant and imprecise. In contrast, Ms. Wong was clear about what she explained to the Parent, and her testimony is found to be persuasive. Student has not established that District should reimburse Parent for a home therapy consultation with Mr. Kaufman. Therefore, no reimbursement is warranted.

Occupational therapy evaluation by Tiffany Martin

207. Student contends that he is entitled to reimbursement for the costs of a privately obtained OT assessment from Tiffany Martin in October 2005. Student established at hearing that District's February 2005 OT assessment was inappropriate, as set forth in Factual Findings 76 to 80. However, Parent never complained to the District about its OT assessment, and did not provide District the opportunity to offer an IEE or file for due process. Parent first informed District that she did not think the District's OT assessment was appropriate when she filed her request for a due process hearing in October 2007.

208. Student did not follow the applicable law to qualify for an IEE when she paid for a private assessment from Ms. Martin in October 2005. Ms. Martin's qualifications, the assessment tools used, and the validity or reliability of the assessment results were not established. Therefore, no other factors exist that would otherwise result in an order for reimbursement at this time. Because District's 2005 OT assessment was inappropriate, District shall be ordered to conduct a comprehensive OT assessment.

Neuropsychological assessment by Dr. Guterman

209. Student contends that he is entitled to be reimbursed for the private neuropsychological evaluation of Dr. Guterman in June 2005. In the spring of 2005, District did not conduct a psychological assessment of Student because Dr. Nunno had conducted a comprehensive neuropsychological assessment in April 2004. The IEP team considered Dr. Nunno's assessment. Nevertheless, Parent asked the District to conduct a neuropsychological assessment in May 2005. While District denied the request, District agreed to conduct a psychoeducational assessment in the fall, as set forth in Factual Findings 40 and 41.

210. Dr. Guterman conducted a neuropsychological assessment of Student in June 2005. Parent never informed District of this assessment or provided District a copy of Dr. Guterman's June 2005 report at any time prior to January 2007, in connection with prehearing document disclosure in this case. Student did not follow the applicable law to qualify for an IEE. Student has not established that District is legally obligated to reimburse Parent for Dr. Guterman's assessment. Student did not establish that any other equitable factors should result in an order for reimbursement for Dr. Guterman's 2005 assessment, and therefore, no reimbursement is warranted. Dr. Guterman's assessment and her opinions have nevertheless been taken into consideration in this case.

Lindamood-Bell language remediation

211. Student contends that he is entitled to be reimbursed for the costs of privately obtained services from LMB, which he characterized at hearing as "academic skills intervention." As set forth in Factual Findings 155 to 163, Student received private LMB services in 2005 and 2006. However, Student was performing academically at grade level in fourth and fifth grade. Student failed to establish that District's academic program was inappropriate or denied him educational benefit. Therefore, no reimbursement is warranted.

Music therapy from Susan Rancer

212. Student contends that he is entitled to reimbursement for privately obtained music therapy from Susan Rancer from second grade to the present. District's annual IEPs addressed Student's deficits regarding attention, directionality, following directions, hand-eye coordination, motor planning and visual tracking, as set forth in Factual Findings 99 to 128, and 152 to 154. District is entitled to discretion in its choice of methodologies to

address those skills. Student has not established that District's program was inappropriate or that he needed direct music therapy services. Therefore, no reimbursement is warranted.

Interactive metronome OT with Lora Harris

213. Student contends that he is entitled to reimbursement for privately obtained interactive metronome OT from Lora Harris, an occupational therapist. Ms. Harris began working with Student in August 2005. Interactive metronome is a relatively new technology developed during the past ten years. It is a computer-based program to address rhythm, time, sequencing, and to improve gross motor skills, reading, transitions, and reciprocal social cues. District is entitled to discretion in its choice of methodologies to address those skills, and addressed Student's needs annually regarding those skills.

214. While Student established that District's 2005 OT assessment was inappropriate, as set forth in Factual Findings 80 to 84, Student has not established that he needs direct interactive metronome therapy to meet his unique needs. District should conduct a new comprehensive OT assessment.

LEGAL CONCLUSIONS

Applicable Law

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

General Principles of FAPE

2. A child with a disability has the right to a free appropriate public education (FAPE) under the reauthorized Individuals with Disabilities Education Improvement Act (IDEA 2004). (20 U.S.C. § 1412(a)(1)(A).) Special education is defined in pertinent part as specially designated instruction, at no cost to parents, that meets state educational standards, and that conforms to the student's individualized education program (IEP). (20 U.S.C. § 1401(9); Ed. Code, § 56031.) The right to a FAPE arises only after a student is identified and assessed, and determined to be eligible for special education.

3. The primary aspects of the legal analysis of whether a school district complied with the IDEA are set forth in *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 206-07. The first part examines whether IDEA procedures were followed, and the second examines whether the IEP developed through those procedures was reasonably calculated to enable the child to receive educational benefit. (*Ibid.*) School districts are required to provide an educational "basic floor of opportunity" that consists of access to specialized instruction and related services individually designed to provide educational benefit to the student. (*Id.* at p. 201.)

4. “Related services” are transportation and other developmental, corrective and supportive services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(a)(26).) In California, related services are called designated instruction and services (DIS), which must be provided if they may be required to assist the child in benefiting from special education. (Ed. Code, §56363, subd. (a).)

Progress and Educational Benefit

5. The IDEA does not require school districts to provide special education students the best education available, or to provide instruction or services that maximize a student’s abilities. (*Rowley, supra*,. at p. 198.) The Ninth Circuit refers to the “some educational benefit” standard of *Rowley* simply as “educational benefit.” (See, e.g., *M.L. v. Fed. Way Sch. dis.* (2004) 394 F.3d 634.) Other circuits have interpreted the standard to mean more than trivial or “de minimis” benefit, or at least “meaningful” benefit. (See, e.g., *Houston Indep. Sch. Dist. v. Bobby R.* (5th Cir. 2000) 200 F.3d 341; *L.E. v. Ramsey Bd. of Educ.* (3d Cir. 2006) 435 F.3d 384.)

6. Student contends that amendments to IDEA 1997 significantly changed the educational standard for special education to one of “high expectations” and superseded the *Rowley* standard, above. Student cited *J.L. and M.L. v. Mercer Island School District* (2006) 46 Ind. Dis. Educ. Law Rptr. (IDELR) 273 (W.D.Wash.). If Congress had intended to overturn *Rowley*, it would have said so. The Ninth Circuit as well as the United States District Court for the Northern District of California, have recently reaffirmed that the appropriate standard for determining whether an IEP provides FAPE is still whether it is “reasonably calculated to enable the child to receive educational benefits.” (*Park Anaheim Union High Sch. Dist.* (9th Cir. 2006) 464 F3d 1025, 1031 (citing *Amanda J v. Clark county School Dist.* (9th Cir. 2001) 267 F.3d 877); and *San Rafael Elementary School District v. California Special Education Hearing Office* (9th Cir. March 28, 2007) 2007 U.S. Dist. LEXIS 27764.)

Methodology at the Discretion of the School District

7. The *Rowley* opinion, *supra*, established that as long as a school district provides an appropriate education, the methodology employed in so doing is left up to the district’s discretion. (*Rowley*, 458 U.S. at p. 208.) A hearing officer must give “appropriate deference to the decisions of professional educators.” (*MM v. School Dist. of Greenville County* (4th Cir. 2002) 303 F.3d 523, 533.) As the First Circuit Court of Appeal noted, the *Rowley* standard recognizes that courts are ill-equipped to second-guess reasonable choices that school districts have made among appropriate instructional methods. (*T.B. v. Warwick School Comm.* (1st Cir. 2004) 361 F.3d at p. 84 (citing *Roland M.*, 910 F.2d at pp. 992-93).)

Procedural Errors

8. Procedural errors in the IEP process do not automatically require a finding of a denial of a FAPE. Procedural violations may constitute a denial of FAPE only if the

procedural inadequacies impeded the child's right to a FAPE, caused a deprivation of educational benefits, or significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of FAPE. (20 U.S.C. § 1415(f)(3)(E).) (See. *W.G. v. Board of Trustees of Target Range School District No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

The IEP

9. An IEP is evaluated in light of the information available at the time it was developed (referred to as a "snapshot"); it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)²⁶ It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*) The focus is on the placement offered by the school district, not the alternative preferred by the parents. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) The evidence must establish an objective indication that the child is likely to make progress. The evidence of progress, or lack thereof, must be viewed in light of the limitations imposed by the child's disability. (*Walczak v. Florida Union Free School District* (2d Cir. 1998) 142 F.3d 119, 130.)

10. An IEP must contain a statement of the child's present levels of educational performance; a statement of measurable annual goals; a statement of the extent to which a child will not participate in a regular classroom with nondisabled children; a statement of the special education and related services to be provided; a statement of measurable annual goals, and a statement of how the child's progress toward the annual goals will be measured. (20 U.S.C. § 1414(d)(1)(A)(i); 34 C.F.R. § 300.347(a); Ed. Code, § 56345.) A district must make a formal written offer in the IEP that clearly identifies the proposed program. (*Union Sch. Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526.) Related services or designated instruction and services (DIS) means transportation and such developmental, corrective and other supportive services as are required to assist a child with a disability to benefit from special education. (Ed. Code, § 56363, subd. (a); 34 C.F.R. § 300.34(a).)

11. The statement of measurable annual goals, including academic and functional goals, must be designed to: (a) meet the individual's needs that result from the disability to enable the student to be involved in and make progress in the general curriculum, and (b) meet each of the student's other educational needs that result from the disability. (Ed. Code, § 56345, subd. (a)(2).)

Assessments

12. The student must be assessed in all areas related to his or her suspected disability, and no single procedure may be used as the sole criterion for determining whether

²⁶ Although *Adams* involved an Individual Family Service Plan and not an IEP, the Ninth Circuit Court of Appeal applied the analysis in *Adams* to other issues concerning an IEP. (*Christopher S. v. Stanislaus County Off. of Educ.* (9th Cir. 2004) 384 F.3d 1205, 1212.) Further, District Courts within the Ninth Circuit have adopted its analysis of this issue for an IEP. (*Pitchford v. Salem-Keizer School Dist. No. 24J* (D. Or. 2001) 155 F.Supp.2d 1213, 1236.)

the student has a disability or an appropriate educational program. (20 U.S.C. § 1414(a)(2), (3); Ed. Code, § 56320, subds. (e) & (f).)²⁷ A reassessment of a student shall occur if the local educational agency (LEA) determines that the educational or related services needs, including improved academic achievement and functional performance, warrant a reassessment, or if the parents or teacher request a reassessment. (Ed. Code, § 56381, subd. (a)(1).) A reassessment of a student shall occur not more frequently than once a year, unless the parents and LEA agree otherwise, and shall occur at least once every three years, unless the parents and LEA agree in writing that it is not necessary. (Ed. Code, § 56381, subd. (a)(2).) Parental consent must be obtained before an assessment is undertaken. (Ed. Code, § 56321.) Assessment materials must not be racially or culturally biased, and the personnel administering them must be knowledgeable about the assessment tools and Student's disability. (Ed. Code, § 56320, subds. (a) & (b).)

13. The assessment plan must be given to the parent within 15 days of the request or referral for assessment, and be accompanied by a notice of the parent's rights and a written explanation of the procedural safeguards under IDEA and California law. (Ed. Code, § 56321, subd. (a).) The parent has at least 15 days from the receipt of the proposed assessment plan to arrive at a decision. (Ed. Code, § 56321, subd. (c).) The school district has 60 days from receipt of the signed assessment plan within which to complete the assessment and convene an IEP meeting to discuss the assessment results.²⁸

14. Under Education Code section 56329, subdivision (b), if a parent disagrees with an assessment obtained by the public education agency, the parent has the right to obtain, at public expense, an independent educational evaluation (IEE) under certain circumstances. (See also 34 C.F.R. § 300.502.) The parent must notify the school district that the parent disagrees with the assessment (but does not need to state why the parent disagrees) and request that the district conduct an IEE at public expense. Faced with that request, the school district must: (a) file a due process complaint and prove at a hearing that its assessment is appropriate; (b) prove at a hearing that the IEE obtained by the parent did not meet the agency criteria; or (c) ensure that an IEE is provided at public expense.

Behavior Support, Strategies and Intervention

15. When a student's behavior impedes his or her learning, or that of other students, federal and State law requires the IEP team to "consider the use of positive behavioral interventions, supports, and strategies to address that behavior." (20 U.S.C. § 1414 (d)(3)(B)(i); Ed. Code §§ 56341.1, subd. (b)(1), 56345, subd. (a).) A behavioral assessment is not required, but may be an appropriate tool to provide the IEP team with analytical data regarding the undesirable behavior, and to provide the team with proposed or

²⁷ Federal law uses the word "evaluation" instead of "assessment," the term used in California, and the terms are synonymous. (Ed. Code, § 56302.5; 20 U.S.C. § 1414(a); 34 C.F.R. § 300.301.)

²⁸ Prior to July 1, 2005, the predecessor IDEA required completion of the assessment IEP within 50 days.

tested interventions and strategies. If a student has an existing behavior plan, the team may determine whether modifications are necessary.

16. In California, another behavioral approach exists to address serious behavior problems. A “serious behavior problem” is defined as behaviors “which are self-injurious, assaultive, or cause serious property damage and other severe behavior problems that are pervasive and maladaptive for which instructional/behavioral approaches specified in the student’s IEP are found to be ineffective.” (Cal. Code Regs., tit. 5, § 3001, subd. (aa).) A behavior intervention plan (BIP) should be developed if a student “exhibits a serious behavior problem that significantly interferes with the implementation of the goals and objectives of the student’s IEP.”(Cal. Code Regs., tit. 5, § 3001, subd. (f).)

17. The BIP shall become part of the IEP. A BIP must contain a summary of the results of a functional analysis assessment or functional behavioral assessment (FBA), objective and measurable descriptions of the targeted maladaptive behaviors and the replacement positive behaviors, a schedule for recording the frequency of the use of the interventions, phasing or fade out criteria, and specific dates for periodic review, among other information. (Cal. Code Regs., tit. 5, § 3001, subd. (f); § 3052.) An FBA should occur when the IEP team determines that other instructional or behavioral approaches in the IEP have been ineffective. The law does not require the team to exhaust all possible behavioral supports prior to conducting an FBA. The FBA should involve District personnel with documented training in behavior analysis, including positive behavioral interventions. (Cal. Code Regs., tit. 5, § 3001, subd. (e); § 3052(a)(1).)

Extended School Year

18 In addition to special education instruction and services during the regular school year, extended school year (ESY) services must be provided if the IEP team determines, on an individual basis, that the services are necessary for a child to receive a FAPE. (Ed. Code, § 56345, subd. (b)(3).) Extended school year services shall be provided to students who have handicaps which are likely to continue indefinitely or for a prolonged period, and interruption of the student's educational programming may cause regression, when coupled with limited recoupment capacity, rendering it impossible or unlikely that the student will attain the level of self-sufficiency and independence that would otherwise be expected in view of his or her handicapping condition. (Cal. Code Regs., tit. 5, § 3043.)

19. The ESY program should be comparable in standards, scope and quality to the school year IEP program. (Cal. Code Regs., tit. 5, § 3043(g)(2).) If during the regular academic year, a student’s IEP specifies integration in the regular classroom a school district is not required by law to meet that component of the IEP “if no regular summer school programs are being offered by that agency.” (Cal. Code Regs., tit. 5, § 3043(h).)

Prior Written Notice of Proposal or Refusal to Initiate or Change Evaluation, Placement, or FAPE

20. The district is required to provide written notice to the parents of the child whenever the local educational agency proposes to initiate or change, or refuses to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child. (20 U.S.C. § 1415(b)(3); Ed. Code, § 56500.4.) The notice given to the parent's of the child must meet the requirements specified in title 20 United States Code section 1415(c)(1).

Reimbursement and/or Compensatory Education

21. When a LEA fails to provide FAPE to a student with a disability, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (*School Committee of Burlington v. Department of Educ.* (1996) 471 U.S. 359, 369-371; 20 U.S.C. § 1415(i)(2)(C)(3).) Based on the principle set forth in *Burlington*, federal courts have held that compensatory education is a form of equitable relief that may be granted for the denial of appropriate special education services to help overcome lost educational opportunity. (*Student W. v. Puyallup Sch. Dist.* (9th Cir. 1994) 31 F.3d 1489, 1496.) The right to compensatory education accrues when the district knows, or should know, that student is receiving an inappropriate education. Compensatory education does not, however, necessarily involve an obligation to provide day-for-day or session-for-session replacement for opportunity or time missed. (*Id.* at p. 1497). The purpose of compensatory education is to "ensure that the student is appropriately educated within the meaning of IDEA." (*Ibid.*) Both reimbursement and compensatory education issues are equitable issues requiring a balancing of the behaviors of the parties.

22. There is no obligation to provide day-for-day or hour-for-hour compensation for missed services. "Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA." (*Student W. v. Puyallup Sch. Dist.*, *supra*, 31 F.3d 1489, 1496.)

23. Parents may be entitled to reimbursement for the costs of placement or services they have procured for their child when the school district has failed to provide a FAPE, and the private placement or services were appropriate under the IDEA and replaced services that the district failed to provide. (20 U.S.C. § 1412(a)(10)(C); *School Comm. of Burlington v. Department of Education* (1985) 471 U.S. 359, 369-71.) Parents may receive reimbursement for their unilateral placement if the placement met the child's needs and provided the child with educational benefit. However, the parents' unilateral placement is not required to meet all requirements of the IDEA. (*Florence County Sch. Dist. Four v. Carter* (1993) 510 U.S. 7, 13-14.) Additionally, the Ninth Circuit has clarified that when a student's unilateral placement is necessitated by "medical, social, or emotional problems...apart from the learning process," the responsible local educational agency is not obligated to pay for that placement. (*Clovis Unified Sch. Dist. v. Office of Admin. Hearings*, 903 F.2d 635, 643 (9th Cir. 1990).)

24. Reimbursement may be denied or reduced if the parents do not give the school district notice of their intent to remove their child from public school before they do so. (20 U.S.C. §1412(a)(10)(C)(iii)(I); 34 C.F.R. § 300.403(d) (1999); 34 C.F.R. § 300.148(d) (2006); Ed. Code, § 56176.) Pursuant to these provisions, parents must provide such notice at the most recent IEP meeting that the parents attended prior to removal of the child from the public school or by written notice ten business days prior to the removal of the child from the public school. (Id.)

Determination of Issues

Issue One(A): Did District fail to assess Student's behavioral needs, including failure to conduct a functional behavior analysis assessment for the 2003-2004 and 2004-2005 school years, and fail to assess Student's behavioral needs for the 2005-2006 and 2006-2007 school years?

25. As found in Factual Findings 3 to 26, and Applicable Law 12 to 17, and 21 to 24, District failed to assess Student's behavioral needs during his second grade 2003-2004 school year, after his maladaptive behaviors had significantly increased. District should have conducted an FBA because Student's pervasive maladaptive behaviors constituted a serious behavior problem under California law. Even if the behaviors did not meet the definition of a serious behavior problem, District should have conducted an FBA as the next reasonable step to develop appropriate behavior support in light of District's ineffective BSPs. Student suffered a loss of educational benefit including lack of academic grades for one quarter. District shall reimburse Parent for Student's 2004 Quest Camp summer program placement, for compensatory behavior intervention, as set forth in Determination of Issues 41. As found in Factual Findings 203 to 205, District shall also reimburse Parent for Dr. Nunno's April 2004 assessment, in the total sum of \$3,165.

26. As found in Factual Findings 27 to 35, and Applicable Law 12 to 17, District failed to assess Student's behavioral needs in the fall of 2004, after Student began third grade in the 2004-2005 school year. District failed to propose another BSP for the IEP team. This procedural violation was harmless in light of other evidence.

27. As found in Factual Findings 36 to 38, and Applicable Law 12 to 17, the evidence did not establish that District failed to assess Student's behavioral needs in either fourth grade (2005-2006) or fifth grade (2006-October 2006), because District did conduct an FBA in fourth grade, and had no reason to assess Student's behavioral needs in fifth grade.

Issue One(B): Did District fail to conduct a neuropsychological or psychoeducational assessment of Student for either the 2004-2005 or 2005-2006 school year?

28. As found in Factual Findings 39 to 42, and Applicable Law 12 to 14, District agreed with Parent during the May 2005 IEP process, and again in June 2005, to conduct a psychological assessment. District technically denied Parent's request for a

neuropsychological assessment and agreed to conduct a psychoeducational assessment after the start of the next school year. District failed thereafter to conduct a psychological assessment for either the 2004-2005 or 2005-2006 school year. This procedural violation was harmless in light of other evidence.

Issue One(C): Did District fail to assess Student's communication, sensory and motor needs (all years except the 2004-2005 school year), his attention, reading, and academic weakness needs (all years except the 2003-2004 school year), his auditory processing needs (all years except the 2003-2004 and 2004-2005 school years), and his social skills needs (all years)?

29. As found in Factual Findings 49 to 52, and Applicable Law 12 to 14, Student has established that District should have conducted another OT assessment for either fourth or fifth grade. District should conduct a new comprehensive OT assessment of Student to assess Student's present levels of skills and needs, including his sensory and motor needs.

30. As found in Factual Findings 43 to 48, and 53 to 63, and Applicable Law 12 to 14, Student did not establish that District failed to assess Student in any other claimed area of need for the relevant years.

Issue Two: Were District's communication, occupational therapy, and auditory processing assessments for the 2004-2005 school year appropriate?

31. As found in Factual Findings 64, and 72 to 75, and Applicable Law 12 to 14, District failed to appropriately assess Student's communication, SL needs in March 2005 because the SL pathologist used an incorrect birthdate which rendered the test results unreliable, failed to recognize Student's autistic perseverative verbal communication, made a material mistake in her evaluation of Student's verbal abilities and never addressed Student's pragmatic language skills in the assessment. District shall conduct a comprehensive SL assessment to determine Student's present levels of skills and needs.

32. As found in Factual Findings 76 to 80, and Applicable Law 12 to 14, District's 2005 OT assessment was inappropriate because it was incomplete, did not sufficiently assess or address Student's sensory integration deficits, and failed to address Student's significantly variable scores. District shall conduct a comprehensive OT assessment to determine Student's present levels of skills and needs.

33. As found in Factual Findings 81 to 84, and Applicable Law 12 to 14, Student did not establish that District's 2005 auditory processing assessment was inappropriate, because District did not need to conduct the assessment in light of Dr. Nunno's report. Although District's 2005 auditory processing assessment used only one test, it supplemented Dr. Nunno's assessment and both assessments were considered by the IEP team.

Issue Three: Was District's functional behavior analysis assessment for the 2005-2006 school year appropriate and timely?

34. As found in Factual Findings 85 to 93, and Applicable Law 15 to 17, District's FBA conducted in November 2005 was untimely. It exceeded the timelines for conducting an assessment based on Parent's date of request in May 2005, and District should have allowed Parent to sign the plan on June 7, 2005, which would have started the statutory time running. District's assessment was inappropriate because it did not contain the requisite elements of systematic assessment. District's failure to conduct an appropriate and timely FBA did not result in any loss of educational benefit for Student. District was not required by law to conduct the FBA because Student's behaviors were no longer seriously impacting his access to educational benefit and District had no other cause to assess. This procedural violation was harmless in light of other evidence.

Issue Four(A): Did District deny Student a free appropriate public education (FAPE) for all years by failure to develop requisite annual goals in the following areas of need: communication, sensory and motor, attention, reading, academic weakness, auditory processing, and social skills?

35. As found in Factual Findings 94 to 105, and Applicable Law 2 to 11, Student's goals for second grade were beyond the statute of limitations, except for the inappropriate behavior goal. The inappropriate behavior goals should have been re-examined in light of Student's maladaptive behaviors, and failure to do so denied Student a FAPE. District shall reimburse Parent for Student's 2004 Quest Camp summer program placement, as set forth in Determination of Issues 41, below.

36. As set forth in Factual Findings 106 to 113, and Applicable law 2 to 11, Student's 2004 annual goals were in compliance with the law, in that they were measurable, designed to meet Student's needs related to his disability, and were designed to enable Student to be involved in and make progress in the general education curriculum.

37. As found in Factual Findings 114 to 120, and Applicable Law 2 to 11, the two 2005 communication goals were materially flawed and inappropriate because they were not measurable. Student did not establish that any of the other 2005 annual goals were not in compliance with the law. Student did not establish that he suffered any loss of educational benefit because of the defective 2005 communication goals, because Parent and District collaborated to make sure Student progressed in his communication areas of need.

38. As found in Factual Findings 121 to 128, and Applicable Law 2 to 11, Student did not establish that the 2006 annual goals were in violation of the law, in that the 2004 goals were measurable, contained descriptions of how progress toward meeting the annual goals would be measured, were designed to meet Student's needs related to his disability, and to enable Student to be involved in and make progress in the general education curriculum.

Issue Four(B): Did District deny Student a FAPE by failing to offer or provide an IEP that included appropriate DIS and services and supports to address his needs, as follows: social skills training (all years), speech and language therapy (all years), behavior support (all years), a trained aide (all years), occupational therapy (all years), music therapy (all years), and academic skills intervention (all years except 2003-2004)?

39. As found in Factual Findings 129 to 135, and Applicable Law 2 to 7, for the second, third, fourth or fifth grade school years, Student did not establish that District's services to address his social skills needs in the context of his educational program were inappropriate, or that additional supplemental services were required in order for Student to benefit from his special education program.

40. As found in Factual Findings 136 to 140, and Applicable Law 2 to 7, and 21 to 24, Student established that District reduced Student's SL services for the 2005-2006 school year based on an inappropriate assessment. Accordingly, District should reimburse Parent for compensatory SL services for the fourth grade school year in the sum of \$1,750. Student did not establish that District's SL services to Student were not sufficient to enable him to benefit from his special education program in any other year.

41. As found in Factual Findings 137 to 143, and Applicable Law 2 to 7, 15 to 17, and 21 to 24, Student established that District failed to provide appropriate behavior support services in 2004, at a time when District's approaches specified in the IEP for negative behaviors were ineffective. As compensatory behavior intervention, District shall reimburse Parent for Student's 2004 Quest Camp summer program placement, in the sum of \$125 for Quest Camp's April 2004 screening evaluation, \$3,885 for the 2004 summer program, \$3 per summer program day for bridge tolls, and round-trip mileage at 68 miles per summer program day in the Quest Camp program, at District's mileage reimbursement rate. Student did not establish that District's behavior support services for any other year failed to provide Student with requisite support.

42. As found in Factual Findings 144 to 148, and Applicable Law 2 to 7, and 21 to 24, Student established that District's failed to provide Student with a full-time classroom aide for less than five months of second grade (2003-2004 school year), which denied Student a FAPE during that time period. This failure is a further equitable reason why District should reimburse Student for Student's behavioral intervention program at Quest Camp for the summer of 2004, as determined in Determination of Issues 41 above. Student failed to establish that District failed to provide classroom aide services necessary for Student to obtain educational benefit for any other school year.

43. As found in Factual Findings 149 to 151, and Applicable Law 2 to 7, Student did not establish that District should have provided direct OT services to Student in second, third, fourth, or fifth grade. Student did not establish that he needed OT consultation services for second grade. Student began receiving OT consultation services in third grade, and has continued to receive OT consultation services every year. Student established that District's 2005 OT assessment was inappropriate as it did not address Student's sensory integration

needs. District shall reassess Student's occupational therapy skills and needs, including his sensory and motor needs, to determine his present levels of functional performance and needs.

44. As found in Factual Findings 152 to 154, and Applicable Law 2 to 7, Student did not establish that he required direct music therapy services in second, third, fourth, and fifth grade to enable him to benefit from District's educational program.

45. As found in Factual Findings 155 to 164, and Applicable Law 2 to 7, Student did not establish that District's services to address his academic skills deficits were deficient for the third, fourth and fifth grade school years, such that Student required additional DIS services to obtain benefit from his special education.

Issue Four(C): Did District deny Student a FAPE by failure to make a clear written offer of placement for speech and language therapy (2003-2004 school year), for integrated play groups (2003-2004 school year), and for extended school years (ESY) for 2004, 2005, and 2006?

46. As found in Factual Findings 165 to 167, and Applicable Law 2 to 10, litigation of District's offer for SL therapy for the 2003-2004 school year, made in March 2003, is barred by the three year statute of limitations applicable in this case.

47. As found in Factual Finding 168, and Applicable Law 2 to 10, litigation of District's offer for integrated play groups for the 2003-2004 school year, made in March 2003, is barred by the three year statute of limitations applicable in this case.

48. As found in Factual Findings 169 to 179, and Applicable Law 2 to 10, 18, and 19, for the extended school years (ESY) for 2004, 2005, and 2006, District determined that Student required ESY services and offered them, but District was not obligated to offer Student a general education classroom because it did not operate a summer general education elementary school program. District's written offers for ESY for the summers of 2004 and 2005 were sufficiently clear to comply with the requirement to make a clear written offer. For the 2006 ESY offer, District failed to comply with the requirement to make a clear written offer because the only written description occurred almost three months after the IEP offer. This procedural error did not deny Student a FAPE because Parent understood and considered the offer.

Issue Four(D): Did District deny Student a FAPE for all years by failure to provide prior written notice of District's refusals to initiate assessments or to initiate or make changes to Student's placement in response to Parent's requests (all years)?

49. As found in Factual Findings 180 to 184, and Applicable Law 2 to 10, and 20, since District had already refused to change the 2004 ESY placement from a public school to Quest Camp in the IEP, District was not obligated to again refuse to change the ESY placement. District should have provided written notice of refusal to fund the additional

social skills and speech therapy programs and its failure to do so was a procedural violation. The violation was harmless error, because it did not impede Student's right to a FAPE or deprive him of educational benefits. Student did not establish that District's services were inappropriate.

50. As set forth in Factual Findings 185 to 187, and Applicable Law 2 to 10, and 20, since District had already refused to change the summer ESY placement from a public school to Quest Camp in the 2005 and 2006 IEPs, District was not obligated to again refuse to change the ESY placement. However, District should have provided written notice of refusal to fund the additional programs. District failed to provide any written notice of refusal of the Lindamood-Bell and speech therapy programs in 2005. In June 2006, District sent Parent written notice of refusal to fund Quest Camp and Lindamood-Bell, but omitted any mention of the requested music therapy program. District committed procedural violations in both 2005 and 2006 by failing to provide the requisite written notices of refusal. The violations were harmless error, because they did not impede Student's right to a FAPE or deprive him of educational benefits in either year. Student did not establish that District's services were inappropriate.

51. As found in Factual Findings 188 to 189, and Applicable Law 2 to 10, and 20, District provided written notice in the spring of 2005 of District's refusal to conduct a neuropsychological assessment, and agreement to conduct an FBA and a psychoeducational assessment.

ORDER

1. Within 30 days of this order, District shall reimburse Student for:

A. Quest Therapeutic Camp tuition for the summer of 2004, as and for compensatory behavior intervention, in the sum of \$125 for Quest Camp's April 2004 screening evaluation, \$3,885 for the 2004 summer program, \$3 per summer program day for bridge tolls, and round-trip mileage at 68 miles per summer program day in the Quest Camp program, at District's mileage reimbursement rate.

B. Privately obtained SL services of Floria Fung for the 2005-2006 school year, for compensatory SL services, in the total amount of 17.5 hours at \$100 per hour, for a total sum of \$1,750.

C. Dr. Nunno's April 2004 neuropsychological assessment, in the total sum of \$3,165.

2. District shall conduct a comprehensive SL assessment of Student and hold an IEP meeting within 60 days of this order, and shall convene an IEP meeting to review the assessment results and make appropriate modifications of Student's IEP, if any.

3. District shall conduct a comprehensive occupational therapy assessment of Student and hold an IEP meeting 60 days of the effective date of this decision, and shall convene an IEP meeting to review the assessment results and make appropriate modifications of Student's IEP, if any.

4. All of Student's other requests for relief and reimbursement, are denied.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that the hearing decision indicate the extent to which each party has prevailed on each issue heard and decided. The Student partially prevailed on Issues 1(A) and (C), Issue 2, and Issues 4(A), (B), (C), and (D), and Student prevailed on Issues 1(B) and 3. The District prevailed on all other issues.

NOTICE OF APPEAL RIGHTS

The parties are advised that they have the right to appeal this decision to a state court of competent jurisdiction. Appeals must be made within ninety (90) days of receipt of this decision. Or, a party may bring a civil action in United States District Court. (Ed. Code, § 56505, subd. (k).)

DATED: June 18, 2007



DEIDRE L. JOHNSON
Administrative Law Judge
Office of Administrative Hearings