

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENTS ON BEHALF OF STUDENT,

OAH CASE NO. 2011080856

v.

OCEAN VIEW SCHOOL DISTRICT,

OCEAN VIEW SCHOOL DISTRICT,

OAH CASE NO. 2011090503

v.

PARENTS ON BEHALF OF STUDENT.

DECISION

Administrative Law Judge Susan Ruff, Office of Administrative Hearings, State of California (OAH) heard this matter on February 21, 22, 23, 28 and 29, 2012, in Huntington Beach, California.

Bruce Bothwell, Esq., represented Student and his parents (Student). Student's mother and father were present for most of the hearing. Mr. Bothwell was assisted during part of the hearing by attorney Cecilia Chang.

Karen Van Dijk, Esq., represented the Ocean View School District (District). Elizabeth Williams, Director of Student Services for the District, and Robyn Moses, Program Director of the West Orange County Consortium for Special Education (SELPA), also appeared on behalf of the District.

Student filed his request for a due process hearing on August 22, 2011. On September 15, 2011, the District filed its request for due process hearing. On September 20, 2011, Student filed a first amended due process hearing request. On September 26, 2011, OAH consolidated the cases, making Student's case (2011080856) the primary matter. On September 30, 2011, OAH granted the parties' joint request for a continuance. At the close of the hearing, the parties requested and received time to file written closing argument. The

matter was taken under submission upon receipt of the parties' reply closing argument on April 2, 2012.¹

ISSUES

The issues for hearing, as clarified during the prehearing conference, are as follows:

Student's Issues:

1) Did the District commit a procedural violation of the Individuals with Disabilities Education Act (IDEA) by predetermining the placement offered to Student in the individualized education program (IEP) offered on July 7, 2011?

2) Is the District's inclusion of intellectual disability (ID) as a secondary eligibility category for Student inappropriate?²

District's Issue:

3) Did the District's IEP offer of July 7, 2011, including the placement, related services, accommodations/modifications, and goals not yet agreed to by Student's parents, constitute a free appropriate public education (FAPE) for Student in the least restrictive environment?³

¹ To maintain a clear record, Student's written closing argument has been marked as exhibit S-111, and Student's reply has been marked as exhibit S-112. The District's written closing argument has been marked as exhibit D-88, and its reply has been marked as exhibit D-89.

² At the time of the prehearing conference and the beginning of the hearing, Student had a third issue: "Was the District's psycho-educational assessment of Student legally deficient because it failed to include appropriate subtests and tools in determining that Student should be eligible for special education under the secondary category of intellectual disability?" Student withdrew that issue at the close of the hearing based on the evidence presented during the hearing.

³ During the hearing, the District withdrew portions of its issue, based on the agreement of Student's parents to certain portions of the District's IEP offer. The issues withdrawn include the appropriateness of certain related services in the proposed IEP, including speech-language therapy, occupational therapy, and adapted physical education, and certain goals in the proposed IEP. The portions still at issue will be discussed in more detail below.

CONTENTIONS OF THE PARTIES

The basic dispute in this case involves who should implement Student's educational program – the District staff or a private provider? Student has autism and is on the low functioning side of the autism spectrum. Both parties agree that Student's program should consist primarily of individual instruction using the principles of applied behavior analysis (ABA). They also agree that Student needs an intensive ABA program consisting of many weekly hours of individual instruction, plus additional hours for supervision of the program. They agree that Student requires speech-language therapy, occupational therapy, and adapted physical education in addition to the ABA hours.

Aside from the transition plan and some of the goals, Student does not directly object to the written terms of the District's proposed July 2011 IEP. Instead, Student questions whether the District staff members are capable of providing appropriate ABA services and believes that those services should be provided by Student's current non-public agency provider, Autism Partnership. Student argues that the transition plan does not allow enough time for a smooth transition. Student also believes that there were too many goals in the proposed IEP. Student contends that certain terms of the IEP itself (for example, terms regarding Student's sensory needs) demonstrate that the District does not have a sufficient understanding of Student's unique needs to implement Student's educational program effectively.

The District contends that its teachers and other staff members are properly trained and capable of providing the services in a manner that will enable Student to gain educational benefit. The District believes that its proposed goals and transition plan were appropriate to meet Student's needs at the time of the IEP offer.

Student also contends that the District's inclusion of a secondary eligibility category of ID in the July 2011 IEP was improper and substantively impacts Student's IEP program. Student argues that the District's assessment results were inadequate to make a finding of ID. The District argues that its assessments were appropriate and that Student met the eligibility criteria for ID, in addition to his primary category of autism.

Finally, Student contends that the District predetermined Student's placement prior to the July 2011 IEP meeting. The District disagrees and contends that it properly considered the input of Student's parents, their counsel, and the private ABA providers during the IEP process.

This Decision finds that the District's proposed July 2011 IEP offered Student a FAPE in the least restrictive environment. The District's 2011 assessment of Student was appropriate and the inclusion of ID as a secondary eligibility category did not violate the law. Any issue regarding predetermination during the June/July 2011 IEP meetings was waived by a prior settlement agreement between the parties, but even if there was no waiver, the evidence did not show predetermination.

FACTUAL FINDINGS

1. Student is a six-year-old boy who is eligible for special education and related services. During the hearing, the parties did not dispute that Student's family resides within the jurisdiction of the District.

2. Student has autism and is on the low-functioning side of the spectrum. He has very little spoken language, significant difficulties with attention, self-help and social skills, and is still attempting to master "learning to learn" skills. He is toilet trained and currently has some ability to communicate through a computer program known as "Proloquo" which can be run on an iPad.

3. "Learning to learn" skills are the skills a child needs to be ready to engage in the academic process. The skills include things such as attending to materials, responding to instructions, remaining seated in an area, learning from feedback and learning from prompting. According to Student's expert Betty Jo Freeman, Ph.D., who assessed Student less than a month before the hearing, Student had not yet mastered these skills at the time of her assessment.

4. Because Student is so highly impacted by his autism, it is very difficult to assess him using standardized cognitive and academic tests. Student has difficulty attending to a test. In addition, the setting in which he is tested and the familiarity of the people conducting the tests may have an impact on Student's test scores.

Student's Prior Assessments

5. Student has been assessed on several occasions prior to the District's 2011 assessment and IEP that are at issue in this case. On each occasion, Student's cognitive and developmental scores have been very low. In August 2008, Student was assessed at the Semel Institute for Neuroscience and Human Behavior, Stewart and Lynda Resnick Neuropsychiatric Hospital at UCLA (UCLA Hospital). The assessors administered various tests, including but not limited to, the Mullen Scales of Early Learning (Mullen) and the Vineland Adaptive Behavior Scales – Second Edition (Vineland). The report concluded that Student was autistic and recommended various strategies for use with Student, including but not limited to, ABA-based instruction.

6. The Mullen assesses a child's early cognitive ability and motor development. The test looks at the child's relative strengths and abilities in various "domains" of functioning, including visual reception, fine motor, receptive language, and expressive language. Its standardized score is reported as a "T-score" with an average T-score of 50 and a standard deviation of 10. In each domain of the test, Student scored 20 or below, two standard deviations below average, in the "very low" range.

7. The Vineland measures a child's adaptive behavior and functioning. It is administered in the form of a questionnaire to the child's parents or other caregivers. The

test is standardized, with an average score of 100 and the standard deviation of 15. Student achieved the following scores on the Vineland: communication domain 74; daily living skills 83; socialization 80; motor skills 82; for an adaptive behavior composite score of 76.

8. The District initially assessed Student to see if he was eligible for special education and related services in December 2008 and January 2009. The tests and assessment instruments used by the District at that time included, but were not limited to, the Mullen, the Vineland, the Developmental Assessment of Young Children (DAYC), and the Preschool Language Scale – Four (PLS-4).

9. The District used the Mullen to assess Student's cognitive functioning level. While administering the test, the District assessor was required to make small adjustments, such as restating the question, multiple presentations of a task when a response was not noted, and a change in the order of item administration. According to the assessment report, the "examiner felt that these slight adaptations were necessary in order to more accurately assess [Student's] cognitive skills, and that strict adherence to standardization, without consideration of his unique needs would simply be an assessment of [Student's] compliance, cooperation and attention to task."

10. Student scored at or below a T-score of 20 on each of the four categories measured on the Mullen (visual reception, fine motor, receptive language, and expressive language), which constituted a score of at least two standard deviations below the average.

11. On the DAYC, Student had a raw score of 18, which placed Student's age equivalent score at 10 months. On the PLS-4, Student attained a score of 51 on the auditory comprehension portion of the test and scored 68 on the expressive communication portion of the test, which placed him in the 10 month and 16 month range, respectively.

12. The Vineland was completed with information provided by Student's mother. Student's standard scores in each of the domains on the Vineland were as follows: communication 69; daily living skills 82; socialization 80; and motor skills 88; for a composite score of 76.

13. Robin Morris, Psy.D, M.F.T., assessed Student in August and September 2009. The tests she administered included the Mullen, among others. She also administered the Child Development Inventory, a research-based parent questionnaire that measures development in the areas of social, self-help, gross motor, fine motor, expressive language, language comprehension, letter and number skills. On the Mullen, Student had a T-score below 20 on all four categories measured. On the Child Development Inventory, he was significantly delayed in all areas.

14. Morris conducted another assessment in June and August 2010 and issued a report dated August 16, 2010. Morris administered the Mullen again, and once again Student's scores were below 20 in all four areas tested. On the Child Development Inventory, Student scored more than two standard deviations below the norm in each area

examined. On the Adaptive Behavior Assessment System – Second Edition, Student scored more than two standard deviations below average in each composite area.

The August 2010 Settlement Agreement

15. Between approximately February 2009 and June 2010, Student attended District schools and received special education services from the District. The parties dispute whether Student made progress in the District’s program at that time. Student filed a request for a due process hearing with OAH in case number 2010041215.⁴

16. In August 2010, the parties signed a settlement agreement in OAH case number 2010041215. The agreement recited that it was intended to resolve outstanding issues “regarding Student’s educational placement through August 31, 2011, related educational services for that time period, compensatory education, assessment issues, reimbursement issues, attorneys’ fees, and other matters addressed herein (‘Disputes’).” The agreement went on to recite that:

By entering into this Agreement, the Parties intend to fully and finally resolve all actual and potential issues and disputes against the District relating to Student’s education, and/or the matters which are the subject of the Disputes and the Action, including the special education program and related services previously provided to Student by District, the educational and other related services to be provided to Student through August 31, 2011, compensatory education, and all substantive and procedural matters pursuant to IDEA arising from or relating to Student’s education through August 31, 2011, as well as any and all claims based on the Rehabilitation Act, 42 U.S.C. §§ 1983 and 1988, the Americans with Disabilities Act, common law, civil/tort law, criminal law, and any other state or federal statute or regulation.

17. The settlement agreement contained several passages regarding waiver of past and future claims. In paragraph 3A of the settlement agreement, the District agreed to reimburse Student’s parents for certain educational expenses, in exchange for which Student, among other things, agreed to the following waiver: “Except as set forth in this Paragraph, Petitioners specifically waive any right or claim to any additional reimbursement for educational placement, services, or assessments received by the Student from the date of this Agreement through August 31, 2011.”

18. In paragraph 3C, Student waived “any and all substantive and procedural claims relating to the Student’s educational placement as reflected under this Agreement

⁴ As will be discussed in the Legal Conclusions below, because of the settlement agreement and other factors, the question of whether Student made progress under the District’s prior program is not relevant to the issues of the instant case. Therefore, Factual Findings regarding that prior program will be made only insofar as they are relevant to the July 2011 IEP offer.

through August 31, 2011, including but not limited to the IEP content, notice, team meeting, and meeting attendance requirements mandated by the IDEA and California Education Code.” There was also similar waiver language in which Student waived any right or claim to additional reimbursement for ABA services, attorneys’ fees or reimbursements relating to assessments. The settlement made payment of Student’s private services contingent upon the continuous residency of Student’s family within the jurisdiction of the District.

19. Further waiver language required Student’s parents to withdraw the OAH proceeding and “specifically waive any right to pursue any matters which are related to the Student’s education through August 31, 2011 in any court of any jurisdiction against the District...including, but not limited to, any and all claims based on the IDEA....” Student’s parents also agreed to release the District and its agents from any and all claims “which they may now have in connection with, relating to, or rising out of Student’s education through August 31, 2011.” The release language recited that it included “specifically, without limitation” the following:

(1) a release of any obligation by the District to provide any educational placement, assessments, or services, or reimbursements for any educational placement, assessments, or services through August 31, 2011, other than those expressly set forth herein; (2) a release of any claim to compensatory education that may exist to date, or that may arise as a result of the Student’s educational placement provided in accordance with this Agreement through August 31, 2011; (3) a release of any claim to attorneys fees and legal costs that Student may have incurred in conjunction with the Disputes, the Action, the Agreement, or any other matter relating to the Student’s education; and (4) a release of any procedural or substantive violation of the IDEA, the Rehabilitation Act, 42 U.S.C. §§ 1983 and 1988, the Americans with Disabilities Act, or any other provision of law, arising from or relating to Student’s education which may have occurred or which may occur as a result of this Agreement.

20. The agreement also contained a waiver of the provisions of California Civil Code section 1542, regarding unknown claims.

Student’s ABA Program at AP

21. In June 2010, Student began receiving intensive ABA-based behavioral instruction from a non-public agency (NPA) provider known as Autism Partnership (AP). Student started at 10 hours per week. In September 2010, Student’s weekly hours with AP increased to approximately 35 hours per week. According to the AP progress report dated September 2010, Student’s program emphasized learning to learn skills. The program focused on “decreasing maladaptive behaviors and teaching replacement skills in the area of behavioral control, communication, social and leisure skills.”

22. As part of the settlement agreement, the District agreed to fund AP services for Student. At the time of the June/July 2011 IEP meetings at issue in this case, Student was still receiving ABA instruction from AP. In June 2011, approximately a year after Student began therapy with AP, Student had made progress in areas such as reduction of tantrum behavior, but was still working on learning to learn skills.

23. On more than one occasion, there were significant staff changes in Student's AP program. Despite changing staff, Student continued to make slow but steady progress. By the time of the hearing in February 2012, he had made some progress in the area of receptive language as well as behavior.

The District's May and June 2011 Assessment

24. In accordance with the settlement agreement, the District conducted a triennial assessment of Student in May and June 2011 and issued a report dated June 9, 2011. At the time, Student was still receiving services from AP, and was not attending a District school. The District's assessors included two school psychologists (Annemarie Potucek and Kristen Henry), special education teacher Kimberly Doyle, a school nurse, an occupational therapist, a speech-language pathologist, and an adapted physical education specialist.⁵

25. Henry received her master's degree in education: counseling in 2002, and has been working as a school psychologist for the District since 2005. In addition to her credential as a school psychologist, she is a Diplomate of School Neuropsychology. She has attended trainings related to autism and behavior interventions, and is currently in training to become a behavior intervention case manager.

26. Potucek received her master's degree in school psychology in 2006 and her Education Specialist Degree in 2008. She is a behavior intervention case manager and has worked as a school psychologist for the District since 2009. Prior to becoming a school psychologist, she worked as a classroom aide at the Delaware Autism Program and in New York as an ABA aide for a child.

27. Potucek and Henry collaborated on the District's assessment. They conferred and reviewed records, and they brainstormed together regarding which assessment tools to use. When they went to Student's home to conduct observations and testing, one was able to work with Student or Student's parents while the other took observational notes. After the observations and testing they conducted a debriefing together. Each one wrote part of the final assessment report. Henry described it as a good collaboration in which the two school psychologists worked well together.

⁵ During the hearing, the District withdrew any issues relating to occupational therapy, speech-language therapy, and adapted physical education services. Therefore, the portions of the assessment dealing with those services will be addressed herein only to the extent (if any) that they relate to the matters still at issue in the case.

28. In addition to the testing which will be discussed below, the assessors reviewed records, interviewed Student's parents, consulted with District and SELPA staff, and conducted observations of Student in both his home and during his AP program.

29. To test Student's cognitive functioning levels, the assessors used the Southern California Ordinal Scales of Development (SCOSD), the Developmental Profile -- Third Edition (DP-3), and the DAYC.

30. The DP-3 is a standardized measure of child development. It can be administered as an interview with a parent or as a parent checklist. Potucek was familiar with the DP-3 and administered that test. She reported Student's cognitive skills at around the two year, four month age range, with emerging skills up to three years, eight months. Student was approximately five years and three months old at the time of the tests.

31. Henry administered the DAYC to Student. The test consists of a battery of five subtests that measure different but interrelated developmental abilities. The Cognitive Subtest consists of 78 items that measure skills and abilities which are conceptual in nature. According to "observation and parent report" as reflected on the DAYC, Student's intellectual abilities were far below the average range, with an age equivalent score of 26 months and a standard score of 52, below the first percentile.

32. The SCOSD is a criterion-referenced, rather than norm-referenced test. Its assessment procedures are flexible, rather than fixed, and the scoring system takes into account the quality as well as quantity of responses. It is a cognitive test often used when a standardized IQ test would not be appropriate, for example when standardized IQ testing for African American pupils is forbidden by prior court cases. Student's scores on the SCOSD placed Student's functioning level at 18 to 24 months and his ceiling level at the two to four year old range.

33. None of these three tests (the SCOSD, the DAYC or the DP-3) is designed to give an IQ score to a child. The district assessors chose these tests because they were concerned that standard IQ testing might not provide an accurate reflection of Student's abilities. Henry explained that standardized IQ testing must be administered according to a very specific script. With a child such as Student, a standardized test can end up measuring attention and compliance to directions, rather than true cognitive ability.

34. Unlike standardized IQ testing, which is typically done by an assessor and child at a tabletop in an office, the tests chosen by the District assessors allowed the assessors to consider input from Student's parents and NPA providers to see if Student was demonstrating skills in other environments that he could not demonstrate in a tabletop testing situation because of his disability. For example, the SCOSD looks at levels of functioning rather than a child's responses (or lack of response) to a series of structured, scripted questions. Likewise, Henry believed that the flexibility of the DAYC would give them a more accurate picture of Student's abilities than a standardized IQ test. That is why she did not choose a standardized test.

35. Kimberly Doyle, a special education teacher and program specialist for the District, also participated in the District's assessment. Doyle received her master's degree in special education in 1996. She has been an Autism and Preschool Program Specialist for the District since 2005. In addition to presenting workshops related to autism, she has attended numerous trainings and workshops related to educating children with autism. Doyle attended Student's AP clinic meetings on more than one occasion prior to the June-July 2011 IEP meetings, and conducted observations as part of the assessment.

36. The District's assessment also included other tests and rating scales relating to autism and communication development. The District assessors tailored the tests and other assessment instruments to assess Student's areas of need, rather than just determine a single IQ score. The assessors administered the tests in accordance with the test producer's instructions and administered the tests in Student's primary language of English. The tests were selected and administered so as not to be racially, culturally or sexually discriminatory, and were administered in the language and form most likely to yield accurate information. The tests and other measures were used for the purposes for which they were valid and reliable.

Dr. Freeman's January-February 2012 Assessment

37. In January and February 2012, shortly before the hearing (and more than six months after the IEP offer at issue in this case), Student was assessed at his parent's expense by Betty Jo Freeman, Ph.D. Although Dr. Freeman's report was not available to the District at the time of the IEP meetings at issue in this case, Dr. Freeman testified as an expert for Student at the hearing so the findings in her assessment are relevant to her opinions.

38. Dr. Freeman received her Ph.D. in 1969 and became a professor at the University of California, Los Angeles, School of Medicine, in approximately 1973. In 2003, she retired and has been an Emerita Professor since 2004. She has published numerous scholarly articles and books relating to autism and has assessed hundreds of children over the years. She has taught classes relating to autism, has done consulting work for school districts, and has also conducted a small private practice.

39. Dr. Freeman's assessment of Student included, among other things, testing and a review of records. The testing conducted by Dr. Freeman included one portion of the Wechsler Preschool and Primary Scales of Intelligence – Third Edition (WPPSI), the Mullen, the Vineland, the Gilliam Autism Rating Scale – Second Edition (GARS), and the Social Responsiveness Scale (SRS).

40. The GARS and the SRS were rating scales filled out by Student's parents. One of Student's therapists at AP also completed the GARS. Based on the findings of these tests and the other parts of her assessment, Dr. Freeman's report concluded that Student met the criteria for a diagnosis of Autistic Disorder.

41. Dr. Freeman first attempted to administer standardized testing to Student in her office, but was unable to do so because of Student's behavior. Instead, Dr. Freeman went to Student's AP program to administer the Mullen, with assistance from the AP therapists. The AP therapists gave Student rewards for cooperation during the testing, although they did not reward Student for "correct" answers, just the fact that he answered. They also allowed Student to take breaks and informed Dr. Freeman when Student needed a break from testing.

42. At the time Dr. Freeman administered the Mullen to Student, Student was five years and 11 months old, and was too old for the test. The Mullen is only standardized for children up to five years and eight months. In addition, the non-standardized method of conducting the test and the involvement of Student's AP therapists would have invalidated any standardized scores, even if Student had been the proper age for the test.

43. Dr. Freeman admitted during the hearing that, because she did not administer the Mullen to Student in accordance with the test manufacturer's instructions, she could not obtain standard scores. Instead, she explained that she used the test only to see what Student could do and compare his progress to past administrations of the Mullen.

44. Dr. Freeman's report did not note any standardized scores for Student on the Mullen, but she did note the following age equivalent scores: Visual reception: 43 months, fine motor: 24 months, receptive language: 27 months, and expressive language: 18 months.

45. According to Dr. Freeman's report, Student's age equivalent scores on the Mullen in the prior assessments had been fairly consistent: scores in the 14 to 20 month range for visual reception, 15 to 19 months for fine motor, nine to 11 months for receptive language, and 10 to 13 months for expressive language. Because Student's age equivalent scores on the past administrations of the Mullen had not improved before and after Student's attendance in the District's prior program, Dr. Freeman concluded that Student had made little or no progress when he was in the District's program. By comparing those low scores with the much higher scores on Dr. Freeman's testing, (after Student had been in the AP program for approximately 18 months), Dr. Freeman concluded Student had made significant progress while undergoing ABA at AP.

46. As noted above, Dr. Freeman also administered one subtest of the WPPSI to Student – the receptive vocabulary subtest. The subtest measures language processing and requires the child to point to the correct one of four pictures that matches the word or concept the examiner says aloud. Student obtained an age equivalent score of three years, one month on this test. Dr. Freeman did not administer any of the other subtests of the WPPSI.

47. Dr. Freeman also had Student's parents and one of the supervising therapists at AP complete the Vineland. Student scored at or below the first percentile in every area tested except gross motor skills, where he scored in the second percentile. His age equivalent scores were all below the three-year level, except for gross motor skills. When discussing the Vineland, Dr. Freeman's report noted: "[Student] is stubborn, can be

impulsive, can be physically aggressive (hits and bites) and has temper tantrums which can last from 10 to 40 minutes.”

48. Dr. Freeman’s report also contained observations of Student’s behavior while in her office:

For the first session, [Student] was brought to the examiner’s office. He was tantrumming when he came into the office and continued to do so throughout the session. [Student’s] mother noted that over the past month, [Student] has shown a significant regression in functioning. For 1½ weeks, [Student] did not receive services and there also have been changes in staff. [Student] has had difficulty with these changes and as a result has regressed. It was not possible to administer testing during the first session. Therefore, he was seen two days later at Autism Partnership with his staff and his reinforcement system in place. In this environment, [Student] was very cooperative throughout the testing session and even communicated using his iPad.

49. In her report, Dr. Freeman also noted that Student’s “behaviors were under control up until the last few weeks, when he began to show increased tantrums. This is currently being evaluated.” The report also noted that “[c]urrent problems dealing with [Student] at home include his difficulty with communicating and explosive tantrums that involve biting, grabbing and pinching himself or others.”

50. Among her conclusions in the report, Dr. Freeman’s found that Student had been making “no progress and appeared to be regressing prior to beginning his program at Autism Partnership. Since instigating the Autism Partnership program [Student] has shown significant improvement.” She recommended, among other things, that Student continue with his AP program.

51. During the hearing, the District questioned the accuracy of Dr. Freeman’s test results. Henry testified that it is inappropriate to report only age equivalent scores for the Mullen. The T-score (the standard score) is the primary measure that should be reported. Upon cross-examination, Dr. Freeman admitted that age-equivalent scores on the Mullen are not standardized scores and must be viewed with caution.

52. Neither Dr. Freeman’s report nor her testimony explained why it was fair for her to compare the results of her non-standardized administration of the Mullen with the results of prior standardized administrations of the test. There was no indication that any prior administrations of the Mullen were given in the same manner that Dr. Freeman gave the test – with the assistance of Student’s familiar ABA providers. As Dr. Freeman testified, an autistic child’s test scores can change based on the setting or the child’s familiarity with the individual giving the test.

53. By administering the test with the assistance of Student’s ABA therapists, Dr. Freeman obtained a level of cooperation from Student that she could not have achieved had

she given the test in a standardized fashion. Both her report and her testimony discussed Student's lack of cooperation in testing when Dr. Freeman first attempted to test Student in her office. Had Dr. Freeman continued to administer the Mullen in her office in accordance with the test manufacturer's instructions, Student would never have achieved the results that he did on her non-standardized administration of the test. Indeed, it is likely that, given Student's lack of cooperation, the test would have yielded the same or similar results as all the prior administrations of the Mullen.

54. While there was nothing wrong with giving a standardized test in a non-standardized manner to see how well Student could perform under optimal circumstances, it was unfair for Dr. Freeman to compare her results to prior administrations of the test which were not conducted under the same, optimal circumstances. Dr. Freeman herself opined that a standardized test is a meaningless concept for an autistic child such as Student and that it would not be fair to Student to administer such a test, yet she relied upon those "meaningless" standardized administrations of the Mullen by others as the basis to show that there was a lack of progress prior to the AP program.

55. Dr. Freeman's Mullen scores compared to the prior Mullen scores do not support her opinion that Student failed to make progress in the District's prior ABA program, nor do they show that Student made progress in the AP program.⁶

The District's June-July 2011 IEP Team Meeting

56. The IEP at issue in this case was developed at two meetings held on June 9, 2011, and July 7, 2011. At the first meeting, the team reviewed the results of the District's May/June 2011 assessment, and representatives from AP submitted proposed goals and objectives to the IEP team. Student's parents and their legal counsel had an opportunity to ask questions about the assessment. The team discussed present levels of performance, and the AP representatives at the meeting agreed that the District accurately described Student's present levels.

57. At the second IEP meeting the team discussed, among other things, the goals and the appropriate educational program for Student. The District staff members reviewed the AP proposed goals in between the meetings and revised the District's proposed goals based on the input from AP. The team discussed that AP had introduced Student to the use of an iPad with a communication program named "Proloquo" instead of a picture communication book. The District team members proposed an assessment in the area of assistive technology (AT) and provided Student's parents with a plan for an AT assessment for Student. Student's parents did not sign the plan that day or agree to the assessment.

⁶ There was other evidence during the hearing to support the fact that Student made progress in his AP program, and the parties stipulated that AP would be a proper parental placement should it be found that the District denied Student a FAPE. Therefore, there is no need to rely on Dr. Freeman's opinion alone in this regard.

58. The parties dispute whether the District predetermined the placement and services offered to Student in the proposed IEP. As will be discussed in the Legal Conclusions below, if a District conducts an IEP meeting without considering parental input and with a predetermined “take it or leave it” attitude, that may constitute a procedural violation of special education law. As will also be discussed in the Legal Conclusions below, because of the settlement agreement, it appears that Student has waived his right to challenge the IEP offer based on such a procedural violation. However, even if there was no waiver, the evidence at hearing did not show predetermination.

59. The District witnesses were consistent in their testimony that they came to the two meetings with open minds. Robyn Moses explained that the District staff sought input from Student’s parents, their counsel and the AP staff at many points during the meetings. There were discussions regarding the assessment, present levels of performance, the goals, the related services (including ABA services), the transition plan, and the placement. Linda Forsythe, the SELPA director who attended the July 7, 2011 IEP meeting as the administrator, confirmed that Student’s parents, their counsel, and AP provided input during the meeting. She testified that she must have asked 20 times if there were questions.

60. In addition, the evidence showed there was a discussion during the meeting about who should provide the ABA services and where the services should take place. AP representatives, including Amber Raemer, the program coordinator for Student’s services at AP, attended both IEP team meetings. According to Moses, the AP representatives at the meeting said that the setting for the ABA services was not as significant as the expertise of the people implementing those services. Someone questioned whether the District staff could adequately provide the services, and Moses asked that individual to describe what further skills the District staff would need to provide the services effectively. There was also a discussion of whether it would be problematic for Student to have two different ABA providers (the District providing educationally-related ABA and AP providing home-based ABA on behalf of the Regional Center). The District staff explained that they had experience collaborating with private ABA providers under similar circumstances.

61. There was also a discussion during the meeting about who should provide the supervision of the ABA services and how many supervision hours would be required. When the need for a transition plan arose, there was a discussion about the transition plan and the AP representatives provided their input.

62. The notes to the second IEP team meeting also reflected the discussion regarding ABA services. For example, the notes stated, in part:

Team answered parents and AP staff questions regarding the staff training and that aides will be ABA aides and will be more than one staff member to ensure generalization. Setting will be designed to meet his attentional needs in a separate room on the regular campus at Golden View. Staff will use transition period to observe and learn the instructional methodologies that are currently

used by AP staff to utilize the same approaches that are successful for [Student] in his new program in September.

63. Student's mother also testified that there was a discussion during the IEP team meetings regarding AP. She said that they talked about the progress Student had made with AP and the fact that Student's parents wished to have him stay in the program. The District staff told the IEP team that the District was capable of taking over Student's ABA program. Student's mother asked how the District's proposed ABA program would differ from the prior District ABA program. She was concerned that the District's proposal appeared to involve the same basic program that the District had used prior to the AP placement.

64. Student's mother testified that the District staff brushed off the concerns raised by Student's parents during the meeting and did not genuinely consider those concerns. For example, part of the proposed IEP called for Student to be provided with a chew toy. Student's parents and AP believed that the use of a chew toy did not properly address Student's biting, because his biting was caused by his behavioral needs and was not sensory-based. Although the District IEP team members ultimately deleted the chew toy from the proposed IEP based on the concerns expressed during the meeting, Student's mother believed that the initial inclusion of the chew toy in the IEP demonstrated that the District staff was not listening to the input from AP and Student's parents. In her opinion, the District staff had already made up their minds not to provide Student with AP services.

65. Student's mother also testified that, when the subject of Student's progress at AP arose, Moses said that AP had simply toilet trained Student and that was it.

66. While it is understandable that Student's mother may have felt frustrated that the District team members did not share her point of view regarding the need for AP, that does not prove predetermination. Instead, the overwhelming evidence showed that the District IEP team members attended the meeting with open minds and engaged in an extensive discussion of the possibilities for Student's program. There was no "take it or leave it" attitude.

67. In Student's written closing argument, Student contended that the testimony of Kimberly Doyle demonstrated that the District had predetermined to offer a District ABA program instead of AP. A review of Doyle's testimony at the hearing does not support that contention. Doyle testified that when she went into the IEP meeting, she did not know what Student's placement would be. She explained that the District team members considered one-to-one instruction would be a good place to start and that the team discussed whether ABA methodology would be appropriate. Student's parents and the AP providers told the team that ABA methodology was necessary.

68. During Doyle's cross-examination, the following exchange occurred:

Student's counsel: Was it your understanding going into the meeting that the District would be proposing some type of program which would involve transitioning [Student] from Autism Partnership back to the District?

Doyle: I knew that we probably would be having some kind of discussion based on what we – what the outcomes were of the recommendations, yes.

Student's counsel: Ok, so that was your understanding going into the meeting that the District would be making a proposal to transition [Student] from Autism Partnership back to the District?"

Doyle: If we decided that was the best way to meet [Student's] needs that we would need to consider that...

69. Doyle went on to testify about the need to consider transition planning in preparation for an IEP whenever a child might transfer from an NPA to a District placement. Because she did not know what would happen at the IEP team meeting, she had to be ready to provide input on different possibilities. She testified that they would discuss at the meeting whether Student would be transitioned back to the District, but they did not have a plan going into the meeting.

70. Contrary to Student's contention, Doyle's testimony did not evidence predetermination. Her testimony was consistent with that of the other District witnesses that no determination had been made prior to the IEP team meeting. However, even if Doyle had testified, as Student contends, that it was "her understanding that at the IEP meeting the District would be offering a District provided ABA program," that does not prove predetermination. One IEP team member's understanding of what the District would offer does not prove that the District would refuse to consider any other possibilities.

71. Student also argued in the written closing argument that the absence of Elizabeth Williams from the two IEP meetings proved that the District had no intention of offering a private placement for ABA services at those meetings. Student contends that Williams was typically the one who authorized NPA services for special education students. However, Williams testified during the hearing that the IEP team makes the decision for such services, and that she takes the matter to the board meeting to authorize expenditures after an IEP team meeting. She explained that Moses, who attended Student's IEP meeting, could have made the recommendation for NPA services, as well as other members of the IEP team.

72. Williams' testimony in this regard was credible and was supported by other evidence at the hearing. For example, the IEP proposed by the District included AP involvement during the transition, even without Williams' attendance at the meeting.

73. Finally, Student contends that the hostility between Student's parents and the District administrators prove that "the District's denial of predetermination is not credible." To demonstrate the hostility between the parties, Student relies upon evidence that District administrators conducted surveillance of Student's family.

74. According to the testimony during the hearing, after the settlement agreement described in Factual Findings 15 – 20 above was signed, a question arose regarding the location of the residence of Student's parents. The District initiated surveillance of Student's family in order to determine if they still resided within the jurisdiction of the District. Williams was involved in that surveillance operation. Student's parents felt that the surveillance was intrusive and invasive of their privacy. Student contends that this conduct destroyed the trust between Student's parents and the District, and that the surveillance is "circumstantially relevant" as to whether the District's proposed program was predetermined.

75. Student presented no evidence to show any connection between the surveillance and the IEP meetings held in June and July 2011. Williams did not attend either the June or July 2011 IEP team meetings, and her testimony indicated that she had little or no involvement with the District team members about the IEP prior to or during those IEP meetings. The evidence of surveillance, even if it occurred in precisely the manner described by Student, is not sufficient to show predetermination.

Intellectual Disability as a Secondary Eligibility Category

76. The District's July 7, 2011 proposed IEP found that Student's primary eligibility category for special education was autism. It also added a secondary eligibility category of ID. Student contends that it was inappropriate for the District to include ID as a secondary eligibility category.

77. The District witnesses maintained that the inclusion of ID as a secondary eligibility category was appropriate. In Henry's opinion, based on the results of the prior assessments, including the District's 2011 assessment, she believed that Student met the criteria for ID set forth in California special education law. Student consistently tested far below the average level in both cognitive ability and adaptive functioning. Henry said that, according to legal directive, she is supposed to list an eligibility category in her assessment if the child meets the criteria for that category. She explained that the secondary eligibility category of ID is important for a child with autism to distinguish between children with high functioning and low functioning autism. In her opinion, there is no prohibition against having two eligibility categories, and determination of eligibility is important for determining an appropriate plan for the child. Potucek, during her testimony, agreed that Student met the criteria for ID.

78. Moses also opined that Student met the eligibility criteria for ID. Moses is a licensed educational psychologist and a credentialed school psychologist. She received her master's degree in educational psychology and counseling in 1990, and has been the Program

Director for the SELPA since 2006. In her opinion, the District's 2011 assessment was appropriate to determine Student's cognitive levels. She did not personally assess Student, but she explained that the District's assessors used valid and reliable measures to determine Student's abilities and assessed him in all areas of suspected disability. She explained that, unlike a diagnosis under the DSM-IV,⁷ an eligibility for special education under ID does not require an IQ score. Based on her knowledge and expertise, Moses felt that the SCOSD is an appropriate test to use for children with autism who do not have the language or attention skills to take standardized tests. In her opinion, a school district must identify all applicable eligibility categories for a child on an assessment; they cannot pick and choose between them. She explained that the District had not included speech-language as a secondary eligibility category because speech-language deficits are included in a finding of eligibility due to autism.

79. Student's mother did not agree with the District's decision to include ID as a secondary eligibility category. She does not believe her child is intellectually disabled. She explained that Student's parents were not satisfied with the District's assessment, which is why they contacted Dr. Freeman for an independent assessment.

80. Dr. Freeman disagreed with the District's decision to include ID as a secondary eligibility category. As discussed above, in her opinion, cognitive tests may not be accurate when dealing with autistic children. Scores may change based on the setting of the test and who is conducting the test.

81. While Dr. Freeman agreed that some children with autism can also have ID, it is not necessarily true for all children with autism even if they function below their grade level. In her opinion, you cannot make a finding of ID for an autistic child until the child is older and you can obtain valid cognitive scores. She believes it is very difficult to measure the true potential of an autistic child before age six or seven. In her experience, research has shown that early testing does not predict later test results and cognitive tests done early in autistic children must be viewed with caution.

82. Dr. Freeman also opined that it is not appropriate to make a determination of ID without administering a standardized test that produces an IQ score. She testified that the three tests used by the District psychologists in the May-June 2011 assessment were appropriate to determine Student's educational needs, but were not the type of tests that produce IQ scores and therefore could not be relied upon to make an eligibility determination of ID. She felt that an IQ test such as the WPPSI should be used, although she acknowledged that Student's language deficits would preclude the administration of that type of test on him. In her own testing of Student, she administered only one subtest of the WPPSI, and she made no attempt to deduce an IQ score based on her administration of the

⁷ DSM-IV stands for the Diagnostic and Statistical Manual of Mental Disorders – Fourth Edition. It is relied upon in making a determination of whether a disabled individual is eligible for Regional Center services. School districts rely upon the eligibility criteria set forth in federal and state special education laws and regulations, not the DSM-IV.

test. She explained that she did not have any qualms about the District's assessment, just their conclusion based on that assessment. She acknowledged that the Los Angeles Unified School District uses the SCOSD to measure cognitive ability of African American pupils because of the decision in the case of *Larry P. v. Riles* (9th Cir. 1986) 793 F.2d 969 (*Larry P.*), forbidding the use of standardized IQ tests to determine the cognitive abilities of African American children for special education eligibility.

83. In addition to Dr. Freeman's general concerns about autism and ID testing, she also had concerns about Student's scores in particular. She explained that, according to the District's test results, Student had some skills close to his age. For example, on the DP-3, he had emerging skills up to a four year, eight month level. He was five years, three months old at the time of the District's tests. In Dr. Freeman's opinion, these scores demonstrated the "scatter" of scores found in a child with autism which made overall test scores meaningless.

84. The District's DP-3 results showed that Student had a few emerging social and adaptive skills above the four year level, such as playing group games and selecting a video. Student also had emerging physical skills above a four year level. Student's emerging skills in the areas of cognition and communication were all below the four year level.

85. Dr. Freeman's report noted in part "[i]ndividuals with Autistic Disorder do not typically present with a consistent scoring profile. For example an individual may score on some items below chronological age, while scoring on other items above chronological age, reflecting a diagnostic presentation of 'consistently inconsistent.'" For that reason, Dr. Freeman believed it was important to consider the results of subtests separately instead of relying solely on overall scores when assessing an autistic child. She admitted that, according to the results of the Vineland, Student was functioning in the manner of a child with ID, but she said that is typical of children with autism.

86. In Dr. Freeman's opinion, Student had developmental delays, but it was too early to determine if he had a developmental disability. For this reason, she gave no opinion during her testimony as to whether Student has ID as well as autism.

87. In its closing argument, the District contends that the inclusion of a second eligibility category did not alter the program that the District offered to Student in the July 2011 IEP. For example, Moses testified that Student's proposed goals were based on Student's present levels of performance and his baselines, not his ID eligibility.

88. The determination of whether the District properly included ID as a secondary eligibility category in Student's July 2011 proposed IEP is partly a legal issue. It will be analyzed in Legal Conclusions 13 – 35 below.

Did the District's July 2011 Proposed IEP Offer Student a FAPE?

89. The District ultimately proposed an IEP in July 2011 that contained, among other things, the following proposed placement and services: intensive individual services

consisting of a one-to-one ABA program five days a week for four hours a day (1200 minutes per week) to be provided in a separate classroom at school; one-to-one individual ABA services for two hours per day five days a week (600 minutes per week) provided in Student's home; small group adapted physical education services two times a week for 30 minutes per session; speech and language services three times a week for 30 minutes per session in a separate classroom at school; ABA supervision services consisting of 15 60-minute sessions per month (total of 900 minutes per month), including a 90-minute monthly team meeting to provide regular reports of progress to Student's parents; occupational therapy individual services one time a week for 30 minutes per session; occupational therapy consultation services one time a month for 30 minutes; occupational therapy group services one time a week for 30 minutes per session; and a session of parent training for 30 minutes a week at home. (The parts of the IEP outlining the transition plan will be discussed below.)

90. The IEP also called for a functional analysis assessment (FAA) to develop a behavior intervention plan (BIP), as well as behavioral goals. The IEP noted that Student previously had a BIP, but recommended that the FAA be conducted in the new classroom environment to determine whether Student still required a BIP and what behavioral interventions would be necessary in his new environment.

91. The classroom accommodations section of the IEP noted that Student "will be provided a modified curriculum to address his goals. He will additionally be provided the following accommodations to support his learning and participation in his program: 1:1 instruction by staff trained in ABA strategies, Sensory strategies (i.e., heavy work activities, move n sit cushion, animal walks, crawling, activities done on his tummy), visual cues, gestural cues, picture symbol communication/choice boards, frequent reinforcement surveys and change in reinforcers, simplified verbal directions, and materials selected to support motivational needs."

92. Student challenges the proposed IEP for several reasons.⁸ First, Student contends that the transition plan was inadequate to effectively transition Student from his AP program to a District ABA program. Second, Student contends that some of the goals were inappropriate and that there were too many goals in the IEP. Third, Student contends that the IEP was not appropriate substantively and would not provide Student with educational benefit.

⁸ Because portions of the IEP are not in dispute (for example speech-language services and some of the goals), the Factual Findings in this Decision will focus on the portions of the IEP which Student claims were defective. However, this does not change the burden of proof on these issues. As discussed in Legal Conclusion 1 below, because the District sought the due process hearing to defend the adequacy of its IEP, the District still has the burden to show its July 2011 IEP offered Student a FAPE.

The Transition Plan

93. The IEP offered a plan to transition Student from his AP program to a school ABA program. The notes to the IEP describe the transition plan as follows:

“In order to facilitate transition to the proposed placement and services in September, District shall provide 20 hours of intensive individual instruction (ABA) in August, 2011 by which District ABA providers will utilize 10 hours to observe [Student’s] program as provided by Autism Partnership in home and clinic settings. The remaining 10 hours shall consist of intensive instruction (ABA) provided by District staff in the home and clinic settings with observation and coaching from Autism Partnership staff. ABA Supervision by district shall also be provided for a total of 6 hours during this period to collaborate with Autism Partnership Supervisor and coordinate District ABA services during the transition.”

94. The proposed IEP also included a service under the heading “other special education/related services” consisting of five sessions per month, 60 minutes per session from September 1, 2011, to December 1, 2011. The IEP described the service as “[a]dditional ABA Supervision during transition period from NPA provider to ensure consistency in program and to collaborate with regional center funded home program.” The location of the service was identified as “service provider location” and the provider was listed as “District of Service.”

95. Student made two basic contentions regarding the transition plan. First Student argued that the plan was too short and did not provide for an effective transition. Second, Student argued that the clause regarding the additional ABA supervision described in the previous Factual Finding was vague and ambiguous.

96. Witnesses on both sides testified about the proposed transition plan. Doyle was the main District witness who testified in support of the proposed transition plan. She explained that the transition was intended to occur in August 2011 to enable Student to start ABA services by the District in September. The transition would begin with District staff spending 10 hours observing ABA conducted by AP with Student. After that, the District staff would provide 10 hours of ABA services directly to Student with coaching from AP staff. She testified that the AP representatives who attended the July 2011 IEP meeting were asked for their input on the transition plan during the meeting.

97. Doyle has worked with transitions in the past and believed that the transition plan proposed in the July 2011 IEP was appropriate. Doyle planned to supervise Student’s transition. Doyle had previously supervised the transition of a child from one District school to another, but this would be the first time she supervised a transition such as Student’s. Based on her knowledge and experience, she believed she would not have any difficulty transitioning Student back to a District program.

98. Student's experts objected to the transition plan. Andrea Waks is the Director of Client Services at AP. She received her master's degree in psychology in 1983 and her law degree in 1997. She has been working with ABA and autistic children in various capacities since approximately the 1980's. Waks felt that 20 hours was not a very significant amount of time for a transition, but could not state a number of hours that would be appropriate for Student's transition. She was not comfortable with any transition plan that called for a certain number of hours, and believed instead that the transition should be based on how effectively the new staff could implement the program.

99. Amber Raemer, a Research Coordinator and Mentor/Consultant for AP, also believed that the proposed transition plan was not appropriate. Raemer has worked for AP since 1996 and received her master of science in applied behavior analysis in 2004. She supervises the AP staff members who are providing Student's services and spends time directly with Student. Like Waks, Raemer was unable to give a number of hours that she thought would be appropriate for Student's transition. Instead, the effectiveness of the transition was dependent on the ABA staff and supervisor who work with Student. In her opinion, the individuals taking over Student's program had to be able to show they could assess the functions of his behavior, make adjustments and create new replacement skills. She admitted that her own experienced AP staff members working under her direction might be able to transition Student in the 20 hours proposed by the District's IEP. However, she testified she would want more than six hours of supervision time for the transition. She explained that other pupils might not take so long to transition, but Student's needs were very complex.

100. Dr. Freeman opined that a 20-hour transition program would not be enough time because of Student's complex needs, but like the others she could not state how much time would be necessary. She explained that it would depend on the training and skill of the individuals taking over the program. She felt the transition must happen very slowly over a long period of time. She admitted that she was not familiar with the training of AP aides or how often AP changed staff working with Student.

101. Moses, on the other hand, agreed with Doyle that the transition plan was appropriate. She felt that the 10 hours of observation was sufficient for the District staff to learn the reinforcement system used by the AP staff with Student. She testified that the subject of the transition was discussed during the IEP meeting and the District asked the AP representatives for their input. The AP representatives felt the transition could not have time or numbers attached to it. In Moses opinion, they seemed to base the length of transition on how Student was responding or how the staff was responding as opposed to a predetermined time. However, Moses explained that the District had an obligation to make it clear to Student's parents what the transition period would be.

102. The underlying concern of Student's witnesses was that Student would regress during the transition period. However, the evidence showed that, despite initial regression after changes in his staff and program at AP, Student continued to make slow, steady progress. Tracee Parker, a Clinical Associate with AP, explained that Student does not like

transitions, but AP does change some of his staff on a regular basis. At other times there has been significant turnover in Student's AP staff. Raemer testified that even after significant staff changes at AP, Student continued to make progress.

103. A major change in Student's AP program occurred when he was toilet trained. During toilet training, AP placed much of the rest of Student's program on hold. AP tried toilet training Student on two occasions. In approximately November 2010, AP began a toilet training program, but cut the training short due to Student's family circumstances. The second time, in approximately February or March 2011, toilet training was implemented successfully. After the toilet training, AP resumed Student's regular ABA programming. According to the goals AP brought to Student's IEP meeting in June 2011, following both of the toilet training periods Student "experienced a significant regression in behavioral control and struggled regaining the use of skills he had previously acquired." However, despite this temporary regression, AP representatives testified that Student made slow but steady progress while at AP.

104. Dr. Freeman testified that prior to her assessment in January/February 2012 Student suffered regression because of a change in AP staff and a holiday break when he did not get ABA programming. Student's mother also testified regarding Student's regression in January 2012, but explained that things had been better after January.

105. During the hearing, Dr. Freeman opined that Student is at a critical stage in his development and needs tight ABA control at this point in his training. In her opinion, any change in his program will result in regression.

106. The evidence supports the opinion of the District witnesses that the proposed transition program was appropriate and reasonably calculated to meet Student's needs. While Student suffers regression during transitions, even after drastic changes in AP staffing and programming, he has always been able to recover from regression and make progress. In criticizing the District's proposed transition program, the AP witnesses seemed more concerned about the experience and abilities of the District staff than Student's ability to transition. While they complained that 20 hours of transition time was insufficient, none of Student's witness was able to articulate a number of hours that would be appropriate.

107. As stated in Factual Findings 137 – 140 below, the District's ABA supervisors and staff had extensive training. The District had knowledge of Student's AP program and strategies at the time the IEP team discussed the proposed transition plan. Doyle had observed Student's clinic meetings at AP and listened to the AP team discuss strategies for Student. One or more of the District staff had observed Student's AP program in connection with the 2011 assessment. District staff had received regular, written reports from AP. To the extent that District staff might need additional coaching regarding effective ABA strategies to use with Student, they would have 10 hours of observation of the AP program and 10 hours of coaching from AP staff to assist them.

108. Dr. Freeman's testimony that Student is at a critical stage and cannot transition to the District is not persuasive. In the first place, her opinion was based on her assessment of Student more than six months after the IEP offer was made, not at the time of the June/July 2011 IEP meetings. Even if Student was at a critical stage in his program as of February 2012, that would have no application to an IEP offered six months before. The District did not have the benefit of Dr. Freeman's opinion or input at the IEP meeting.

109. However, even if her opinion did relate to July 2011 and even if the District had notice of her opinion at that time, there are still weaknesses with her opinion. First, as discussed in Factual Findings 37 – 55 above, the problems with her report weaken her opinion. Her testing did not show that Student failed to make progress in the District program or that he made progress at AP. Further, the evidence did not support her opinion of the critical nature of Student's current program. Student has been working on "learning to learn" skills with AP for over a year and a half. The staff at AP halted that program on at least two occasions to concentrate on toilet training. Prior to Dr. Freeman's assessment, Student's AP staffing had changed and Student took a break for the holidays. Those circumstances do not support a finding that the ABA program was at such a critical stage that it could not be transferred to the District.

110. The evidence supports a finding that the proposed transition plan was appropriate to meet Student's needs at the time it was proposed in June and July 2011.

111. Student's second objection to the transition plan involved the clause described in Factual Finding 94 above, which called for additional hours of ABA supervision between September 1, 2011, and December 1, 2011, to ease the transition process. Student contends that the clause is vague because it does not specify whether AP or the District will provide the hours of additional ABA supervision services.

112. Moses testified that the clause was intended to provide additional collaboration between the District staff and AP for the first few months after the transition. She explained that the District would provide five additional hours of AP services during that time period. Student contends that the clause is ambiguous, because the "provider" is listed as the "District" not AP. Moses testified that the mention of the District as the provider was a typographical error based on the wrong choice in a "pull-down menu."

113. That clause, even if ambiguous, was not sufficient to destroy the transition plan or deny Student a FAPE. If the designation of provider as "District of Service" truly raised an ambiguity in the minds of Student's parents about whether AP would be involved in these additional supervision hours, all they had to do was ask a single question to obtain clarification. Student's parents were represented by counsel during and after the IEP meeting and could easily have clarified the matter. Further, the transition plan would have been appropriate even if that clause had been omitted entirely from the IEP, so there was no procedural or substantive violation even if the clause was vague.

114. Student's reply closing brief contended that the District's proposed transition plan did not provide for any hours by AP, so it did not give Student's parents proper notice of the transition offer. It is not clear what Student meant by this, because the transition plan mentioned AP hours. If Student is arguing that the IEP should have contained a separate page listing AP transition services, the lack of such a page does not make the offer ambiguous – the offer clearly anticipated that the District would fund any AP services required as part of the transition.

The IEP Goals

115. The IEP goals were discussed at both meetings. During the first meeting, AP provided proposed goals in the areas of lessening self-stimulatory behavior, learning new age-typical play activities, functional communication, receptive language, community safety (staying with an adult when in the community), imitating actions, and matching identical and non-identical items.

116. The first time the District team members saw the AP proposed goals was at the June 2011 IEP meeting. The District IEP team members reviewed the AP proposed goals between the June and July IEP meetings, and made revisions to the District's proposed IEP goals based on AP's input. The IEP team also made revisions to the goals during the July IEP meeting.

117. The IEP proposed by the District on July 7, 2011, contained approximately 25 goals. Student's parents ultimately agreed to some of those goals so they are not at issue in this case. Those agreed-upon goals include two goals related to gross motor skills, three goals related to receptive language skills (understanding six verbs in context, identifying basic body parts and clothing items by pointing to them, and understanding 10 new school-related vocabulary words including certain specified words), two expressive communication goals (requiring imitation of a new word(s) and increasing his expressive repertoire by 20 new words through naming, signing or picture selection), a goal related to following directions, a goal related to pre-reading skills (pointing to a particular picture in a book upon request by the instructor), two fine motor goals (zipping and unzipping his backpack and drawing horizontal strokes with a crayon), a goal related to motor planning, and a safety goal involving Student's ability to wait or remain within the proximity of a supervising adult for up to two minutes at a time.

118. There are 12 disputed goals remaining at issue in this case. The first was a behavior goal requiring Student to reduce his tantrum behavior to no more than one episode per week and fussing behavior to no more than one episode per week. Doyle drafted this goal. She explained that her review of the reports from AP showed that reduction of tantrum and fussing behavior had been one of the priorities of Student's AP program because those behaviors interfered with his ability to learn. Doyle derived the baseline for the goal from the information contained in AP's progress report. In her opinion, the goal was objectively measurable and could be achieved by Student in one year.

119. Doyle also drafted a behavior goal requiring Student to show improved self-control by refraining from self-stimulatory behaviors for at least six minutes. She based this goal on information from AP, as well as her observations and testing. She believed the goal was necessary because these behaviors interfered with Student's ability to learn. In her opinion, the goal was objectively measurable and could be achieved in a year by Student.

120. The third disputed goal was a safety goal calling for Student to stay with adults during transition activities both in and outside of a building and to stop if the adults said to stop or wait. Doyle explained that Student's behavior of this type had been a concern of both the District in its prior program and of AP. In her opinion, the baseline for the goal was accurate, the goal was objectively measurable, and it could be achieved in a year's time.

121. The fourth goal was an academic goal requiring Student to demonstrate the ability to match at least six different categories from a field of at least three with 80 percent accuracy. Doyle proposed this goal because it involved a skill that was a building block for later skills and was a skill that AP was working on with Student. In her opinion, the baseline was accurate at the time of the IEP meeting, the goal was objectively measurable, and it could be achieved in a year's time.

122. Doyle also drafted an attention goal, requiring Student to show improved attention by imitating a sequence of two actions performed by third person with 80 percent accuracy. This was an area of focus of Student's AP programming, and Doyle believed that it was an area of unique need that required a goal. In her opinion, the baseline was accurate, the goal was objectively measurable, and it could be achieved in one year.

123. The IEP also contained three goals related to play skills: a goal calling for Student to learn to play with 10 new, age-appropriate toys; a goal involving reciprocal play in which Student would demonstrate turn taking in highly structured activities; and a goal involving independent play in which Student would independently maintain engagement with an activity or toy for a total of five minutes or longer for at least 10 different play activities. Doyle proposed these goals because each was an area of need for Student and AP was working on play skills. In her opinion, the baselines were accurate, the goals were objectively measurable and they could be achieved by Student in one year's time.

124. The next two goals involved communication through a communication book filled with pictures/icons and a communication goal for Student to respond to "communication temptations" by using either picture/symbol communication, sign/gesture or a word/word approximation. Doyle drafted these goals based on the District's assessment and what she observed Student working on at AP. In her opinion, the baselines were accurate, the goals were objectively measurable, and they could be achieved in a year's time.

125. Doyle also proposed a math concepts goal in which Student would touch items up to five as an adult counts and attempt a verbal approximation for the last number. She based the goal on her assessment of Student and review of records. During the hearing, she explained that this is an important skill to prepare Student for kindergarten and first grade.

In her opinion, the baseline was accurate and the goal was measurable and could be achieved in a year's time.

126. The final disputed goal required Student to locate and match items from various places within the same room without disruptive behavior with 80 percent accuracy. Doyle explained that this goal arose because of a discussion during one of the IEP meetings about Student engaging in matching skills without disruptive behavior. There was another goal related to matching in the proposed IEP but that goal worked on categories. For this second matching goal, the focus was on compliant behavior during the matching exercise. In Doyle's opinion, the baseline for the goal was accurate, and the goal was objectively measurable and could be achieved in one year's time.

127. The main objection to the goals during the IEP meeting was not to individual goals or the areas targeted, but to the number of goals. The section of the IEP entitled "concerns of parent relevant to educational process" noted: "[t]hey are concerned with the quantity of proposed goals and don't want his success diluted with things that don't work."

128. Waks told the IEP team that she believed too many goals would reduce the intensity of Student's ABA program. During the hearing she explained that Student is a slow learner – if there are too many goals it is hard for him to reach mastery of any one skill. The AP staff felt Student's goals should focus on areas such as functional communication, readiness skills, frustration tolerance, self-control, and reducing elopement. They also wanted the goals to involve functional things that Student could use in every day life.

129. During her testimony, Waks raised only minor concerns about a few of the individual goals. She expressed concern that the communication goal (described in Factual Finding 124 above) allowed Student to use too many communication modalities. She was concerned that it might be confusing for him. She also objected to two of the other goals, but those goals were agreed to by Student's parents, so they are not at issue in this Decision.

130. Dr. Freeman believed that Student could not achieve 25 goals in one year, although she admitted that she does not write goals. She felt that Student's program and goals should focus on his behavior. Once his behavior was under control, Student's program could move onto other skills. In her report, Dr. Freeman criticized some of the goals in the proposed IEP, because she believed Student had already met those goals. There were also implications in her report that the District's goals were improper because they called for Student to use a communication picture book instead of an iPad and Proloquo.

131. Moses disagreed with Dr. Freeman. She opined that each of the goals was appropriate and addressed an area of need for Student. Many of the disputed goals addressed areas in which AP was working with Student. She explained that the IEP team had written the goal for a picture book, because the District IEP team members did not learn about Student's use of the iPad and Proloquo until the IEP meeting. When they learned about it, they proposed an assistive technology assessment for Student.

132. Moses' position is more persuasive in this regard. Dr. Freeman's criticism of the goals was based on her findings during her assessment, not Student's situation six months earlier at the time of the IEP offer. Just because Student had met certain goals six months later does not mean the goals were inappropriate at the time they were offered. The District IEP team members did not learn about Proloquo until the time of the IEP meeting, and when they learned about it, they acted appropriately.

133. The evidence supports the District's position that the goals in the July 2011 IEP were appropriate. They all involved areas of need for Student. At the time of the June/July 2011 IEP meetings, AP was working with Student on most of these areas, so the District's proposed goals simply reflected the work that was already being done with Student. The District witnesses were experienced educators who had worked with children on goals before. They believed that Student could meet all 25 goals in one year. If Student failed to make progress on his goals, the District would be responsible for holding another IEP meeting to revise his program.

The District's Proposed ABA Program

134. Student's main concern regarding the District's proposed ABA program was whether the District staff could effectively implement the program to enable Student to gain educational benefit. The offer itself does not appear to be the problem -- the District offered a very similar program to the AP program. The District witnesses testified that the proposed program would provide Student with a FAPE. Doyle described in detail the various components of the District's proposed program and how they would help Student gain educational benefit in the least restrictive environment. Moses opined that the proposed services were appropriate and were comparable to the approximately 32 hours per week of ABA instruction Student had been receiving from AP at the time of the July IEP meeting.

135. During the hearing, Student's experts did not object to the District's proposal as it appeared on paper or state that such a program could not provide Student with educational benefit. It would have been difficult for Student to do so because the program was so similar to the AP program. Student's own experts stated that an intensive one-to-one ABA-based program was necessary for Student.⁹

⁹ The District's proposed ABA program and the AP program are so similar that Student had to stretch to find differences between them. For example, Student brought in evidence that the District aides do not attend monthly meetings with the parents, while AP aides attend monthly clinic meetings. Student also pointed out that the District's data tracking sheets do not define the maladaptive behavior that is being tracked and the District supervisors do not prepare graphs of data, while the AP data tracking sheets define behavior and AP supervisors prepare graphs. At hearing, the District witnesses explained that the constant oversight of District ABA aides by teachers and other ABA supervisors made these types of practices unnecessary for the District's program.

136. Instead, Student's experts questioned the ability of the District staff to implement an ABA program appropriately. However, the evidence at hearing showed that the District staff members were highly trained and well qualified to conduct an ABA-based instructional program.

137. District employees who use ABA methodologies with children receive extensive training. First they are required to undergo 40 hours of training given by the SELPA regarding ABA-based instruction and techniques used as part of ABA such as discrete trial training (DTT). The SELPA training program began in the 1990's when the number of autistic children in school began to increase. The SELPA brought in experts in the field of autism to help set up the training program.

138. The 40 hour SELPA training takes place over five days. The first two days involve lectures on the characteristics of autism and similar matters. The next three days involve the hands-on application of DTT and other strategies. The trainees engage in role play simulations of conducting ABA-based instruction. They are given a written test, and are also tested on how well they did on hands-on work and role play.

139. Once they finish their level one training through the SELPA, the trainees return to their school district for their level two training. This consists of 10 hours of observation and 30 hours of hands-on ABA instruction in which they are coached by the trainers. After they finish that level two training, they must pass a hands-on test in which they are graded on data collection and ability to implement the techniques. If they pass, they go through a six month probationary period.

140. Doyle explained that she conducts an interview with each District trainee to make sure the individual understands the process, and District educators provide additional direct training to aides working with specific pupils. The aides also attend annual trainings. Two District ABA aides, Tyler Leon and Brenda Edelen, testified at hearing about the intensive nature of the SELPA and District training. Doyle testified that the District staff was qualified to implement Student's IEP and could implement it appropriately.

141. Student's witnesses did not dispute the qualifications or training of the District ABA staff, but instead focused on their ability to understand Student's needs and effectively implement the program. Dr. Freeman was particularly critical of the District's ABA staff and the IEP offer. In her report, she noted that:

"It is clear from all data presented that [Student] was making no progress and appeared to be regressing prior to beginning his program at Autism Partnership. Since instigating the Autism Partnership program [Student] has shown significant improvement. Review of the IEP proposed by the school district indicates that the district has little understanding of [Student's] current level of functioning and of what his needs are. Goals are written for skills [Student] has already learned and some goals are meaningless for [Student]. All of [Student's] goals need to be functional, meaningful to [Student] and

lead to independent functioning. In addition, the district has failed to write a behavior plan for [Student] which indicates a lack of recognition as to the importance of [Student's] behavioral difficulties and the implications this has for him to be able to function in an academic setting.”

142. At hearing, Dr. Freeman reiterated her belief that the District has little understanding of Student's needs. In her opinion, the problems with the District's proposed goals demonstrated that lack of understanding. She felt that Student's program must focus on intensive behavioral training, not on the other skills addressed in the District's IEP. In her opinion, the District's IEP did not place emphasis on what Student needs at this point in his life. She was concerned the District's inclusion of ID as a secondary eligibility category indicated that the District staff would not have high expectations for Student.

143. Dr. Freeman also believed that Student should stay in the AP environment until his behaviors are under control. Until that time, in her opinion, no educational program would be appropriate for him. She opined that any change to Student's program would cause serious regression at a time when he's just beginning to show real progress.

144. Dr. Freeman was extremely experienced and knowledgeable in the field of autism, but there were several weaknesses that made her opinions less persuasive than they might otherwise have been. First, she had not met Student prior to her assessment in 2012, and did not know him at the time of the District's IEP offer. Much of her criticism of the District's program was based on Student's needs at the time of her assessment, not at the time of the IEP offer. Student's needs had changed by the time of Dr. Freeman's assessment. For example, Dr. Freeman's comment that the goals were written for skills Student had already learned ignored the fact that her assessment was conducted after Student had six months to progress.

145. Dr. Freeman criticized the District for failure to propose a behavior plan, but apparently missed the fact that the District's IEP offered to conduct an FAA to prepare a behavior plan after Student started in the school program. Moses explained that the nature of an FAA requires it to be done in the educational setting where the child will be placed. Doyle testified that a child's behaviors might be different in another environment, so analyzing his behaviors in a school setting would lead to a more accurate BIP.

146. Dr. Freeman did not speak with the District or SELPA staff at the time of her assessment, although she had their reports. Her opinion regarding Student's lack of progress in the District's program was based, at least in part, on her comparison of the Mullen test results. As stated in Factual Findings 37 – 55 above, that comparison was flawed and weakens her entire opinion.

147. Dr. Freeman sincerely believes that AP will do a better job with Student's program than the District will. However, as discussed in the Legal Conclusions below, the legal standard for determining a FAPE does not involve a comparison of a district's proposed program to the parents' preferred program. Nothing in Dr. Freeman's opinion was sufficient

to counter the testimony of the District witnesses that the July 2011 IEP offer was reasonably calculated to provide Student with meaningful educational benefit. Every one of Student's experts testified that Student was making progress in the AP program. The District's offer of FAPE was extremely similar to the AP program, except that it involved District providers rather than AP. As of July 2011, the District staff had every reason to believe Student would make the same educational progress in the District's proposed program as he had at AP.

148. Student also contends that the District's inclusion of sensory strategies in the proposed IEP demonstrates that the District did not understand Student's needs. As stated in Factual Finding 91 above, the proposed IEP called for the use of sensory strategies such as "heavy work activities, move n sit cushion, animal walks, crawling, activities done on his tummy."

149. Doyle testified that the occupational therapist at the IEP meeting felt that sensory strategies should be part of Student's program. Doyle explained that sensory strategies, such as Student engaging in activities on his tummy, could help Student develop muscle strength that he would need for subsequent, more-advanced activities.

150. Waks testified that there was no evidence to show that sensory-based strategies are effective for a child with autism. Waks believed that sensory strategies had not been effective for Student in the past, and she was concerned to see the July 2011 IEP rely upon those ineffective strategies. Waks was concerned that sensory strategies, if used inappropriately, could reinforce maladaptive behaviors.

151. Part of Student's objection to sensory strategies involved the use of a "chew toy." The chew toy was a small item given to Student to discourage biting behavior. According to the assessment reports, a chew toy had been used in the past to calm Student and curb his biting. The UCLA Hospital assessment report described above in Factual Findings 5 – 7, noted that Student had developed a habit of biting himself and others, and that Student's parents used a "chew-T" for him.

152. The District's 2008 – 2009 assessment report noted that Cornerstone Therapies, Student's provider of services prior to age three, introduced the use of a "chewy T" to Student to reduce his biting of himself and others. The report also noted that during the District's observation of Student at Cornerstone Therapies, Student had a difficult time transitioning to occupational therapy "and was given a chew T and physical comfort before he could calm down." The report mentioned that, during the observation at Cornerstone Therapies, Student "responded well to having a chewy tube in his mouth for calming."

153. When the District first drafted the proposed July 2011 IEP, the use of the chew toy was included with the sensory strategies. Based on the concerns raised by Student's parents and the AP providers during the IEP meeting, the District deleted the chew toy from the IEP. However, Student contends that the initial proposal for the chew toy demonstrates that the District staff did not understand Student's needs at the time of the meeting.

154. Waks testified that she did not believe Student's biting behavior was due to a sensory need, so giving him a chew toy might serve as an accommodation to reduce his biting, but would not teach him appropriate replacement behaviors. Student mother testified that she was also very concerned when the District proposed using the chew toy. Student contends that the prior use of the chew toy, as well as other strategies used by the District in its prior program, reinforced Student's maladaptive behaviors instead of extinguishing them.

155. The evidence does not show that the inclusion of sensory strategies in the IEP would deny Student a FAPE. Based on earlier assessments and the input from the occupational therapist during the IEP meeting, there was some basis for the District to conclude that sensory strategies might be effective for Student. The District deleted the chew toy from the proposed IEP, and Student's parents agreed to the occupational therapy services in the proposed IEP. The mere fact that sensory strategies were included in the IEP does not prove that the District would fail to implement properly the ABA services that make up the vast majority of the District's program for Student.

156. In written closing argument, Student objects to the District's proposed program, in part, because it did not address the "complex and sophisticated token system currently being used" with Student by AP. Likewise, Student objects to the proposed IEP because it did not mention the AP relaxation training. The evidence indicated that both of these strategies were put into place by AP *after* the IEP offer in question.

157. Raemer testified that the token reinforcement system changed over time as Student progressed in the AP program, and by the time of the hearing it had three levels of reinforcement. She did not specify when his token system changed. Based on the June 2011 AP progress report, it does not appear that the three-level token system was used at the time of July 2011 IEP meeting, so it could not have been included in the District's IEP. However, even if the "complex and sophisticated" token system had been in place at the time of the July 2011 IEP meeting, the 20 hours of transition time would be sufficient for the District educators to learn that system.

158. Likewise, the evidence at hearing regarding the relaxation training indicated it was a relatively recent addition to Student's AP program. For example, the relaxation training was not mentioned in the June 2011 AP progress report.

159. Student's primary objection to the proposed IEP arises from Student's belief that it mirrors the District's prior program for Student in 2009-2010. Student contends that, because he did not progress under the prior District's program, he would not progress in the new one which was so similar to the old. In his closing brief, Student argues that the District did not properly implement or supervise Student's prior ABA program.

160. This contention is highlighted by portions of the testimony of Student's parents. For example, Student's parents referred to two occasions in which Student had run away from his ABA aides in the District's prior program. On the first occasion, in approximately June 2009, Student had run out of his District classroom and was stopped

before he reached the parking lot by a District aide. On the second occasion, Student's father saw Student running in a gated area at school with no supervision.

161. Student's mother testified that Student's behavior became worse under the District's prior program and that he failed to make progress. She stated that Student has made progress since starting the AP program, including increased eye contact, using his iPad for basic communication, riding a bicycle, and playing more with his brothers.

162. The testimony of Student's parents and the AP witnesses showed that Student made progress in his AP program. However, as discussed in the Legal Conclusions below, the FAPE standard looks at a District's proposed program, *not* the parents' preferred program.

163. Likewise, Student's comparison of the District's prior program with the July 2011 offer was not sufficient to show a denial of FAPE, even if Student was correct that Student made no progress in the prior program.¹⁰ In the first place, the District's July 2011 IEP offer was *not* identical to its prior program. The July 2011 IEP included, among other changes, additional one-to-one, ABA-based instruction and additional supervision time. Secondly, the circumstances had changed since the prior program. Student had grown since the prior District program and his needs had evolved. The District staff had the input of AP staff at the IEP meeting and would be observing the AP program as part of the transition.

164. More importantly, however, as discussed in the Legal Conclusions below, Student's basic contention fails as a matter of law. Student cannot use the District's alleged failure to implement the program properly in 2009 – 2010 to prove that an IEP offered a year later was inappropriate, particularly where the parties had entered into a settlement agreement of a prior case.

165. Finally, Student's mother expressed her concerns about Student returning to the District because of the District's conduct during the surveillance of Student's family. She said that after the settlement was signed, the District accused the family of moving out of the District and tried to stop payments for the AP program. She reported that her family was followed, and her children were terrorized by it. Student contends the District's conduct destroyed the family's trust of the District.

166. However, as stated in Factual Findings 74 – 75 above, there is no indication that the District's surveillance had any impact on the IEP meetings or Student's proposed program. Williams was not even at the two IEP meetings in question and had little if any involvement in the IEP offer. Any hostility or lack of trust between the parties does not invalidate an otherwise appropriate IEP.

¹⁰ Nothing in this Decision is intended to imply that Student failed to progress in the District's prior program or that the District improperly implemented that program.

LEGAL CONCLUSIONS

1. The party filing a due process case has the burden of proof. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528].) In the instant case, Student has the burden of proof with respect to his two issues, and the District has the burden of proof with respect to the remaining issues.

2. Under the Individuals with Disabilities Education Act (IDEA) and corresponding state law, students with disabilities have the right to a FAPE. (20 U.S.C. § 1400 et seq.; Ed. Code, § 56000 et seq.) FAPE means special education and related services that are available to the student at no cost to the parents, that meet the state educational standards, and that conform to the student's IEP. (20 U.S.C. § 1401(9); Cal. Code Regs., tit. 5, § 3001, subd. (p).)

3. The congressional mandate to provide a FAPE to a child includes both a procedural and a substantive component. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034] (*Rowley*), the United States Supreme Court utilized a two-prong test to determine if a school district had complied with the IDEA. First, the district is required to comply with statutory procedures. Second, a court will examine the child's IEP to determine if it was reasonably calculated to enable the student to receive educational benefit. (*Id.* at pp. 206 - 207.)

4. Not every procedural violation of IDEA results in a substantive denial of FAPE. (*W.G. v. Board of Trustees of Target Range School District* (9th Cir. 1992) 960 F.2d 1479, 1484 (*Target Range*).) According to Education Code section 56505, subdivision (f)(2), a procedural violation may constitute a substantive denial of FAPE only if it:

- (A) Impeded the child's right to a free appropriate public education;
- (B) Significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents' child; or
- (C) Caused a deprivation of educational benefits.

5. In *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, supra*, 458 U.S. at p. 201.) *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 "sufficient to confer some educational benefit" upon the child. (*Ibid.*)

6. 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. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314 (*Gregory K.*)) 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.*) An IEP is evaluated in light of information available at the time it was developed, and is not to be evaluated in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) The Ninth Circuit has endorsed the "snapshot rule," explaining that an IEP "is a snapshot, not a retrospective." The IEP must be evaluated in terms of what was objectively reasonable when it was developed. (*Ibid.*)

Did the District Commit a Procedural Violation of the IDEA by Predetermining the Placement Offered to Student in the July 7, 2011 IEP?

7. Parents are an important part of the IEP process. An IEP team must include at least one parent of the special education child. (Ed. Code, § 56341, subd. (b)(1).) The IDEA contemplates that decisions will be made by the IEP team during the IEP meeting. It is improper for the district to prepare an IEP without parental input, with a preexisting, predetermined program and a "take it or leave it" position. (*Target Range, supra*, 960 F.2d at p. 1484.) Predetermination in the development of an IEP can occur when a school district "independently develops an IEP, without meaningful parental participation, and then simply presents the IEP to the parent for ratification." (*Ms. S. v Vashon Island School District* (9th Cir. 2003) 337 F.3d 1115, 1131 (*Vashon Island*)).

8. The standard for "meaningful participation" is an adequate opportunity to participate in the development of the child's IEP. (*Vashon Island, supra*, 337 F.3d at p. 1133.) A parent has an adequate opportunity to participate in the IEP process when he or she is present at the IEP meeting. (34 C.F.R. § 300.322(a)(2006); Ed. Code, § 56341.5, subd. (a).) An adequate opportunity to participate occurs when a parent has the opportunity to discuss the proposed IEP and the team considers the concerns of the parent. (*Fuhrman v. East Hanover Board of Education* (3rd Cir. 1993) 993 F.2d 1031, 1036.) An adequate opportunity to participate occurs when a parent engages in a discussion of the goals contained in the proposed IEP. (*J.G. v. Briarcliff Manor Union Free School Dist.* (S.D.N.Y. 2010) 682 F.Supp.2d 387, 394.)

9. As stated in Factual Findings 56 – 75 above, the evidence at hearing showed there was no predetermination or failure to allow parental participation in the instant case. There was a full and meaningful discussion at both IEP team meetings. Student's parents, the AP representatives, and Student's counsel all had an opportunity to provide input, ask questions, and discuss their objections to the proposed IEP. Goals were changed based on input during the meeting, strategies (such as the use of the chew toy) were changed based on input, and the District IEP team members proposed an AT assessment based on what they learned at the meeting. There was a full discussion regarding placement, present levels of performance, services, accommodations, and the details of the proposed ABA program for Student.

10. Just because the parties disagreed about who should provide the ABA services does not mean there was predetermination. Parental participation does not mean that a school district must accept every preference of the child's parents. A parent does not have a veto power at an IEP meeting. (*Vashon Island, supra*, 337 F.3d at p. 1131.) Likewise, just because the team does not adopt a placement preferred by the parent, does not mean that the parent did not have an adequate opportunity to participate in the IEP process. (*B.B. v. Hawaii Dept. of Education* (D.Hawaii 2006) 483 F.Supp.2d 1042, 1051.)

11. Furthermore, even if there had been a procedural violation at the July 2011 IEP team meeting due to predetermination, any due process case based on that violation would be barred by the terms of the settlement agreement. As discussed in Factual Findings 15 – 20 above, the August 2010 settlement agreement contained numerous clauses waiving claims through August 31, 2011. There was a specific waiver of procedural claims “relating to the Student’s educational placement...including but not limited to the IEP content, notice, team meeting, and meeting attendance requirements...” In exchange for all these waivers the District, among other things, agreed to reimburse Student’s parents for ABA services by an NPA. A specific waiver of procedural claims relating to the IEP team meeting would include things that occurred at that meeting, such as predetermination by the District staff.

12. Student failed to meet his burden to show that the District improperly predetermined the proposed placement at the July 11, 2011 IEP meeting. Student also failed to overcome the legal bar created by the settlement agreement. There was no procedural violation and no denial of FAPE.

Did the District Deny Student a FAPE by Including Intellectual Disability as a Secondary Eligibility Category for Student?

13. In order for a child to be eligible for special education in California, the child must have a disability as defined by state and federal law. (Ed. Code, § 56026, subd. (d); 34 C.F.R. § 300.8 (2006).) However, nothing in the IDEA requires children to be classified by their disabilities (20 U.S.C. § 1412(a)(3)(B)), and the IDEA “does not give a student the legal right to a proper disability classification.” (*Weissburg v. Lancaster School District* (9th Cir. 2010) 591 F.3d 1255, 1259 (*Weissburg*)).

14. Section 3030 of title 5 of the California Code of Regulations defines the various eligibility categories under California law. Subdivision (h) of section 3030 defines ID as follows:

A pupil has significantly below average general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period, which adversely affect a pupil’s educational performance.

15. The federal definition is similar: “significantly subaverage general intellectual functioning, existing concurrently with deficits in adaptive behavior and

manifested during the developmental period, that adversely affects a child's educational performance." (34 C.F.R. § 300.8(c)(6) (2006).)¹¹

16. California law describes the eligibility category of autistic-like behaviors in the following manner:

A pupil exhibits any combination of the following autistic-like behaviors, to include but not limited to:

- (1) An inability to use oral language for appropriate communication.
- (2) A history of extreme withdrawal or relating to people inappropriately and continued impairment in social interaction from infancy through early childhood.
- (3) An obsession to maintain sameness.
- (4) Extreme preoccupation with objects or inappropriate use of objects or both.
- (5) Extreme resistance to controls.
- (6) Displays peculiar motoric mannerisms and motility patterns.
- (7) Self-stimulating, ritualistic behavior.

(Cal. Code Regs., tit. 5, § 3030, subd. (g).)

17. The federal definition of autism is similar to that of California:

(i) Autism means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences.

(ii) Autism does not apply if the child's educational performance is adversely affected primarily because the child has an emotional disturbance, as defined in paragraph (c)(4) of this section.

¹¹ Intellectual disability used to be referred to as "mental retardation," and some of the legal sources still refer to it by that name.

(iii) A child who manifests the characteristics of autism after age three could be identified as having autism if the criteria in paragraph (c)(1)(i) of this section are satisfied.

(34 C.F.R. § 300.8(c)(1) (2006).)

18. As set forth in Factual Findings 1 – 55 and 76 – 88 above, the evidence demonstrates that Student meets the technical definition of ID under state and federal law. All of the tests conducted for Student found that Student had significantly below average general intellectual functioning as well as significant deficits in adaptive behavior. Even Dr. Freeman acknowledged during her testimony that Student functions in a manner similar to a child with ID. Dr. Freeman mentioned the fact that autistic children will sometimes have inconsistent scores with high scores in some areas and low scores in others. In Student's case, however, even the inconsistent scores were still below where a typical child of his age would be normally.

19. Student objects to the District's inclusion of ID as a secondary eligibility category for two main reasons. First, Student objects to the District's May/June 2011 assessment and contends that assessment was not sufficient to make a finding of ID under the law. Dr. Freeman was emphatic in her testimony that a finding of ID cannot be made unless a child is given a standardized test that produces an IQ score. Because the District's May 2011 assessment used criterion based tests rather than standardized IQ tests, Dr. Freeman believes it was inappropriate to conclude Student has an ID.

20. Dr. Freeman's position is not supported by the law. Special education law does not require a standardized IQ test to find eligibility under ID. In fact, the law forbids an IEP team from relying solely on a single IQ test score in determining eligibility. (Ed. Code, § 56320, subd. (c); Cal. Code Regs., tit. 5, § 3030.) Indeed, with certain groups of children, school districts are not even permitted to administer standardized IQ tests. (See *Larry P.*, *supra*, 793 F.2d 969; see also *Ford v. Long Beach Unified School District* (9th Cir. 2002) 291 F.3d 1086 (IQ score not necessary for determination of specific learning disability; *K.S. v. Fremont Unified School District* (N.D.Cal. 2009) 679 F.Supp.2d 1046 (appropriate to determine cognitive ability without an IQ score).) If Dr. Freeman's opinion was correct, certain children could never be found eligible under ID under the *Larry P.* holding and would miss out on important educational services.¹²

21. The two District psychologists who assessed Student in May and June 2011 testified persuasively that the tests they gave provided a more accurate picture of Student's

¹² Even if a standardized IQ test was required, there is no real doubt how Student would have scored on such a test in the instant case – his scores would have been similar to the scores on every standardized cognitive test he previously took. During her assessment, Dr. Freeman was not even able to administer a standardized test to Student in a standardized fashion.

needs and current levels of functioning than a standardized IQ test would have done. Their decision to use alternative testing was directly in line with California law which requires:

Tests are selected and administered to best ensure that when a test administered to a pupil with impaired sensory, manual, or speaking skills produces test results that accurately reflect the pupil's aptitude, achievement level, or any other factors the test purports to measure and not the pupil's impaired sensory, manual, or speaking skills unless those skills are the factors the test purports to measure.

(Ed. Code, § 56320, subd. (d).)

22. By using non-standardized testing, the District's assessors were able to obtain a much more accurate picture of Student's needs and levels of functioning. The testing, observations and other actions conducted by Henry, Potucek and Doyle within the assessment process met the requirements of the code. Even Dr. Freeman acknowledged that their testing was appropriate to determine Student's needs. The evidence showed that the District conducted an appropriate assessment in May 2011, and that it accurately determined Student's needs.

23. Student's second contention is more difficult. As set forth in Factual Findings 80 – 81 above, Dr. Freeman believes that one cannot determine the intellectual capacity of a young child such as Student who is unable to take standardized testing because of his autistic behaviors. In Dr. Freeman's opinion, a school district must wait until the autistic child is older and the child's behaviors are under control before a determination of whether the child also suffers from ID can be made.

24. The District witnesses, on the other hand, believe that the law requires them to determine every disability category that applies to a child. Because Student met the definition of ID under the law, they believed it was necessary to add that category to Student's IEP. Relying on the *Weissburg* case, the District contends that if it failed to list all applicable eligibility categories, an ALJ might have held that omission to be inappropriate. The District witnesses also felt it was important to add ID as a secondary category to distinguish a child with high functioning autism from one with low functioning autism.

25. In the *Weissburg* case, a school district had classified a child as mentally retarded, but not autistic. The child's parents contested that eligibility category and filed for due process requesting an independent educational evaluation. The District filed for due process to defend its IEP offer. At the due process hearing, the ALJ concluded that the district's assessment was appropriate, but the child should have been found eligible under both mental retardation and autism. However, the ALJ found no denial of FAPE because the child still received appropriate services under the IEP. The Ninth Circuit recognized that IDEA "does not give a student the legal right to a proper disability classification" (*Weissburg*, 591 F.3d at p. 1259), but determined that the parents were the prevailing parties and awarded attorneys' fees to the parents. The Ninth Circuit based its rationale, in part, on

the finding that the change in eligibility categories materially altered the legal relationship between the parties because it entitled the child to be placed in a classroom with a teacher qualified to teach students with the primary disabilities of mental retardation and autism. (*Id.* at p. 1260.)

26. In light of the holding in *Weissburg*, it was understandable that the District would include every applicable eligibility category in Student's IEP. On the other hand, there is some merit to Dr. Freeman's opinion that it is too early to tell if Student has ID. There is no question that Student's disabilities interfere with cognitive testing. If Student's severe autistic behaviors are ever brought under control, he might demonstrate higher cognitive functioning. Even Dr. Freeman could not state whether he would ultimately be found cognitively impaired.

27. But the issue is not what might happen in the future. The issue is, given what the District knew at the time of the July 2011 IEP meeting, was it wrong for the District to add ID as a secondary eligibility category? As stated in Legal Conclusion 6 above, an IEP is evaluated based on what was known to the school district at the time the offer was made.

28. The District did not have the benefit of Dr. Freeman's assessment and opinion at the time of the July 2011 IEP meeting. Instead, the District had a history of assessments of Student that showed cognitive and adaptive functioning far below average levels. At the time of the IEP meeting, Student had been undergoing intensive, one-to-one ABA therapy with AP for months, but had not even mastered learning to learn skills. Even when the District used criterion-based testing rather than standardized testing in an effort to determine what Student could do, his skills were still far below average. He functioned at the level of a child with ID, and he met the definition of a child with ID under both state and federal law.

29. Student cites to no law that forbids a District from adding ID as a secondary eligibility category to autism. Even Dr. Freeman indicated that some children suffer from both autism and ID. Autism is a spectrum, and a "high functioning" autistic child may have different needs than a "low-functioning" autistic child.

30. If the Congress or the California Legislature had intended to exclude young, severely autistic children from being eligible under ID, they could have done so unequivocally. In other circumstances, the law excludes a child with one type of disability from being found to have another type of disability. For example, as set forth in Legal Conclusion 17 above, the federal definition of autism does not apply if a child's educational performance is adversely affected primarily because the child has an emotional disturbance. (34 C.F.R. § 300.8(c)(1)(ii) (2006).) Similarly, the California definition of emotional disturbance provides that the child's inability to learn "cannot be explained by intellectual, sensory, or health factors." (Cal. Code Regs., tit. 5, § 3030, subd. (i)(1).) California law excludes from eligibility for special education pupils whose educational needs are due primarily to "limited English proficiency; a lack of instruction in reading or mathematics; temporary physical disabilities; social maladjustment; or environmental, cultural, or economic factors...." (Ed. Code, § 56026, subd. (e).)

31. However, there is nothing in the definition of autism or ID under either state or federal law that prevents a child from being eligible under both categories. If Student believes that no young child with severe autism should be found to have ID, then the remedy is to change the definition for the eligibility category for autism as set forth in the law.

32. The District did not commit a procedural violation of special education law by adding ID as a secondary eligibility category. As the Ninth Circuit recognized in *Weissburg*, there is no legal right to a proper disability classification. Student has not cited any authority that creates such a right.

33. In Student's written closing argument, Student contends that the ID designation constituted a substantive denial of FAPE, because it led the District to develop an improper program for Student. Student argues that the secondary eligibility category of ID "resulted in an IEP more written for a child with mental retardation than one with autism."

34. The evidence does not support that assertion. The District's IEP did not propose a program designed primarily for a child with ID, such as a functional program in a special day class. Instead, almost the entire District program is designed to address Student's autistic behaviors through intensive one-to-one ABA-based instruction. The proposed IEP program was for an *autistic* child. The similarity of the District's program to the AP program, alone, is enough to show that the District's program was for an autistic child. Contrary to Student's claims that the secondary ID classification would lower the District's expectations for Student, the evidence at hearing showed the District's expectations for Student were higher than those of Student's experts (who believed that Student could not possibly meet 25 goals in one year).

35. The evidence demonstrated that the District's proposed program was designed to address Student's *needs*, not his eligibility classification. This was in accordance with special education law. As will be discussed below, the District's IEP was reasonably calculated to provide Student with meaningful educational benefit at the time it was proposed. There was no substantive denial of FAPE.

Did the District's IEP Offer of July 7, 2011, Constitute a FAPE for Student in the Least Restrictive Environment?

36. Prior to discussing whether the District's July 2011 IEP offered Student a FAPE, there is a preliminary legal issue that must be addressed. During the hearing, Student attempted to introduce evidence to show that the District's prior IEP(s) (during the 2009 – 2010 time frame) had not enabled Student to gain educational benefit and had not been appropriately implemented by the District staff. The District objected to the introduction of the evidence on the basis that it was irrelevant to the issues in the current case and because any consideration of the prior IEP(s) was barred by the August 2010 settlement agreement.

37. Student conceded that the settlement agreement barred litigation of whether the District offered Student a FAPE in 2009 – 2010. However, Student contended that Student was still permitted to bring in evidence regarding problems with the prior IEP(s) to show that the current IEP offer was not appropriate.

38. Essentially, Student wished to litigate the case that he settled. He tried to introduce into evidence dozens of pages of documents and expert testimony to pick apart the District's 2009 – 2010 IEP(s) and the implementation of the ABA program contained within those prior IEP(s). If Student had done so, it would have forced the District to bring in its own expert testimony and evidence to defend the appropriateness of the prior IEP(s) and the District's implementation of them. Instead of focusing the case on what was actually at issue (the July 2011 IEP), the case would have turned into litigation over a case that was settled.

39. There are strong public policies favoring settlements in special education cases. The IEP process is intended to be nonadversarial. (Ed. Code, § 56341.1, subd. (h).) When disputes about a child's educational program arise, both federal and state law contain numerous mechanisms designed to assist parents and districts to settle their differences without need for an administrative hearing. When a due process hearing request is filed by a pupil's parents, the law calls for an informal resolution session to assist the parties with settling their differences. (20 U.S.C. § 1415(f)(1)(B); Ed. Code, § 56501.5.) If the parties are unable to resolve the matter in resolution, there is a mediation process prior to the hearing. (20 U.S.C. § 1415(e); Ed. Code, §§ 56501, subd. (b)(2); 56503.) Even after a due process hearing has begun, the parties are permitted to stop the proceeding to engage in mediation. (Ed. Code, § 56501, subd. (b)(2).)

40. California law also provides for mediation *before* a due process hearing request is filed. (Ed. Code, § 56500.3.) This type of mediation is intended to be an informal procedure, conducted without attorneys being present to negotiate the terms. (Ed. Code, § 56500.3, subd. (a).) Parties are also permitted to settle their differences even before this mediation session is held. (Ed. Code, § 56500.3, subd. (j)(1).)

41. To force a school district to litigate a case that was settled would thwart the strong policies favoring settlement. Districts settle cases for many reasons, but some of those reasons may include a desire to avoid the costs of litigation or the uncertainties of the litigation result. At times, a district might even settle a case based on the discovery that its prior actions might have denied a child a FAPE. The district might settle the case to provide compensatory education to the child and move on to a more appropriate IEP offer. If districts are forced to litigate issues despite settlement agreements, it could discourage settlement in the future.

42. In the instant case, there is no question that the terms of the settlement agreement bar any litigation of the 2009 – 2010 IEP(s). Student could have litigated that prior case, but chose to settle instead. He waived all claims regarding the prior IEP(s). The law, public policy, and the very terms of the agreement he signed, all mandate that the evidence be excluded from this case.

43. In addition, the evidence Student sought to introduce was irrelevant to the issues in the current case. Even if Student was correct that the District failed to supervise and implement the ABA program properly in 2009 – 2010, that does not prove the District would have done the same in July 2011. The issue in the instant case was the IEP offer as made in July 2011. There was never any implementation of that IEP because Student’s parents never agreed to that offer. Speculation on how the District might have implemented that IEP is not relevant to the validity of what was offered.

44. Student’s reliance on the case of *Kevin T. v. Elmhurst Community School District No. 205* (N.D.Ill 2002) 2002 WL 433061 is not well taken. That case was an unpublished decision from a different circuit and involved a different issue (whether the court could review past IEP’s and assessments, even if the documents had been created prior to the statute of limitations). That case does not support Student’s position.

The Transition Plan

45. As set forth in Factual Findings 93 – 114 above, the District met its burden of showing that the proposed transition plan was appropriate at the time it was offered in July 2011. Although Student did not like transitions, he had endured transitions involving both personnel and programming while at AP and still made progress. It was objectively reasonable at the time of the July 2011 IEP meeting for the District to conclude that Student would similarly endure the District’s proposed transition plan and still make progress.

46. The objection of Student’s experts to the transition plan seemed to be based more on their concerns about the training and experience of the District staff taking over the program than the transition itself. Not one of Student’s experts was able to state a number of hours that would have been appropriate for a transition. While a private provider may prefer an open-ended transition period, a District offering an IEP to a parent is expected to propose a specific transition plan, lest the IEP be challenged for vagueness. (See *Union School District v. Smith* (9th Cir. 1994) 15 F.3d 1519 (IEP offer must be clearly stated in writing).) The District met its burden of showing its proposed transition plan was appropriate at the time it was offered.

The Goals and Objectives were Appropriate

47. An IEP is a written document that includes statements regarding a child’s “present levels of academic achievement and functional performance” and a “statement of measurable annual goals, including academic and functional goals” designed to meet the child’s educational needs. (Ed. Code, § 56345, subds. (a)(1), (2).) The IEP must also contain a description “of the manner in which the progress of the pupil toward meeting the annual goals...will be measured and when periodic reports on the progress the pupil is making...will be provided.” (Ed. Code, § 56345, subd. (a)(3).)

48. As set forth in Factual Findings 115 – 133 above, Doyle’s testimony was persuasive that the goals and objectives contained in the proposed July 2011 IEP were

appropriate and designed to meet Student's needs. Most of the goals reflected areas that AP was working on with Student. Others involved foundational skills that Student would need for school. The District met its burden of proving that the goals were appropriate.

The District's Proposed IEP Program was Reasonably Calculated to Provide Student with Educational Benefit.

49. As set forth in Factual Findings 89 – 166 above, the evidence at hearing showed that the District's July 2011 proposed IEP was reasonably calculated to provide Student with meaningful educational benefit. The proposed program was very similar to the AP program. The AP representatives at the IEP meeting discussed the progress Student made under the AP program. It was objectively reasonable for the District IEP team members to conclude that Student could gain educational benefit under a similar District program. The District assessors were well qualified to determine Student's needs and had conducted an appropriate assessment. District staff was well trained and capable of carrying out an ABA program.

50. Dr. Freeman's testimony to the contrary was not persuasive, for the reasons discussed in Factual Findings 141 – 147 above. Her assessment took place months after the IEP meeting and she failed to take into account that time difference in her criticism of the District's proposed goals and objectives. Her opinion that Student had made no progress prior to the AP program was based on a flawed comparison of dissimilar testing.

51. Student spent a lot of time at hearing trying to show how much better the AP program was compared to the District's program. However, the FAPE standard looks solely at the District's proposed program, not the parent's preferred program, even if that preferred program would lead to greater educational benefit. (*Gregory K., supra*, 811 F.2d at p. 1314.) Likewise, as discussed above, Student's argument that the District's prior program had not been appropriately implemented was not relevant to the current IEP offer.

52. During the hearing the District withdrew portions of its case based on the agreement by Student's parents to portions of the July 7, 2011 IEP offer. The District withdrew issues relating to the appropriateness of the speech-language services, occupational therapy services and adapted physical education services offered in the IEP, including any issues regarding the one-to-one aide support provided during those services. The District also withdrew from the case any issues related to the IEP goals agreed to by Student's parents. Therefore, there is no need for a ruling on any of these issues.

53. Likewise, there was no dispute about least restrictive environment. As a general rule, a child is supposed to be educated with nondisabled pupils to the maximum extent appropriate and any removal of a child to separate schooling should occur only if the "nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." (34 C.F.R. § 300.114(a)(2) (2006).) However, in the instant case, the experts all agreed that Student

required an intensive, ABA-based program. Nothing less restrictive than the District's proposed program would have met Student's needs as of the time of the IEP meeting.

54. Finally, Student's reliance on the hostility and distrust between the parties created by the surveillance does not change the appropriateness of the District's offer. As discussed in the Factual Findings 165 – 166 above, Student showed little or no connection between the District staff who authorized and conducted the surveillance and the District staff involved in the IEP. Even if hostility or distrust could invalidate an otherwise valid IEP under extreme circumstances, Student has shown no reason to do so here.

55. The District met its burden proving that the July 2011 IEP offered Student a FAPE in the least restrictive environment. Because the District prevailed on the issues in this case, there is no need to address any of Student's proposed remedies.

ORDER

1. The District's July 7, 2011 individualized education program offered Student a free appropriate public education in the least restrictive environment.
2. All of Student's claims for relief are dismissed.

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 prevailed on all issues heard and decided in this matter.

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. (Ed Code, § 56505, subd. (k).)

Dated: May 11, 2012

/s/

SUSAN RUFF
Administrative Law Judge
Office of Administrative Hearings