

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Consolidated Matters of:	
PARENT ON BEHALF OF STUDENT,	OAH CASE NO. 2010011021
v.	
GARVEY SCHOOL DISTRICT	
<hr/>	
GARVEY SCHOOL DISTRICT	OAH CASE NO. 2010030772
v.	
PARENT ON BEHALF OF STUDENT.	

**DECISION**

Carla L. Garrett, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), heard this matter on May 24, 25, 26, 27, and June 1, 2, and 3, 2010, in Rosemead, California.

Matthew Pope, Jackie Chiang, and Katie Hornberger<sup>1</sup>, Attorneys at Law, represented Student. Student's parents (Parents) attended all seven days of hearing.

Benjamin Nieberg, James Meeker<sup>2</sup>, and Bonifacio "Bonny" Garcia<sup>3</sup>, Attorneys at Law, represented the Garvey School District (District). District representative, Barbara Razo, Program Administrator of the Special Education Department, attended all seven days of hearing.

Student filed his request for due process hearing (complaint) on January 20, 2010. On March 4, 2010, pursuant to the parties' request, and for good cause shown, OAH granted a continuance of the due process hearing. On March 5, 2010, District filed a complaint, as well as a Motion for Consolidation. On March 29, 2010, OAH issued an order granting

---

<sup>1</sup> Ms. Hornberger attended the hearing on May 26, 27, and June 1, 2, and 3, 2010.

<sup>2</sup> Mr. Meeker attended the hearing on May 25, 26, 27, and June 1, 2, and 3, 2010.

<sup>3</sup> Mr. Garcia attended the hearing on May 24, and 26, 2010.

District's motion, and ordered that the timelines initiated by Student's complaint would govern the consolidated matters.

On June 3, 2010, at the close of hearing, the matter was continued at the request of the parties to June 24, 2010, so that the parties could file written closing arguments. Upon receipt of the written closing arguments, the matter was submitted and the record was closed.

## ISSUES

### *Student's Issues*

1. Did District substantially deny Student a free and appropriate public education (FAPE) by improperly terminating applied behavioral analysis (ABA) services during the 2008-2009 school year?

2. Did District deny Student a FAPE by providing inappropriate ABA services after March 2009?

3. Did District deny Student a FAPE by failing to provide adequate supports in the full inclusion program during the 2008-2009 and 2009-2010 school years?

4. Did District deny Student a FAPE by depriving him an opportunity to fully present the results of an independent social emotional evaluation at the October 21, 2009 individualized education program (IEP) meeting?

5. Did District deny Student a FAPE by failing to provide adequate assistive technology services during the 2009-1010 school year?

### *District's Issue*

6. May District implement the June 9, 2009 IEP, as amended on November 9, 2009, because it offered Student a FAPE?

## FACTUAL FINDINGS

### *Jurisdiction and Background*

1. Student is a nine-year-old boy, who, at all relevant times, resided in the District. He is eligible for special education under the eligibility category of autistic-like.

2. Student was diagnosed with autism at the age of three, marked by significant communication problems, delayed speech and language development, unusual speech patterns, idiosyncratic behaviors, and a lack of social engagement.

3. Since preschool, Student has been receiving special education services from the District. When Student entered kindergarten, he was placed, pursuant to Parents' request, in the full inclusion program. Specifically, Student was placed, full-time, in the general education setting with support services, including speech and language therapy, occupational therapy, and accommodations and modification to his curriculum. Student has remained in the full-inclusion program in every grade since his kindergarten year, along with support services, including applied behavioral analysis (ABA) intervention services that were added in December 2007. The ABA services were added to help address Student's behavior and socialization issues.

*Second Grade - 2007-2008 School Year*

4 Student's IEP developed on December 11, 2007, when he was seven years old, provided speech and language services, occupational therapy services, daily, full-time one-on-one aide services<sup>4</sup>, consultation for inclusion support services, and consultation for resource support services. The IEP indicated that the provider of the ABA aide services would be the "DOS", meaning the district of service. However, ABA services were provided by California Pediatric & Family Services (Cal-Peds), a non-public agency. The IEP also provided the following accommodations and modifications: (1) a visual schedule; (2) modified classwork and homework assignments; (3) increased time for assignments and tests; (4) close proximity to the teacher or aide; (5) modified presentations using smaller chunks of information; (6) the use of visuals; and (7) cooperative learning groups.

5. In April 2008, Parents contacted UCLA Semel Institute for Neuroscience and Human Behavior (UCLA), and requested UCLA to conduct a speech and language evaluation of Student. UCLA conducted a speech and language assessment and prepared a report in May 2008. The report concluded that Student had significant communication delays and deviances characterized by mild apraxia of speech, mild vocabulary deficits, severe receptive language delays, severe expressive language delays, and moderate-to-severe pragmatic deficits. In addition, Student had significant auditory memory deficits that impacted Student's ability to acquire, manipulate, and remember new information; however, Student was able to learn, retain, and retrieve information if it was concrete, presented with visual aids, and repeated frequently. The report recommended, among other things, that Student use the Picture Exchange Communication System (PECS) to improve his social initiation and spontaneous functional communication skills. Parents provided District a copy of the UCLA report prior to Student's triennial IEP meeting, scheduled for June 2008.

6. On or about June 16, 2008, Angelina Saulino, District's resource and inclusion specialist, administered the Wechsler Individual Achievement Test-2nd Edition (WIAT-II) to Student as part of Student's triennial assessment. Ms. Saulino, who testified at hearing, has been employed at District for seven years as a resource specialist. In that capacity, she provides resource support services to special education students mainstreamed in the general

---

<sup>4</sup> There is no dispute that these services were intended to be one-on-one ABA services.

education setting. In addition, Ms. Saulino concurrently serves as District's inclusion specialist, a position she has held for the last five years. In that capacity, she collaborates with teachers, aides, and therapists to help special education students learn in a general education setting. Ms. Saulino has a bachelor's degree in human development, a master's degree in special education (mild to moderate disabilities), holds a clear teaching credential, a CLAD<sup>5</sup> credential, an assistive technology certificate from the Southern California Diagnostic Center (Diagnostic Center), an autism training certificate from La Casa Center for Autism, and has attended conferences and seminars regarding autism. In addition, Ms. Saulino completed a 12-15 week ABA training course presented by the California Pediatric & Family Services (Cal-Peds). Ms. Saulino has been part of Student's IEP team since Student was in the preschool program.

7. During the assessment, Ms. Saulino often prompted Student and redirected him to remain on task. The results of the WIAT-II indicated that Student scored in the pre-kindergarten range for listening comprehension, and oral expression. He scored in the kindergarten range for math reasoning and written expression, and below the first grade range for reading comprehension. Student scored in the second grade range for numerical operations, in the third grade range for word reading, in the fourth grade range for pseudo-word decoding, and in the fifth grade range for spelling.

8. Ms. Saulino also administered the Wide Range Achievement Test-4 (WRAT-4). Student scored in the first grade range for sentence comprehension, in the second grade range for math computation, in the third grade range for word reading, and in the fifth grade range for spelling. Ms. Saulino concluded that, overall, Student had good decoding, reading, and spelling skills, but struggled academically in the areas of written expression, sentence comprehension, reading comprehension, numerical operation, and math reasoning.

9. Student was also given the California Standards Test (CST) for second grade. Student took the CST without any accommodations or modifications. The results of the CST showed Student scored in the "far below basic" range in both reading and math.

10. Student also took the Performance Standards Records (PSR) test for the second grade. The PSR was a measurement tool used by District that directly correlated to the core curriculum teaching. Student received accommodations during his PSR testing. In math, Student performed at a non-proficient level in the areas of number sense and math reasoning. In language arts, Student performed at a non-proficient level in all areas tested, including reading comprehension, and written expression.

11. In June 2008, Dr. Sean Surfes conducted a psychoeducational assessment of Student, pursuant to the District's request. The purpose of the assessment was to determine Student's current levels of functioning. Dr. Surfes, who testified at hearing, is a licensed educational psychologist and a board certified behavior analyst. Dr. Surfes earned his Bachelor of Science degree in psychology in 1990, and received his Master of Science

---

<sup>5</sup> Cross-Cultural Language and Academic Development

degree in counseling in 1994. He also received his school psychology and pupil personnel services credentials in 1994. In 2005, he earned his doctorate in education, with a specialization in school psychology. Dr. Surfás has been in private practice since 1995 at the Sierra Madre Learning Center (Sierra), which he owns. In that capacity, he provides educational and behavioral consultation to parents, school district staff, regional center staff, teachers, and support staff for students who have learning differences and disabilities, including students with autism. He also conducts psychoeducational assessments, as well as functional behavioral assessments, and functional vocational assessments.

12. Dr. Surfás explained that prior to administering any tests, he reviewed Student's school records dating back to 2004, including prior assessment reports, as well as IEP documents. In addition, Dr. Surfás reviewed information from Student's second grade teacher concerning his academic performance. Moreover, he observed Student on three separate occasions, once on the playground, and twice in Student's classroom, noting that Student never worked independently. Student was heavily dependent on his one-on-one aide to prompt him to begin and complete class assignments, to stay on task, to interact with others, and to explain class assignments to him.

13. Dr. Surfás administered three tests to measure Student's intellectual and cognitive abilities: (1) the Southern California Ordinal Scales of Development-Cognition (SCOSD-C), which is a non-standardized test that measures intellectual development and cognitive ability; (2) the Developmental Profile 3 (DP-3), which measures development in the areas of physical ability, adaptive behavior, social-emotional functioning, cognitive ability, communication skills, and general development; and (3) the Comprehensive Test of Nonverbal Intelligence, which isolates and assesses an individual's visual learning skills. The results of these tests showed that, overall, Student scored in the four to seven year old range for cognitive abilities, signifying that Student was skilled on many cognitive tasks. However, Student scored in the delayed range in the area social-emotional functioning, signifying Student was well below the expected level of social-emotional development for his age. In addition, he scored in the delayed range in his communication skills, denoting significant difficulty in his ability to understand spoken and written language, as well as his ability to use both verbal and nonverbal skills to communicate. Finally, Student scored in the below average range in adaptive behavior skills, suggesting that Student had difficulties with age-appropriate independent functioning.

14. Dr. Surfás also tested Student's academic skills using the WIAT<sup>6</sup>, and noted Student's scores fell in the third grade level for reading, reading comprehension, and numerical operations, and in the sixth grade level for spelling. For math reasoning, Student scored in the upper first grade range. Dr. Surfás explained that despite these average and above average scores, Student was not able to independently glean information from the general education setting, suggesting Student lacked academic competence in that setting.

---

<sup>6</sup> Dr. Surfás administered the first edition of the WIAT. Several months prior, Student had taken the second edition of the WIAT administered by Ms. Saulino.

15. Dr. Surfás concluded that Student would continue to require support in accomplishing most of his daily activities. Specifically, Student would need direct instruction and adapted materials or strategies (i.e., modeling, hand-over-hand guidance, specific cuing, prompting, and fading procedures) to develop new skills. In addition, repeated trials would be necessary in order to master content. Moreover, Student would require extensive support in areas requiring complex judgments, or for functioning outside of the protective environment of the classroom.

16. Dr. Surfás recommended that Student be placed in a specialized program to meet his needs, particularly one with expertise in teaching children with autism. Specifically, he recommended that the program include the following: (1) visual menus; (2) visual schedules; (3) social stories; (4) a picture wall; (5) software to increase auditory processing skills; (6) structured work systems where he is shown visually what is expected; (7) a reduction in distractions and external stimuli; (8) verbal prompts or gestures; (9) involvement in class discussions; (10) posting of class rules; (11) visual and oral acknowledgement of pending transitions; (12) frequent breaks; (13) time to do as many things independently as possible; and (14) ABA methods of instruction to learn new skills. The program should focus on building adaptive skills, social development, communication development, behavior modification, and building Student's academic competence.

17. Dr. Surfás explained that a general education teacher would not be able to handle all of the components of the program Student would need, given the large number of children in the general education classroom. In addition, based on his observations, Student's inclusion program in the general education setting did not truly appear to be an inclusion program, as the majority of Student's teaching was delivered from the teacher to the aide, and then to Student, unlike the other children in the class. He opined that in a smaller setting with a higher staff-to-student ratio, Student would more likely have the instructional levels he needed to access the curriculum, and could potentially move back into the general education setting after Student builds his academic competence and his communication and social skills.

18. Dr. Surfás shared his findings at Student's triennial IEP held on October 8, 2008, when Student was eight years old and in the third grade.

#### *Third Grade - 2008-2009 School Year*

19. Student's third grade class had 20 students, and it was taught by Ms. Kathleen Phung. At the beginning of the school year, Ms. Saulino gave Ms. Phung literature about autism that provided a general overview of the disorder and the characteristics associated with it. In addition, Ms. Saulino discussed strategies Ms. Phung could use to help Student access the curriculum. Specifically, Ms. Saulino explained the importance of prompting and redirecting Student so he could stay on task. She also discussed components of Student's IEP with Ms. Phung, including information regarding accommodations and modifications for Student. Specifically, Ms. Saulino discussed the need to give Student more time to complete assignments, as well as the importance of shortening Student's assignments. Ms. Saulino

also explained the necessity of chunking Student's assignments (i.e., breaking up his assignments into more manageable components), and writing schedules on the board.

20. On September 29, 2008, as part of Student's triennial assessment, Ms. Saulino prepared a report describing Student's progress in the inclusion program. The report was based on Ms. Saulino's observations of Student, as well as on feedback Ms. Saulino received from Ms. Phung, and Student's aides, occupational therapist, and speech and language therapist. Ms. Saulino explained at hearing that the consensus of Student's teachers, therapists, and aides was that Student had become too prompt dependent, as he required aide assistance in most of his daily activities at school.

21. Ms. Saulino also reviewed Student's second grade report card, which showed Student was making inadequate progress toward meeting grade level standards. She also reviewed Student's CST and PSR testing results from second grade, showing Student scoring in the far below basic range, and in the non-proficient range, respectively, in math and language arts.

22. Finally, Ms. Saulino reviewed Student's ten behavior goals, which had been in effect since Student's kindergarten year. Student had met three of his behavior goals. Specifically, he met two classroom goals: emotional regulation and staying on task, but only with the assistance of his teacher or aide. He also met his school behavior goal of transitioning from class to lunch. However, Student had not met his seven other goals, even with assistance from his teachers or aides. Specifically, Student failed to meet his classroom goals of sitting and responding, making eye contact, and raising his hand. In addition, he failed to meet his two social goals of interacting with peers and taking turns. He also had not met any of his three language and communication goals: socializing, nonverbal communication, and following school routine.

23. Ms. Saulino shared her report at Student's triennial IEP meeting in December 2008. She also discussed her concerns about Student's dependence on his one-on-one aide, and recommended the phasing out of Student's ABA support to facilitate his independence. Consequently, District developed a plan phasing out Cal-Peds' one-on-one ABA aide services beginning on February 1, 2009 and ending on March 31, 2009. As part of the transition process, District was to provide a District aide to Student beginning on February 1, 2009, and completely phase out aide services by May 15, 2009. Parents disagreed.

24. In December 2008, Ms. Phung administered to Student's class the Writing and Running Record, which is a District trimester benchmark test designed to assess a child's writing skills. Specifically, it tests a child's ability to write multiple paragraphs that maintain a consistent focus, have a logical progression, include details and descriptive words, and adhere to rules of convention. The students were instructed to write a personal narrative about an event in their lives. Student received extra time to complete the test, instructions were read to him, thinking maps<sup>7</sup> were provided, and he was prompted to remain on task.

---

<sup>7</sup> A thinking map is a tool designed to help students outline their ideas prior to writing their paragraphs.

Out of a possible 20 points, Student received zero points because Student did not write any paragraphs that related to the topic.

25. In December 2008, Ms. Phung administered to Student's class the language arts INSPECT test, which is a District trimester test designed to assess a child's achievement in reading comprehension and vocabulary. Student was provided extra time to complete the test. Student answered 26.7% of the questions correctly.

26. In March 2009, Ms. Phung administered the Writing and Running Record for the second trimester. The students were instructed to write an imaginative narrative. Student received extra time to complete the test, instructions were read to him, thinking maps were provided, and Student was prompted to stay on task. Out of a possible 20 points, Student received zero points because Student wrote nothing.

27. In March 2009, Ms. Phung administered to Student's class the language arts INSPECT test for the second trimester. Student was given extra time to complete the test. Student answered 36.7% of the questions correctly.

28. On or about March 9, 2009, when Mother picked up Student from school, Student's ABA aide from Cal-Peds advised Mother that during a writing assignment, Student had a meltdown, dropped onto the floor, and refused to get up. As a result, the aide tried to pick up Student and bring him to his desk.

29. On March 16, 2009, Mother sent Ms. Phung a letter, stating that she saw scratches on Student's right shoulder and arm, and a bruise on his leg, as a result of the aide's actions on March 9, 2009. Mother advised that the aide's action was overly aggressive and inappropriate. In addition, Parents sent a letter to District on Thursday, March 19, 2009, requesting an emergency IEP meeting to discuss their concerns about the actions of the Cal-Peds' aide. District scheduled an emergency IEP meeting for March 30, 2009, and reassigned two one-on-one instructional aides to assist Student until then, in lieu of a Cal-Peds' aide.

30. District immediately conducted an investigation and determined Parents' allegations were unfounded.

31. On March 30, 2009, the team met for the emergency IEP meeting. Cal-Peds advised the team that it would be withdrawing its services, and would not continue to provide one-on-one ABA services to Student. District advised that it would provide an instructional aide with ABA training beginning on April 13, 2009, after spring break. Cal-Peds offered to provide consultation services during the transition. The team was unable to complete the meeting, and agreed to reconvene the meeting after spring break.

32. On April 30, 2009, the team reconvened. District stated it would use Cal-Peds to provide consultation services to the District's instructional aides, one hour per week, to assist with the transition. Parents declined and requested a different non-public agency to

provide consultation services. District declined to provide a different agency. Consequently, the instructional aides received no consultation services from any non-public agency during the transition period. Instead, Ms. Saulino continued to supervise the instructional aides.

33. In April 2009, District assigned Ana Maldonado, an ABA-trained instructional aide, to offer Student full-time one-on-one aide support services. Ms. Maldonado, who testified at hearing, has been an instructional aide with the District for 22 years, nine of those years in special education classrooms. In her capacity as an instructional aide, Ms. Maldonado has worked with autistic children, as well as other children with developmental disabilities. In 2001, she received in-service training in autism, and in 2008, received 22-24 hours of ABA training provided to the District by Cal-Peds. On the first day of service, Ms. Maldonado met with Ms. Saulino, who gave her background information concerning Student, and offered her advice and strategies on how to provide Student services. Specifically, Ms. Saulino directed Ms. Maldonado to highlight and circle pertinent information to help Student understand his class assignments. In addition, she discussed rephrasing instructions to Student, as well as breaking up assignments into smaller chunks. Ms. Saulino also discussed strategies to help Student build his socialization skills, such as using socialization stories designed to help Student learn how to interact in different situations, and prompting Student to communicate with his peers. Finally, Ms. Saulino discussed how to redirect Student, such as using verbal prompts, gestures, tapping his desk, and verbal questioning.

34. Ms. Maldonado explained that she often communicated with Ms. Saulino regarding Student's progress. Specifically, Ms. Saulino visited the classroom a minimum of three times a week, observing Student, and offering advice on how to prompt, and redirect Student. She often recommended using gestural and verbal prompts, as well as positive reinforcement. Ms. Saulino also advised her, in conjunction with Student's occupational and speech therapists, to prompt Student to use flashcards with words printed on them, such as a "help" card. The "help" card was designed to help Student communicate when he needed assistance.

35. Ms. Maldonado also used sensory breaks to allow Student to manipulate objects, recommended by his occupational therapist, such as sand, beans, blocks, jigsaw puzzles, and cubes. The sensory objects were designed to increase Student's exposure to tactile stimulation. Student enjoyed sensory breaks, and Ms. Maldonado often used the promise of sensory breaks to encourage Student to complete tasks.

36. On May 15, 2009, Ms. Saulino administered the WIAT-II to Student as part of his academic assessment for his annual IEP. Student received accommodations during the test, such as extra time, prompting, and redirection. Student scored in the pre-kindergarten range for oral expression, and in the kindergarten range for math reasoning and written expression. He scored in the first grade range for reading comprehension and listening comprehension, and in the third grade range for numerical operations. For word reading, pseudo-word decoding, and spelling, Student scored in the fourth, sixth, and seventh grade ranges, respectively.

37. Ms. Saulino also administered the WRAT-4. Student performed at a first grade level for sentence comprehension, at third grade level for math computation, and at fourth grade level for word reading. In spelling, Student scored in the upper sixth grade range.

38. In May 2009, Children's Hospital of Los Angeles, pursuant to Parent's request, conducted a speech and language evaluation of Student, and prepared a report. The report stated Student had significant auditory processing difficulties that negatively affected his ability to comprehend spoken language. However, his ability to process visual requests greatly helped with his comprehension. The report also stated Student's expressive language skills, and social language skills were severely delayed. The report recommended that Student continue to receive speech therapy, to increase his exposure to same-aged peers, to continue placement in social groups, and to use PECS, given Student's previous success with PECS. Parents provided District a copy of the Children's Hospital report prior to Student's annual IEP meeting, scheduled for June 9, 2009.

39. In May 2009, the Team of Advocates for Special Kids (TASK) prepared an assistive technology evaluation report of Student at the request of Parents. Parents wanted TASK to determine what kind of assistive technology Student required to assist him in the areas of reading, writing, and social cues. TASK commenced the assessment, but was unable to finish due to time constraints. Parents elected not to return Student to complete the evaluation. TASK prepared a report based on the partial assessment, and stated Student was a visual learner who performed well on the computer. As such, TASK recommended that Student use computer software to assist him. Specifically, TASK recommended *Elementary Advantage 2009* by Encore, defined by TASK as interactive software designed to reinforce classroom learning of 17 subjects, including social studies, English, and math. TASK also recommended *Learning to Get Along Series* by Attainment, which TASK reported as software designed for students to use a highlight feature to click and hear word definitions. Finally, TASK recommended *WH Questions* by Super Duper Publications, which TASK defined as software to help students practice and learn how to ask and answer who, what, where, when, and why in stories. On June 4, 2009, Parents sent District a copy of the TASK report.

40. On June 5, 2009, Ms. Saulino, who had previously received an assistive technology certificate from the Diagnostic Center, explained at hearing that she had not considered the recommended software as assistive technology, but rather as instructional software.

41. In June 2009, Ms. Saulino prepared a report regarding Student's progress on his ten behavior goals that had been in place since he was in kindergarten. Based on her observations, as well as discussions with Student's teacher and aide, Ms. Saulino reported Student had made some progress on his behavior goals. Specifically, Student continued to meet his goal of emotional regulation in the classroom, with verbal prompting and visual cues, as previously reported on her September 28, 2008 inclusion report. In addition, he

continued to meet his goal of staying on task, with prompting by the teacher or aide. He also continued to meet his goal of transitioning between his classroom and lunch. Although he had shown some progress on his remaining seven goals (i.e., sitting and responding, making eye contact, raising his hand, interacting with peers, socializing, demonstrating nonverbal communication, and following school routines), he had not met them.

42. On June 4, 2009, Ms. Phung administered to Student's class the language arts INSPECT test for the third trimester. Student was given extra time to complete the test. Student answered 30% of the questions correctly.

43. During Student's third grade year, District administered to Student's class the Scott Foreman Benchmarks for math. Specifically, the test measured Student's achievement in number sense, algebra and functions, measurements and geometry, data analysis, and mathematical reasoning. There were four benchmark tests given throughout the school year. On the first benchmark test given at the beginning of the school year, Student answered 43.6% of the questions correctly. On the second benchmark test, Student answered 46.2% correctly, and answered 33.3% correctly on the third benchmark test. On the fourth benchmark test, Student scored 38.5% correctly. The first two benchmark tests were a review of the second grade math curriculum, and the third and fourth benchmark tests were a review of the math taught in the third grade class. The scores reflected Student was not proficient during any of the benchmark periods.

44. Also during Student's third grade year, Ms. Saulino administered the California Standards Test (CST) to Student in her RSP room, and provided accommodations such as flexible setting and time, questions read aloud to Student, and multiple breaks. The results of the CST showed Student scored far below basic in reading, and below basic in math.

45. In June 2009, Agatha Metichecchia, a private inclusion specialist, prepared an independent inclusion report concerning Student's inclusion program, pursuant to Parents' request. Ms. Metichecchia, who testified at hearing, received her bachelor's degree in psychology in 1977, and her master's degree in educational administration in 2000. She also received a masters' degree in special education in 2001, with an emphasis on inclusion of students with multiple and severe disabilities. She holds credentials in administrative services, orthopedic and health impairments, learning disabilities, and multiple subjects. She also holds a resource specialist certificate, and she is certified to teach students with dual sensory impairment and with emotional disturbance. She is also a premier BICM (Behavior Intervention Case Manager). Ms. Metichecchia has been employed with the Los Angeles Unified School District (LAUSD) since 1979, where she presently works as an itinerant inclusion facilitator. In her capacity as an inclusion facilitator, she supports pupils with disabilities in the general education setting, and works in the classroom collaboratively with the pupil, the pupil's teachers and aides, and with other members of the pupil's team. She also provides support in training students in social skills, and in the pragmatics of language and social interaction. LAUSD has also employed Ms. Metichecchia as an inclusion

program coordinator, an inclusion facilitator, a resource specialist, and as a special education teacher.

46. Prior to preparing her report, Ms. Meticecchia observed Student in his school setting for five hours, reviewed Dr. Surfas' report, interviewed school staff, and conducted an informal functional ecological assessment of Student. A functional ecological assessment observes the responses of typical students to natural cues, and environmental expectations, and compares those responses to the responses of an atypical student. The results of the informal ecological assessment showed Student had difficulty responding to natural cues because he did not focus on his teacher's requests, did not comprehend the material, did not attend to his assignments, and received too much assistance from his aide. Student also lacked interest in engaging with other students. Ms. Meticecchia performed no educational or academic assessments of Student.

47. In her report, Ms. Meticecchia recommended the following support strategies: (1) an individual visual schedule; (2) natural breaks built into Student's schedule; (3) natural movement breaks which allow Student time out of his seat; (4) modified instructional activities; (5) increased participation in classroom discussions; (6) reduced workload; (7) chunked assignments; (8) Student choices in ordering tasks to be completed; (9) Student options to use a computer for word processing, or for the internet; (10) work with a peer buddy; (11) alternatives to open-ended questions; (12) review of comprehension questions prior to reading material; (13) passages broken into sections; (14) highlighted reading materials; (15) graphic organizers; (16) hands-on instructional materials; (17) positive behavior plan to reinforce independence; (18) visual supports; (19) reinforcement system based on Student's preferences; (20) the use of break cards; (21) sensory diet items; (22) identify a prompting hierarchy; (23) provide an established wait time before an additional prompt is given; (24) aide to prompt Student to attend to teacher's directions as opposed to repeating instructions for him; (25) develop a circle of friends for Student and encourage peer interaction; (26) identify motivating games; and (27) create and teach social stories and social scripts.

48. In her report, Ms. Meticecchia recommended that Student remain fully included in his general education program. Ms. Meticecchia explained that Student understood the school routine and navigates the campus confidently. Student also followed the class schedule with adult prompting and with little disruption to the general education program. In order to benefit from his inclusive placement, Student should receive a modified curriculum, and his special education support should include collaborative support from the special educator who provides direct and indirect support to Student, including co-teaching in the general education classroom. Direct support includes modeling of instructional strategies for both the general educator and the aide working with Student. Indirect support includes co-planning with the general education teacher, creating curricular modification, and collaboration with team members. Finally, Ms. Meticecchia recommended regular collaborative team meetings to identify areas of concern, and to develop short-term action plans, if necessary.

49. At hearing, Ms. Metichecchia explained that, in a special day class, Student would not make as much progress as in a general education setting, as Student would not have the opportunity to be with typically developing peers. Ms. Metichecchia believes an autistic child needs to hear, and communicate with the other peers to whom they will be expected to communicate in the future, and believes that 50 percent of autistic children in Special Day Class (SDC) placements should not be there. She further explained that was a disservice to a child to be in a class with disabled students, where that child learns from disabled students, as opposed to learning from typically developing peers. She believes disabled children benefit more from placement in the natural environment where society expects them to perform (i.e., a general education setting), and learning skills in that environment.

50. On June 9, 2009, the IEP team met to discuss Student's annual IEP and to review assessments reports. Each member of the team had previously received a copy of each recent assessment report concerning Student. The team consisted of Parents, Ms. Saulino, Ms. Phung, Ms. Metichecchia, Ms. Jerlene Hales (Special Education Director), as well as Student's service providers, principal, and a family friend. Ms. Metichecchia shared her conclusions and recommendations set forth in her independent inclusion report, noting that Student should remain in an inclusion program. In addition, Ms. Saulino shared the results of her academic assessment of Student conducted on May 15, 2009, stating that Student's performance ranged from kindergarten level to seventh grade level. Due to time constraints, the team agreed to end the meeting, and to reconvene after the commencement of the new school year to complete Student's annual IEP.

#### *Fourth Grade - 2009-2010 School Year*

51. Student entered fourth grade in the fall of 2009, when he was nine years old. His fourth grade class consisted of 36 students, and it was taught by Jerry Getman. At the beginning of the school year, Ms. Saulino gave Mr. Getman literature about autism and discussed strategies to help Student access the curriculum, including information on accommodations and modifications of Student's curriculum. With the assistance of Mr. Getman, Ms. Maldonado, and Student's service providers, Student's overall transition to fourth grade went well. Student learned to follow the basic routine of the classroom, and demonstrated a little more independence on the playground.

52. On September 14, 2009, Melinda Martinez, a child development specialist from Pasadena Child Development Associates (PCDA), prepared a social emotional development assessment of Student, at Parents' expense. Ms. Martinez, who testified at hearing, received her bachelor's degree in communicative disorders in 2000. She earned her master's degree in marital and family therapy in 2008, and completed her thesis on the therapeutic benefits of animal assisted therapies in children with autism. At PCDA, Ms. Martinez provides, among other things, social-emotional, relationship-based therapy, utilizing developmental individual-difference relationship-based (DIR) methodology and Floortime techniques. Ms. Martinez explained that such methodology and techniques are

developmental in nature and are relationship-based. Ms. Martinez has conducted approximately 100 assessments, including approximately 20 social-emotional assessments.

53. At hearing, Ms. Martinez explained that PCDA has been providing Student with private clinic-based social skills individual (SSI) training, as well as community-based and home-based social emotional developmental intervention (SEDI), since 2006. As part of her assessment, Ms. Martinez interviewed Student's SSI and SEDI developmental interventionist, as well as Parents, Ms. Phung, and Ms. Maldonado. She also reviewed school records, and observed Student at school, and at a home-based SEDI session. Ms. Martinez also applied a Social-Emotional Developmental Checklist used at PCDA, which Ms. Martinez explained incorporated six functional emotional developmental milestones: (1) basic regulation, which involves a child's ability to regulate attention and behavior; (2) forming relationships, intimacy, and trust; (3) two-way purposeful communication; (4) complex communication and social problem solving; (5) emotional ideas, which involves the ability to create mental representations, such as pretend play, or conveying a wish or feeling; and (6) emotional thinking, which involves the ability to make logical connections between different ideas.

54. Based on her observations, Ms. Martinez concluded that Student demonstrated many capacities across milestones one through four. Specifically, he showed abilities, with some limitations, in basic regulation, forming relationships with trusted family members and service providers, and two-way communication with adult support. He demonstrated an active interest in others as evidenced by parallel play, imitation, and watching while demonstrating pleasure. However, Student did not engage in spontaneous associative play with peers, had not demonstrated the capacity to use words to express different emotions, and could not make logical connections between different or emotional ideas. She noted Student benefited most from coaching "in the moment" which involved prompting Student to initiate, respond, and reciprocally interact with others. Ms. Martinez concluded that without support, Student would continue to operate primarily on a parallel level to his peers and not form meaningful relationships with his teachers, which could directly impact his functional and academic capabilities.

55. Ms. Martinez recommended three intervention goals: (1) Student to demonstrate consistent interest in others, with continual verbal and gestural support from teachers and service providers; (2) Student to demonstrate his ability to communicate his intentions, needs, and wishes to others, with predictable, moderate facilitation from teachers and service providers; and (3) Student to initiate and open a circle of communication with a peer, and begin to demonstrate an ability to respond to the questions and overtures of peers. In order to accomplish these goals, Ms. Martinez recommended that a provider familiar with DIR methodology provide direct support to Student, and coach teachers and aides to use affect, gestures, verbalizations, and sensorimotor supports to help Student sustain interest in others. She also recommended that a DIR provider coach teachers and aides to maintain eye level, speak slowly, and use short phrases when requesting responses from Student, pausing for up to ten seconds at a time in order to allow for Student's processing and response time. A DIR provider could also interpret all of Student's behaviors and directly support teachers

and aides on how to do so. Finally, Ms. Martinez recommended that the DIR provider share information and peer-based relationship techniques with teachers, aides, and other support staff.

56. On October 13, 2009, the IEP team reconvened. The attendees included Parents, Barbara Razo (Special Education Program Administrator), Mr. Getman, Ms. Saulino, Pamela Riley (speech and language therapist), Danielle Martinez (occupational therapist), Robin Libby (Principal), District's counsel, and Ms. Martinez. Each member of the team had previously received a copy of each recent assessment report concerning Student, including Ms. Martinez's. Pamela Riley, Student's speech and language therapist, advised the team that Student had met his goals addressing receptive language and comprehension, receptive language and reasoning, pragmatics, and had partially met his expressive language goal. Ms. Riley, who testified at hearing, reviewed Ms. Martinez's report prior to the IEP meeting, and developed two new goals, in part, based on the recommendations contained in Ms. Martinez's report. One goal was designed to improve Student's verbal reciprocal communication skills by, among other things, requiring Student to answer basic questions of others involved in a related activity. The other goal was designed to improve Student's pragmatic skills by requiring Student to answer questions related to a functional social activity, or a social story related to emotions of self or others. In addition to these goals, Ms. Riley developed three other goals designed to address receptive language comprehension and reasoning, as well as expressive language syntax.

57. Ms. Martinez was not able to share her report at the October 13, 2009 meeting, due to time constraints. The team agreed to reconvene the meeting on October 21, 2009 to complete Student's annual IEP. On October 21, 2009, the IEP team reconvened. The attendees included Parents, Ms. Libby, Mr. Getman, Ms. Saulino, Ms. Razo, Dr. Chamberlain from PCDA, District's counsel, an agency representative, and Ms. Martinez. Ms. Martinez was given an opportunity to present her report approximately ten or fifteen minutes before the adjournment of the meeting. Ms. Martinez shared her concerns regarding Student's social and emotional skills, and advised the team that Student had no meaningful relationship with his peers, initiated no communication with his peers, and existed on a parallel basis with his peers. Ms. Martinez further explained Student lacked skills to maintain two-way communication with his peers and teacher, and needed maximum support and step-by-step guidance from the aide. Ms. Martinez's presentation sparked some discussion from the team concerning the validity of the DIR approach. Consequently, the time designated for the IEP expired before Ms. Martinez could complete her presentation. As a result, Ms. Martinez was not able to discuss her goals and recommendations for Student.

58. The team reconvened the meeting on October 29, 2009, and a final time on November 9, 2009 to complete Student's annual IEP. The attendees at the October 29, 2009 meeting were Parents, Ms. Libby, Mr. Getman, Ms. Saulino, Ms. Razo, an agency representative, and District's counsel. The same individuals attended the November 9, 2009 meeting, with the exception of Mr. Getman and Ms. Saulino. At the November 9, 2009, Michael Oyler, a resource specialist, attended the meeting in Ms. Saulino's stead, and presented academic goals prepared by Ms. Saulino. The goals were based on Student's

present levels of performance as determined by the academic assessments Ms. Saulino conducted in May 2009. Specifically, the goals were in the areas of mathematical number sense, mathematical reasoning, reading comprehension, and writing strategies.

59. Mr. Oyler also presented behavior and social goals drafted by Ms. Saulino. The goals addressed independence, responding and sitting, following class and school rules, making eye contact, engaging in peer interaction, and turn-taking. At hearing, Ms. Saulino explained that these goals were an encapsulation of the seven behavior goals Student had yet to meet.

60. District offered placement in an SDC setting for his core subjects (i.e., reading, English and language arts, math, science, physical education, health, and social science), with participation in the general education setting during lunch, recess, sports, and assemblies. District also offered 90 minutes per week of individual speech therapy, and 30 minutes per week of group speech therapy. In addition, District offered 30 minutes per week of occupational therapy. All services were designated to be provided by the district of service (DOS). The IEP included the following modifications and accommodations for the classroom environment: (1) visual aids (picture schedule, flash cards, etc.); (2) modified class and homework assignments; (3) increased time for assignments and tests; (4) checking for understanding; (5) close proximity to teacher/aide; (6) extra time for oral responses; and (7) use of a visual timer. For standardized tests, Student would receive a flexible time and setting, breaks between tests, simplified directions, and math reasoning read aloud to him when the District administered the CST. The IEP also included Student's present levels of performance, and included measurable annual academic, behavior, and social goals drafted by Ms. Saulino, as well as the speech and language goals drafted by Ms. Riley. District declined to offer any one-on-one aide services, or any assistive technology services. Parents did not consent to District's offer but agreed to the speech and language goals developed by Ms. Riley.

61. Because Parents did not consent to the District's offer of placement and services, Student remained in his general education placement. On February 2, 2010, Mr. Getman ceased his teaching duties with District. Michelle Mendoza, who had been a teacher in an SDC teacher for 12 years, as well as a resource specialist, replaced him as the general education fourth grade class. Ms. Mendoza, who testified at hearing,<sup>8</sup> explained that from the beginning, she would consult with Ms. Saulino on a daily basis, discussing strategies on how to address Student's academic needs, behavior, and socialization. She would also consult with Student's aides throughout the course of the day concerning assignment modifications and accommodations. In addition, she would consult multiple times a week with Student's speech and occupational therapists to discuss general concepts, lessons, assignments, and projects on which her class was working, and to receive direction on how to support Student. She noted Student required constant prompting and redirecting to stay focused on class assignments, as well as to interact with his classmates. She also noted

---

<sup>8</sup> Ms. Mendoza's testimony is only relevant as it pertains to facts occurring up to March 5, 2010, the date District filed its complaint with the Office of Administrative Hearings.

Student was significantly behind academically, and struggled in the areas of reading comprehension, writing, language expression, and math reasoning. As an SDC teacher, she was trained in working with children with special needs, including autism; however, due to the large class size, she was unable to spend a lot of time with Student. Ms. Mendoza explained that she was familiar with the fifth grade curriculum, and noted that it was more abstract and covered more material than the fourth grade curriculum, as it was designed to prepare students for junior high school. She believed Student would encounter more challenges in a fifth grade general education setting, as the class size is larger, the pace is faster, and the amount of material is substantially larger. Ms. Mendoza believed Student would be better served in an SDC because the class size would be smaller, and he would get more individualized attention from his SDC teacher and the SDC aides.

62. Ms. Phung testified at hearing. She has been a teacher with the District for 12 years, and has been a third grade teacher for the last eight years. Ms. Phung earned her bachelor's degree in child development, her master's degree in new media design, and received her teaching credential in 1998. In her third grade class, there were 20 students, including Student. Consequently, Ms. Phung could only spend, on average, fifteen minutes per day with Student. Ms. Phung noted Student had much difficulty learning concepts. Often, she would have to move on to other lessons, while Student was stuck on a prior lesson. Student was very far behind academically in comparison to the other students, and was not self-sufficient. Student required many prompts and redirections from her or from his aides, and always required that instructions be repeated multiple times. He also required his aides to re-teach concepts to him. Ms. Phung reviewed Student's IEPs as they pertained to modifications and accommodations, and would modify Student's assignments accordingly. Specifically, she would have Student complete shortened assignments, or she would chunk assignments into smaller segments. She also provided Student with increased time to complete assignments and tests. In addition, she would write the class schedule on the board in front of the room, while Student's aide would write the class schedule on his personal white board. Ms. Phung would speak with Ms. Saulino almost daily to discuss Student's progress, as well as strategies on how to help Student access the curriculum. Ms. Phung had no prior experience working with children with autism or with developmental disabilities. Ms. Phung felt that Student was in the wrong placement, and that he needed an SDC with teachers trained to teach him.

63. At hearing, Ms. Maldonado explained that, in her one year experience as Student's instructional aide, Student seemed to comprehend very little, despite her collaboration with his teachers on how to modify, chunk, or shorten assignments for Student. In class, she sat next to Student, and had to prompt and redirect him often. He would not begin an assignment without prompting by her, or without her explaining the teacher's instructions. Ms. Maldonado felt most of Student's academic instruction came from her, as Ms. Phung, Mr. Getman, and Ms. Mendoza could not offer Student the time he required to understand, begin, and complete an assignment, given the large amount of children in their classes. Ms. Maldonado, who had previously worked in an SDC setting for nine years, explained that Student would benefit from being in an SDC, because it would be considerably smaller than a general education class, and there are generally two or three

aides in the class. Consequently, Student would receive more assistance, as the teachers and aides would have more time to work with him, and they could give him the attention he requires.

64. Student's speech therapist, Ms. Riley, testified at hearing. Ms. Riley is a licensed speech pathologist, and has been a District speech pathologist for over 31 years. She earned a bachelor's degree in communicative disorders, a master's degree in communicative disorders, and is a member of the American Speech, Language, and Hearing Association. Ms. Riley explained that Student has auditory processing deficits, and limited communication and social skills. She has provided Student with speech and language services since he was in third grade, where she often interacted with Ms. Phung and Ms. Maldonado. Specifically, Ms. Riley discussed Student's speech goals with Ms. Phung. She suggested to Ms. Phung methods to incorporate Student in a group, and on how to get Student to become a participating member of her class (e.g., encouraging Student to raise his hand, pairing him with peers, participating in classroom activities, etc.). Ms. Riley also shared strategies with Student's aides, as well as discussed Student's progress with Ms. Saulino approximately three or four times a week. This collaboration continued when Student entered fourth grade, when Student's teachers were first Mr. Getman, and then Ms. Mendoza. Ms. Riley expressed concern regarding Student's needs, and whether they could be met in a fifth grade general education setting, given the abstract nature of much of the fifth grade curriculum. Student had significant difficulty with abstractions, which is why it was necessary to chunk assignments for him, give him multiple choice questions, and modify his work. Also, because the fifth grade class size was generally large, she believed it would subject Student to more distractions, which could negatively impact his auditory processing. For these reasons, Ms. Riley felt a smaller setting, such as an SDC, would be a more appropriate placement for Student.

65. At hearing, Ms. Saulino explained that she and Student's teachers, aides, and therapists engaged in exhaustive collaboration. Specifically, Ms. Saulino had daily interaction with Student's teachers, and multiple interactions a week with Student's aides and therapists. The purpose of the interactions was for Student's team to share strategies on how to best get Student to access the curriculum, as well as address his behavior and socialization needs. Ms. Saulino also drafted monthly activity and action plans concerning Student, which were distributed to Student's team and his Parents. The monthly activity plans were based on her observations, as well as on input from Student's teachers, aides, and therapists, that described Student's progress, and noted actions discussed by team members to help address Student's needs. In addition, prior to the inclusion assessment conducted by Ms. Metechechia, Student's team had been employing many of the support strategies outlined in her report, such as visual schedules, natural breaks, modified instructional activities, reduction in workload, chunked assignments, multiple choice questions, highlighting, graphic organizer, reinforcement systems, sensory diet items, prompting, and social stories. The team had not, however, been employing the PECS system, because Student could read and could communicate with words. Despite the team's efforts, Ms. Saulino felt the collaboration and support strategies have not been enough for Student to access the curriculum, and Student is not at grade level. In addition, Student had become too dependent

on his one-on-one aide. Moreover, Student demonstrated great difficulty in handling abstract concepts, as evidenced by his CST scores in reading, which showed he had performed better in second grade than in third grade. Ms. Saulino believes these reading scores were due to the more abstract nature of concepts from the second grade to the third grade. Ms. Saulino explained her concerns that due to the more abstract thinking the fifth grade curriculum requires, Student will fall farther behind, without some intense academic instruction in a smaller setting. Ms. Saulino believes an SDC would be an appropriate placement for Student, because the teachers are specially trained to provide the academic, behavior, and social support Student needs, as well as the accommodations and modifications set forth on the IEP.

66. Barbara Razo, Special Education Program Administrator, who facilitated Student's IEP meetings, testified at the hearing. Ms. Razo has been involved with the special education program for four years, overseeing the provision of services, evaluating teachers, coordinating programs, and attending IEPs. She has overseen approximately 40 students who have autism. Ms. Razo also had experience as a program specialist. She was a principal for 14 years, an assistant principal for six months, a resource specialist for six months, and had taught in a general education setting for 17 years. Ms. Razo explained that Student had not made the progress District had hoped in a general education setting, and the team wanted his core subjects to be in the SDC, with mainstreaming for physical education, lunch, recess, sporting events, and assemblies. The team considered all the reports presented during the course of Student's IEP meetings, including the report presented by Ms. Martinez that focused on the DIR approach. Ms. Razo explained that District declined adopting DIR as its primary approach, because District questioned the validity of the methodology given the lack of research of the effectiveness of DIR, as reported by the National Research Council, as well as the National Autism Center. Despite the concerns about the DIR approach, the November 9, 2009 IEP incorporated some of Ms. Martinez' recommendations, specifically as they related to the communication and pragmatic goals prepared by Ms. Riley. The IEP also incorporated recommendations presented by Dr. Surfes and Ms. Metichchia, as set forth in the accommodations and modifications section of the IEP, such as visual aids, picture schedules, flash cards, modified class and homework assignments, increased time for assignments and tests, checking for understanding, close proximity to teacher/aide, extra time for oral responses, and the use of a visual timer. Given these factors, Ms. Razo believed District's offer of placement and services was appropriate to meet Student's unique needs.

## LEGAL CONCLUSIONS

1. As the petitioning party, Student has the burden of persuasion on all issues. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].)

### *Issues One and Two: ABA Services*

2. Student contends District substantively denied him a FAPE in March 2009 by improperly terminating his ABA services provided by Cal-Peds, and by not reassigning

another ABA non-public agency to continue providing ABA services. Student argues that, at a minimum, District should have provided ABA supervision from a non-public agency, when it elected to use its own one-on-one instructional aides. In addition, Student contends that the ABA services provided after March 2009 were inappropriate, as District implemented techniques that disregarded Student's auditory processing delay and his significant and fundamental need for visual prompts. District disagrees, and contends that the operative IEP did not designate Cal-Peds or any other non-public agency to provide Student with ABA services. Despite this, District provided substantially the same level of ABA services as Cal-Peds, through the use of its ABA trained instructional aides, who were closely supervised by Ms. Saulino, the inclusion and resource specialist. As discussed in more detail below, Student failed to meet his burden of showing District denied him a FAPE by improperly terminating Cal-Peds in March 2009, or by providing inappropriate ABA services after March 2009.

3. California special education law and the IDEA provide that children with disabilities have the right to a FAPE that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and independent living. (20 U.S.C. § 1400(d); Ed. Code § 56000.) Under the IDEA, eligible children with disabilities are entitled to FAPE, which means special education and related services that are available to the child at no charge to the parent or guardian, meet State educational standards, and conform to the child's individualized education program. (See 20 U.S.C. §§ 1400(d), 1401(3), 1401(9), 1401(29), 1412(a); Ed. Code, §§ 56001, 56026, 56040.) "Special education" is defined as "specially designed instruction at no cost to the parents, to meet the unique needs of a child with a disability...." (20 U.S.C. § 1401(29).) California law also defines special education as instruction designed to meet the unique needs of individuals with exceptional needs coupled with related services as needed to enable the student to benefit fully from instruction. (Ed. Code, § 56031.) "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(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).)

4. In *Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 200 [102 S.Ct. 3034] ("*Rowley*"), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.)

5. When a student alleges a denial of FAPE based on the failure to implement an IEP, in order to prevail the student must prove that any failure to implement the IEP was “material,” meaning that “the services a school provides to a disabled child fall significantly short of the services required by the child’s IEP.” (*Van Duyn v. Baker School Dist. 5J* (9th Cir. 2007) 481 F.3d 770, 780.) “Minor discrepancies between the services provided and the services called for by the IEP do not give rise to an IDEA violation.” (*Ibid.*)

6. Here, Student’s December 11, 2007 IEP, the operative IEP as it related to ABA services, simply stated that the “DOS”, meaning the “district of service”, would be providing the services. It did not state that the services would be provided by a non-public agency. Although Student’s complaint alleged that Cal-Peds was to provide ABA services pursuant to an October 2007 settlement agreement, Student presented no evidence to establish this. Regardless, the evidence showed that even if Cal-Ped’s had been the designated service provider, District substantially complied with the IEP by providing Student comparable service through its ABA-trained instructional aides, as established by the credible testimony of Ms. Maldonado, Ms. Saulino, Ms. Phung, and Ms. Mendoza. Specifically, the instructional aides, despite Student’s assertion that District ignored Student’s auditory processing challenges, used visual cues, visual aids, visual prompts, visual schedules, gestures, and highlighting. In addition, the instructional aides used verbal prompts, verbal questioning, redirection, positive reinforcement, social stories, and sensory breaks. They also offered Student support by providing modifications and accommodations, as directed by his teachers, such as chunking assignments, rephrasing directions, and shortening assignments. Furthermore, the instructional aides provided the services under the close supervision of Ms. Saulino, an ABA-trained inclusion and resource specialist, who routinely visited the classroom to observe Student, and to offer advice on how to interact with Student. Such vigilant supervision rendered unnecessary Student’s demand that District use a nonpublic agency to provide consultation and supervision services, especially given the lack of evidence showing that the supervision or services provided by District were substandard. On the contrary, the evidence showed that Student progressed since March 2009. Specifically, as set forth in Ms. Saulino’s June 2009 report, Student made some progress on his behavior goals, as he continued to meet his goal of emotional regulation in the classroom, staying on task, and transitioning between his classroom and lunch. In addition, Student showed some progress on his remaining seven behavior goals, although he had not met them. Given the above factors, Student has failed to meet his burden of demonstrating that District denied him a FAPE by improperly terminating Cal-Peds in March 2009, or by providing inappropriate ABA services after March 2009. (Factual Findings 1 - 66; Legal Conclusions 1 - 6.)

### *Issue Three: Full Inclusion Program*

7. Student contends District denied him a FAPE during the 2008-2009 and 2009-2010 school years because of its failure to provide Student with adequate supports in the full inclusion program. Student asserts, in essence, that District failed to systematically implement the recommendations and strategies set forth in the independent inclusion assessment report completed by Ms. Metichcchia, including formal collaboration between

Student's team.<sup>9</sup> District disagrees, and contends that it developed a well-coordinated program for Student to learn exclusively in the general education setting for the 2008-2009 and 2009-2010 school years.

8. As discussed above, California special education law and the IDEA provide that children with disabilities have the right to a FAPE that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and independent living. (20 U.S.C. § 1400(d); Ed. Code § 56000.) FAPE consists of special education and related services that are available to the child at no charge to the parent or guardian, meet the standards of the State educational agency, and conform to the student's individual education program. (20 U.S.C. § 1401(9).) (*See* Legal Conclusion 3, incorporated by reference.)

9. As discussed above, *Rowley* held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs, and reasonably calculated to "confer some educational benefit" upon the child. (*Rowley, supra*, 458 U.S. at pp. 200, 203-204.) (*See* Legal Conclusion 4, incorporated by reference.)

10. Here, the evidence did not support Student's contention that District failed to offer Student adequate supports in his full inclusion program. On the contrary, the evidence shows that District provided comprehensive and collaborative inclusion supports, including speech and language goals implemented in the class, particularly in the areas of pragmatics and social conversation. In addition, Student also received sensory breaks in the classroom, recommended by Student's occupational therapist, where he could manipulate sand, beans, blocks, jigsaw puzzles, and cubes. Also, District provided one-on-one aide support, as well as supports recommended by independent inclusion specialist, Ms. Metichecchia. Specifically, the credible testimony of Ms. Maldonado and Ms. Saulino demonstrate that District used the following support strategies set forth in Ms. Metichecchia's report: (1) visual schedules; (2) natural breaks; (3) modification of instructional activities; (4) reduction of amount of work to be completed; (5) chunking assignments; (6) multiple choices; (7) graphic organizers; (8) breaking passages into sections; (9) highlighting material; (10) visual supports; (11) positive reinforcement; (12) break cards; (13) sensory diet breaks; (14) prompting; (15) encourage peer interaction; and (16) social stories. In addition, the testimony of Ms. Saulino, buttressed by the credible testimony of Ms. Phung, Ms. Riley, Ms. Mendoza, and Ms. Maldonado, demonstrated that Student's team collaborated extensively to offer Student a well-coordinated program. Specifically, Ms. Saulino spoke with Student's teachers daily to discuss Student's progress, to discuss modifications and accommodations, and to discuss strategies to facilitate Student's learning, communication, and social skills. In addition, Ms. Saulino visited Student's class a minimum of three times a week to observe

---

<sup>9</sup> Student has also alleged in his closing brief that District failed to provide adequate inclusion supports because it predetermined Student should be in an SDC. At the prehearing conference in this matter, except for the issues set forth in the order following prehearing conference, Student withdrew all issues in his complaint, including all issues related to predetermination. As such, claims of predetermination will not be addressed in this Decision.

Student and to offer the instructional aides strategies and advice to help Student through prompting and redirection. Moreover, Ms. Saulino often met with Student's therapist to discuss Student's progress. For example, according to the credible testimony of Ms. Riley, Ms. Saulino would meet with her approximately three to four times a week to discuss progress in the area of speech and language. Student's team members also interacted with each other, evidenced by the credible testimony of Ms. Riley, who explained she often collaborated with Ms. Phung when Student was in third grade, and with Mr. Getman, Ms. Mendoza, and Ms. Maldonado when Student was in fourth grade, to offer suggestions on how to get Student incorporated in a group, as well as how to encourage Student to participate in class by raising his hand, pairing him with peers, and by participating in classroom activities. Moreover, Ms. Saulino organized and drafted monthly activity and action plans, which were distributed to Student's team, including Parents, concerning Student, based on her observations, as well as on input from Student's teachers, aides, and therapists, that described Student's progress, and noted actions discussed by team members to help address Student's needs.

11. Overall, the evidence showed that Student was afforded an inclusion program during the 2008-2009 and 2009-2010 school years that was reasonably calculated to provide Student with an educational benefit. Not only were the programs comprehensive and collaborative, but they also provided more accommodations and modifications than were provided in the operative IEPs. The evidence showed that made some progress, although not at a rate District would have preferred. Specifically, the evidence showed that Student met three behavior and social goals, as well as goals addressing receptive language, receptive reasoning, and pragmatics. Given the above factors, Student has failed to meet his burden of demonstrating that District denied him a FAPE by failing to provide Student with adequate supports in the full inclusion program. (Factual Findings 1 - 66; Legal Conclusions 7 - 11.)

*Issue Four: Presentation of Assessment Report at October 21, 2009 IEP Meeting*

12. Student contends Ms. Martinez was denied an opportunity to present the recommendations contained in her social emotional developmental report and the rationale behind those recommendations. As such, Student contends Ms. Martinez' report was not adequately considered. District disagrees, and contends that it properly considered Ms. Martinez' social-emotional independent assessment, as all members of the team received and reviewed her report, and certain elements of the report were incorporated in Student's IEP.

13. As discussed above, California special education law and the IDEA provide that children with disabilities have the right to a FAPE that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and independent living. (20 U.S.C. § 1400(d); Ed. Code § 56000.) FAPE consists of special education and related services that are available to the child at no charge to the parent or guardian, meet the standards of the State educational agency, and conform to the student's individual education program. (20 U.S.C. § 1401(9).) (See Legal Conclusion 3, incorporated by reference.)

14. The IDEA requires that a due process decision be based on substantive grounds when determining whether the child received a FAPE. (Ed.Code, §56505, subd. (f)(1).) A procedural violation therefore only requires a remedy where the procedural violation impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of a FAPE to the child, or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E); Ed. Code, § 56505, subd. (j); *Rowley, supra*, 458 U.S. at pp. 206-07; see also *Amanda J. v. Clark County Sch. Dist.* (9<sup>th</sup> Cir. 2001) 267 F.3d 877, 892.) Procedural violations which do not result in a loss of educational opportunity or which do not constitute a serious infringement of parents' opportunity to participate in the IEP formulation process are insufficient to support a finding that a pupil has been denied a FAPE. (*W.G. v. Bd. Of Trustees of Target Range Sch. Dist. No. 23* (9<sup>th</sup> Cir. 1992) 960 F.2d 1479, 1483.)

15. If a parent obtains an independent educational evaluation (IEE) at public expense, or shares with the school district an evaluation obtained at private expense, the results of the evaluation must be considered by the agency, if it meets agency criteria, in any decision made with respect to the provision of a FAPE. (34 C.F.R. § 300.502(c); Ed. Code §§ 56341, subd. (b)(1) and 56381, subd. (b).) The duty to consider the evaluation does not obligate the school district to accept the evaluation or its recommendations, or discuss the report at the IEP meeting. (*G.D. v. Westmoreland School District* (1st Cir. 1991), 930 F.2d. 942, 947.)

16. Here, Student has not established that District failed to consider Ms. Martinez' social-emotional report. Even though Ms. Martinez was not able to complete her presentation of her report, the evidence shows that the team did, in fact, consider her report in depth, as set forth in the IEP. Specifically, Ms. Riley testified that she developed two new speech goals based, in part, on the recommendations set forth in Ms. Martinez' assessment. Specifically, Ms. Riley developed a goal designed to improve Student's verbal reciprocal communication skills by, among other things, requiring Student to answer basic questions of others involved in a related activity. She developed a second goal designed to improve Student's pragmatic skills by requiring Student to answer questions related to a functional social activity, or a social story related to emotions of self or others. In addition, according to the credible testimony of Ms. Razo, who was the facilitator at Student's annual IEP meetings, the team fully considered all reports submitted and presented at the meetings. Student, has therefore, failed to meet his burden of establishing District denied him a FAPE when Ms. Martinez could not complete her presentation at Student's October 21, 2009 IEP meeting. (Factual Findings 1 - 66; Legal Conclusions 12 - 16.)

#### *Issue Five: Assistive Technology*

17. Student contends District denied him a FAPE by failing to provide PECS as recommended in the UCLA and Children's Hospital reports, and failing to adopt the software recommended in an independent assistive technology assessment report prepared by TASK. District disagrees, and contends that PECS was not appropriate for Student given his ability to read words, and communicate with words. In addition, District contends that the software

recommended in TASK’s assistive technology assessment report was not actually assistive technology, but was simply instructional.

18. As discussed above, California special education law and the IDEA provide that children with disabilities have the right to a FAPE that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and independent living. (20 U.S.C. § 1400(d); Ed. Code § 56000.) FAPE consists of special education and related services that are available to the child at no charge to the parent or guardian, meet the standards of the State educational agency, and conform to the student’s individual education program. (20 U.S.C. § 1401(9).) (*See* Legal Conclusion 3, incorporated by reference.)

19. As discussed above, *Rowley* held that “the ‘basic floor of opportunity’ provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to” a child with special needs, and reasonably calculated to “confer some educational benefit” upon the child. (*Rowley, supra*, 458 U.S. at pp. 200, 203-204.) (*See* Legal Conclusion 4, incorporated by reference.)

20. “Assistive technology device,” means any item, piece of equipment, or product system, whether acquired commercially without the need for modification, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of an individual with exceptional needs. (Ed. Code § 56020.5.)

21. Here, Student failed to present credible evidence demonstrating Student required assistive technology services of any kind. Student presented no witness with expertise in the area of assistive technology to discuss Student’s needs in this area, including any individuals who conducted any assistive technology assessments on Student. Student simply submitted an incomplete assessment report prepared by TASK, that recommended software programs that appeared unrelated to the area of assistive technology. As evidenced by the credible testimony of Ms. Saulino, the software appeared instructional in nature, and not within the true meaning of assistive technology. California law considers assistive technology as an item or equipment used to increase, maintain, or improve the functional capabilities of a child with special needs. Student offered absolutely no evidence demonstrating how the software programs would increase, maintain, or improve Student’s functional capabilities. Similarly, Student presented no expert testimony or any other evidence demonstrating how PECS would increase, maintain, or improve Student’s functional abilities. On the contrary, the evidence showed that Student had outgrown the need for PECS, according to the testimony of Ms. Saulino, as Student could read. In fact, according to the results of Student’s WIAT-II and his WRAT-4, word reading was one of Student strengths. In addition, the credible testimony of Ms. Maldonado showed Student could communicate using words or by using flashcards with words written on them, evident from Student’s use of the “help” card. Given the above factors, Student has failed to establish that District denied Student a FAPE by not providing Student with assistive technology services. (Factual Findings 1 - 66; Legal Conclusions 17 - 21.)

*Issue Six: District's Issue – Appropriateness of Offer of Placement and Services*

22. District contends it offered Student a FAPE in the June 2009 IEP, as amended in November 2009, as it offered Student an appropriate SDC placement, and services to address Student's unique needs. Student disagrees, and contends that the SDC is not the least restrictive environment for Student. Student argues that he should remain in a full inclusion program, with appropriate supports, including the application of the DIR methodology to address Student's behavior and social needs.

23. As discussed above, California special education law and the IDEA provide that children with disabilities have the right to a FAPE that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and independent living. (20 U.S.C. § 1400(d); Ed. Code § 56000.) FAPE consists of special education and related services that are available to the child at no charge to the parent or guardian, meet the standards of the State educational agency, and conform to the student's individual education program. (20 U.S.C. § 1401(9).) (*See* Legal Conclusion 3, incorporated by reference.)

24. As discussed above, *Rowley* held that “the ‘basic floor of opportunity’ provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to” a child with special needs, and reasonably calculated to “confer some educational benefit” upon the child. (*Rowley, supra*, 458 U.S. at pp. 200, 203-204.) (*See* Legal Conclusion 4, incorporated by reference.)

25. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (*See Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer of educational services and/or placement must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. (*Ibid.*) An IEP is evaluated in light of the information available to the IEP team at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) “An IEP is a snapshot, not a retrospective.” (*Id.* at p.1149, citing *Fuhrman v. East Hanover Bd. of Education* (3d Cir. 1993) 93 F.2d 1031, 1041.) Whether a student was denied a FAPE must be evaluated in terms of what was objectively reasonable at the time the IEP was developed. (*Ibid.*)

26. In order to provide the least restrictive environment, school districts must ensure, to the maximum extent appropriate, that children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature and the

severity of the disability of the child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412a)(5)(A); Ed. Code, § 56031; 34 C.F.R. § 300.114(a).) To determine whether a special education student could be satisfactorily educated in a regular education environment, the Ninth Circuit Court of Appeals has balanced the following factors: (1) “the educational benefits of placement full-time in a regular class,” (2) “the non-academic benefits of such placement,” (3) “the effect [the student] had on the teacher and children in the regular class,” and (4) “the costs of mainstreaming [the student].” (*Sacramento City Unified School Dist. v. Rachel H.* (9<sup>th</sup> Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Daniel R.R. v. State Board of Ed.* (5<sup>th</sup> Cir. 1989) 874 F.2d 1036, 1948-1050]; see also *Clyde K. v. Puyallup School Dist. No. 3* (9<sup>th</sup> Cir. 1994) 35 F.3d 1396, 1401-1402 [applying *Rachel H.* factors to determine that self-contained placement outside of a general education environment was the least restrictive environment for an aggressive and disruptive student with attention deficit hyperactivity disorder and Tourette’s Syndrome.].) If it is determined that a child cannot be educated in a general education environment, then the least restrictive environment analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R. v. State Board of Ed., supra.*, 874 F.2d at p. 1050.)

27. The continuum of the program options includes, but is not limited to, regular education, resource specialist programs, designated instruction and services, special classes, nonpublic, nonsectarian schools, state special schools, specially designed instruction in settings other than classrooms, itinerant instruction in settings other than classrooms, and instruction using telecommunication instruction in the home or instructions in hospitals or institutions. (Ed. Code, § 56361.)

28. When a school district seeks to prove that it provided a FAPE to a particular student, it must also show that it complied with the procedural requirements under the IDEA. (*Rowley, supra.*, 458 U.S. at pp. 200, 203-204, 206-207.)

29. The IEP team is required to include one or both of the student’s parents or their representative, a regular education teacher if a student is, or may be, participating in the regular education environment, a special education teacher, a representative of the school district who is qualified to provide or supervise specially designed instruction to meet the unique needs of children with disabilities, is knowledgeable about the general education curriculum and is knowledgeable about available resources. (34 C.F.R. § 300.321(a).) The IEP team is also required to include an individual who can interpret the instructional implications of assessment results, and, at the discretion of the parent or school district, include other individuals who have knowledge or special expertise regarding the child. (34 C.F.R. § 300.321(a).) Finally, whenever appropriate, the child with the disability should be present. (34 C.F.R. § 300.321(a).)

30. The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of FAPE to the child. (34 C.F.R. § 300.501(a); Ed.

Code, § 56500.4.) A parent has meaningfully participated in the IEP process when he or she has an opportunity to discuss a proposed IEP and when parental concerns are considered by the IEP team. (*Fuhrmann v. East Hanover Bd. Of Educ.* (3rd Cir. 1993) 993 F.2d 1031, 1036.)

31. An IEP is a written document for each child with a disability that includes: a statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general education curriculum; and a statement of measurable annual goals, including academic and functional goals, designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum, and meet each of the child's other educational needs that result from the child's disability. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. §§ 300.320.) When appropriate, the IEP should include short-term objectives that are based on the child's present levels of academic achievement and functional performance, a description of how the child's progress toward meeting the annual goals will be measured, when periodic reports of the child's progress will be issued to the parent, and a statement of the special education and related services to be provided to the child. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. §§ 300.320.) The IEP must also contain a statement of how the child's goals will be measured. (20 U.S.C. § 1414(d)(1)(A)(iii); Ed. Code, § 56345, subd. (a)(3).) An IEP must include a statement of the special education and related services, based on peer-reviewed research to the extent practicable, that will be provided to the student. (20 U.S.C. § 1414(d)(1)(A)(i)(IV); 34 C.F.R. § 300.320(a)(4); Ed. Code, § 56345, subd. (a)(4).) The IEP must include a projected start date for services and modifications, as well as the anticipated frequency, location, and duration of services and modifications. (20 U.S.C. § 1414(d)(1)(A)(i)(VII); 34 C.F.R. § 300.320(a)(7); Ed. Code § 56345, subd. (a)(7).) The IEP need only include the information set forth in title 20 United States Code section 1414(d)(1)(A)(i), and the required information need only be set forth once. (20 U.S.C. § 1414(d)(1)(A)(ii); 34 C.F.R. § 300.320(d); Ed. Code § 56345, subds. (h) and (i).)

32. In developing the IEP, the IEP team must consider the strengths of the child, the concerns of the parents for enhancing the child's education, the result of the most recent evaluation of the child, and the academic, developmental, and functional needs of the child. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. §§ 300.324 (a).)

33. If the parent or guardian of a child who is an individual with exceptional needs refuses all services in the IEP after having consented to those services in the past, the local educational agency shall file a request for due process pursuant to Chapter 5 (commencing with Section 56500). (Ed. Code, § 56346, subd. (d).)

34. Here, the evidence showed that the annual IEP meetings, beginning on June 9, 2009, and ending on November 9, 2009, were procedurally proper. Parents participated at each meeting. In addition, the correct district personnel attended, and all assessments were explained by IEP team members who were qualified to do so. Moreover, the IEP met the requirement of including a statement of the special education and related services to be

provided to Student, as well as specifying the frequency, duration, and location of services. Also, the IEP included Student's present levels of academic achievement and functional performance, including how Student's disability affected his involvement and progress in the general education curriculum. District also met the requirement of including in the IEP document a statement of measurable annual goals for Student, including academic, behavior, social, and speech and language goals, designed to meet the Student's needs that result from Student's disability.

35. The evidence also showed that the November 9, 2009 offer of placement and services was appropriate to meet Student's unique needs. District offered Student a placement in an SDC for reading, English and language arts, math, science, physical education, health, and social science. The offer also included Student's participation in general educational settings and activities, such as lunch, recess, break, sports, and assemblies. The SDC placement offer was supported by the reports of Dr. Surfás, and Ms. Saulino, testing results, and the observations of Ms. Phung and Ms. Riley. Dr. Surfás provided credible testimony that, despite Student's average cognitive abilities, Student was not able to independently glean information from the general education setting, suggesting Student lacked academic competence in that setting. Given the large number of children in the general education classroom, Dr. Surfás concluded that a general education teacher would not be able to handle all of the components of a program Student would require. As such, Dr. Surfás recommended that Student be placed in a specialized program to meet his needs that would focus on building Student's adaptive skills, social development, communication development, and building Student's academic competence. Ms. Saulino also provided credible testimony addressing the appropriateness of the SDC placement offer. Specifically, Ms. Saulino explained that despite the exhaustive collaborative efforts of Student's team, Student encountered significant difficulty in accessing the curriculum, as evidenced by his CST scores showing he was far below basic in the areas of reading and math, his PSR scores showing he was non-proficient in language arts, math reasoning, and number sense, his WIAT-II results showing Student scoring in the pre-kindergarten range for oral expression, in the kindergarten range for math reasoning and written expression, and in the first grade range for reading and listening comprehension. In addition, his WRAT-4 results showed Student scoring at a first grade level for sentence comprehension. Ms. Saulino also explained Student had become too prompt-dependent, and demonstrated great difficulty handling abstract concepts. Ms. Saulino concluded Student would encounter significant difficulty with the fifth grade curriculum, as it required more abstract thinking, and believed Student would be better served in a small setting with intense academic instruction, with teachers specially trained to provide Student the appropriate academic, behavior, and social support Student needs.

36. Ms. Phung also provided credible testimony addressing the appropriateness of the SDC placement offer. Specifically, Ms. Phung explained that Student seemed to comprehend very little, even with the extensive modifications and accommodations to his program, and was very behind academically. This was evidenced by Student's poor results on his Writing and Running Record benchmark tests, where he received a score of zero for writing off-topic, or for writing nothing at all. Student also scored poorly on the language

arts INSPECT test, where he answered only 26.7% of the questions correctly in the first trimester of third grade, and only 36.7% correctly in the second trimester. Also, due to the large size of the general education class, she could give Student very limited attention, despite the fact he required sufficiently more, due to his lack of self-sufficiency. As such, Ms. Riley felt an SDC was a more appropriate placement for Student, where he could be in a setting with teachers specially trained to teach him. Similarly, Ms. Riley provided credible testimony, where she expressed concern regarding Student's needs, and whether they could be met in a fifth grade general education setting, given the abstract nature of much of the fifth grade curriculum, and Student's significant difficulty with abstractions. Also, because of the sheer size of the fifth grade general education class, Student would be subjected to more distractions, which could negatively impact his auditory processing deficits. As such, Ms. Riley felt a smaller setting, such as an SDC, would be a more appropriate placement.

37. The placement offered by District also gave Student sufficient opportunity to interact with his non-disabled peers in a general education setting (i.e., during lunch, recess, breaks, sports, and assemblies).

38. The District also met its burden of demonstrating that the placement offer was in the least restrictive environment. Overall, a determination of whether a district has placed a pupil in the least restrictive environment involves the analysis of four factors: (1) the educational benefits to the child of placement full time in a regular class; (2) the non-academic benefits to the child of such placement; (3) the effect the disabled child will have on the teacher and children in the regular class; and (4) the costs of mainstreaming the child. Regarding the first element, Student argues the inclusion program would be a more appropriate placement, as Student showed signs of progress, evidenced from the three behavior and social goals he met, as well as the goals he had met addressing receptive language, receptive reasoning, and pragmatics. However, the evidence clearly established that Student had not been successful academically in the general education setting, even with accommodations and modifications to his curriculum. Assessment results demonstrated that Student was non-proficient, as he performed significantly under grade level academically, and that his lack of academic competence negatively affected his ability to access the general education curriculum. Also, Ms. Saulino, Ms. Phung, and Ms. Maldonado credibly testified that Student encountered significant difficulty understanding the meaning of concepts, difficulty completing assignments, and difficulty remaining focused. Student's difficulties in these areas persisted, despite excessive prompting and redirection, despite exhaustive collaboration between Student's teachers and services providers, and despite extensive accommodations and modifications made to Student's curriculum. Consequently, Student's receipt of educational benefits in a general education setting was limited, at best.

39. In reference to the second element, it is unclear whether Student could receive a non-academic benefit of interacting with his peers, given his extreme prompt-dependency, and his apparent inability to interact independently. Regarding the third element, the general education teacher would be required to repeatedly modify Student's assignments, constantly repeat directions to him, chunk assignments, rephrase materials, shorten work assignments, and make other accommodations for him. Consequently, the teacher would be required to

focus significant time and resources on Student, taking attention away from the other 39 students in the class. Finally, regarding the fourth element, neither party introduced any evidence demonstrating the costs associated with educating Student in a general education setting versus a special education setting. Weighing the above factors, a general education placement would not be appropriate.

40. District's offer of related services was also appropriate. The IEP provided for occupational therapy services, individual speech and language services, as well as group speech and language services. The appropriateness of these services was not in dispute. In addition, as established by the credible testimony of Ms. Mendoza, Ms. Maldonado, and Ms. Riley, the SDC, because of its smaller class size, the individualized attention to each student, and the expertise of the SDC teacher and aides, Student would not require a one-on-one aide in that setting. Student argues that District should have also included social-emotional developmental support from a nonpublic agency employing the DIR model. District, on the other hand, questioned the validity of the DIR approach. Specifically, according to the credible testimony of Ms. Razo, the National Council, as well as the National Autism Center, indicated that the DIR approach lacked research on its effectiveness. As such, District declined from adopting the DIR as its primary approach, opting, instead, to rely on the expertise of District personnel to address Student's social, emotional, and behavioral needs, as set forth in Student's measurable annual goals. Case law provides that a school district is not required to place a student in a program preferred by a parent, even if that program would result in greater educational benefit to the student.

41. The District met its burden of demonstrating that it offered Student a FAPE in the November 9, 2009 IEP. Because the November 9, 2009 IEP offered Student a FAPE, District may implement it without Parents' consent. (Factual Findings 1 - 66; Legal Conclusions 22 - 41.)

#### ORDER

1. All of Student's requests for relief are denied.
2. District offered Student a FAPE as set forth in Student's November 9, 2009 IEP, and may implement the IEP without parental consent.

#### PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, the District was the prevailing party on all issues presented.

RIGHT TO APPEAL THIS DECISION

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

DATED: July 19, 2010

\_\_\_\_\_/s/\_\_\_\_\_  
CARLA L. GARRETT  
Administrative Law Judge  
Office of Administrative Hearings