

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

SADDLEBACK VALLEY UNIFIED  
SCHOOL DISTRICT.

OAH CASE NO. 2011100454

**DECISION**

The due process hearing in this case convened on January 30 and 31, 2012, February 1, 2 and 29, 2012, and March 1, 2012, before Timothy L. Newlove, Administrative Law Judge (ALJ) from the Office of Administrative Hearings (OAH), State of California.

Timothy Adams, Attorney at Law, represented Student. Student's mother (Mother) attended each day of the hearing.

Epiphany Owen, Attorney at Law, represented the Saddleback Valley Unified School District (District). Dr. Rona Martin, the District's Director of Special Education, attended the hearing. Deborah Miller, the District's Special Education Program Specialist, also attended the hearing.

On October 12, 2011, Student, through counsel, filed with OAH the Due Process Complaint in this matter. On November 29, 2011, OAH granted a continuance of the initially scheduled hearing dates in the case, thereby tolling the decision timeline.

At the conclusion of the hearing, the parties agreed to a briefing schedule. On March 15, 2012, the attorneys representing Student and the District filed closing briefs. Exhibit 165 is Student's closing brief. Exhibit 166 is Student's Correction to Closing Brief. Exhibit 167 is the District's closing brief. On March 22, 2012, the parties filed rebuttal briefs. Exhibit 168 is Student's rebuttal brief. Exhibit 169 is the District's rebuttal brief. The ALJ closed the record on March 22, 2012.

## ISSUES

The issues for hearing and decision in this matter are as follows:

1. Has the District denied Student a free appropriate public education (FAPE) during the 2009-2010 school year (to the extent that year falls within the statute of limitations)?
2. Has the District denied Student a FAPE during the 2010-2011 school year?
3. Has the District denied Student a FAPE during the 2011-2012 school year (and prospectively)?
4. Has the District unlawfully refused to reimburse Student's parents for an agreed upon independent educational evaluation (sometimes "IEE")?

As remedies, Student seeks reimbursement for private school placements, privately provided therapies and the cost of two IEE's. Student also seeks an Order that requires the District to fund his placement at the private school he currently attends, and numerous educational programs and therapies in conjunction with such placement.

## OVERVIEW

Student is a young boy who has severe developmental delays caused by an illness contacted in infancy. The District performed an initial evaluation of Student, and conducted several individualized education program (IEP) meetings for him. However, Parents, and particularly Mother, have elected to educate Student through private schools and therapy providers. The District has not had the opportunity to teach Student.

In this case, Student has alleged that the District denied him a substantive FAPE for the last three school years, and he seeks reimbursement for the cost of an IEE. On the issue of whether the District denied FAPE for the 2009-2010 school year, the ALJ dismissed this claim at the hearing because the controlling IEP was formulated outside of the two year statute of limitations. This Decision affirms that ruling. On the issue of whether the District denied FAPE for the 2010-2011 school year, the Decision finds that the District met the standard of offering Student a special education program that was reasonably calculated to provide educational benefit in the least restrictive environment. On the issue of whether the District denied FAPE for the current school year, the Decision finds that Parents have forfeited their claim by refusing to permit the District to perform a triennial evaluation of Student, and failing to cooperate in the IEP process. On the matter of the IEE, the District has agreed to make the reimbursement, and the Decision will order that payment.

## FACTUAL FINDINGS

### *The Student*

1. Student is a nine-year-old male living with his Parents who reside within confines of the District. Student's mother has taken the primary responsibility for his education. Student currently attends second grade at a small private school called Briosio in Newport Beach, California.

2. Student contracted bacterial meningitis as a baby. The bacterial meningitis caused damage to his brain and central nervous system. The illness also caused moderate hearing loss in his right ear. Student has a medical diagnosis of cerebral palsy and spastic paresis, and he has suffered from strokes. He has developmental delays in all major life functions.

3. Student has an intellectual disability. He cannot remember what he has been taught. Student is verbal, but his functional communication is limited. He speaks in short sentences with a limited vocabulary. Student is far behind in academics. He has had great difficulty learning the letters of the alphabet and numbers. He cannot read and he has difficulty spelling his own name. Student's early medical problems also significantly impacted his fine and gross motor skill development. He has had persistent deficits in the areas of gross motor skills, balance, fine motor speed, dexterity, motor planning and visual motor coordination.

4. Student is a friendly boy with a big personality. He is social and has a good sense of humor. He enjoys building things, and playing puzzles and games with his parents. He is interested in cars, and likes to draw. In school, he is respectful and enthusiastic.

### *Background*

5. In May 2008, the District performed an initial evaluation of Student. The evaluation was conducted for the purpose of determining Student's eligibility for special education and the educational needs stemming from his disabilities. The initial evaluation included assessments in the areas of psychoeducation, academics, speech and language, occupational therapy and physical therapy.

6. A school psychologist performed the psychoeducational assessment of Student. On the Kaufman Assessment Battery for Children, Second Edition (KABC-II), Student obtained a Mental Processing Index score of 59, placing him in the lower extreme range. On the Connors Rating Scale, both parents and teachers scored Student with a significant attention deficit. Cathryn Harris, a District special education teacher, performed the academic assessment, and determined that Student recognized four letters of the alphabet, had a very short attention span, and was able to follow one-step directions. Connie Erickson, a District speech and language pathologist, conducted the speech and language assessment, and found that Student had significant receptive and expressive language deficits. Anna

Berezin, a District occupational therapist, performed the occupational therapy assessment. On a test of visual motor integration skills, Student scored below average for pre-writing skills. Mary Halonen, a physical therapist, conducted the physical therapy assessment, and found that Student was at-risk for falls in school due to decreased balance, abnormal bilateral lower extremity muscle tone, and an abnormal gait pattern.

7. In September 2008, the District convened an IEP meeting to discuss the results of the initial evaluation. The IEP team determined that Student was eligible for special education and related services under the disabling condition of Other Health Impaired, with a secondary disability category of Hard of Hearing. The IEP team offered Student a program at a District school. Parents did not consent to the offer. For the 2008-2009 school year, Parents placed Student at a private preschool called Tutor Time, and funded private services, including speech and language therapy, occupational therapy and physical therapy.

8. On January 28, 2009, Renee Faulkner, an occupational therapist in private practice, prepared a report of her evaluation of Student (Faulkner Report). Ms. Faulkner utilized several standardized test instruments in her evaluation. She determined that Student had delays in his vestibular and proprioceptive sensory processing systems, that he functioned in the below average range for fine motor precision skills, and that he had difficulty with manual coordination skills. Ms. Faulkner recommended that Student receive direct occupational therapy services two times a week in 45 minute sessions to assist him with overall attention, postural control and fine motor skills.

9. On March 26, 2009, Ruth Bass prepared a Speech and Language Report, after an evaluation of Student (Bass Report). Ms. Bass is a speech and language pathologist, in private practice as Island Therapies, and she had been providing therapy for Student since June 2008. Ms. Bass administered several well-known test instruments in her evaluation. On the Peabody Picture Vocabulary Test, Fourth Edition [Form B], which measures receptive vocabulary, Student obtained a standard score of 87, placing him on the low side of the average range. On the Expressive Vocabulary Test, Second Edition [Form B], which measures expressive vocabulary, Student obtained a standard score of 81, placing him below the average range. On the Clinical Evaluation of Language Fundamentals, Fourth Edition (CELF-4), in Core Language, which measures overall language skills, Student obtained a standard score of 52, indicating a severe impairment. In her report, Ms. Bass concluded that Student had a severe communication disorder, and recommended that he receive individual therapy three or four times weekly in 50 minute sessions.

10. On April 13, 2009, Laura Schirmuhly prepared a Physical Therapy Progress Report concerning Student (Schirmuhly Report). Ms. Schirmuhly is a physical therapist in private practice who was working with Student. In her report, Ms. Schirmuhly noted improvement in Student's static standing abilities and in his trunk strength and endurance. However, she noted that Student continued to display weakness in his hip and trunk musculature and deficits in static and dynamic balance, conditions that contributed to functional mobility skills like negotiating obstacles and stair navigation. Ms. Schirmuhly recommended that Student continue to receive twice weekly physical therapy sessions.

11. On April 16, 2009, the District convened an IEP meeting for Student. The IEP team included Mother and her attorney. The purpose of the meeting was to review the Faulkner, Bass and Schirmuhly reports. The IEP team also discussed Student's special education program, including goals, placement and services, for the upcoming 2009-2010 school year. District team members proposed that Student enter kindergarten at a District site. At this meeting, Mother signed consent for the District to perform a reevaluation of Student. The reevaluation included assessments in the areas of intellectual development, academic achievement, social and emotional behavioral status, and psychomotor development.

12. The District reevaluation of Student occurred during May 2009. Caprice Pelonis, a District school psychologist, utilized two nonverbal tests to measure Student's intellectual development. On the Test of Nonverbal Intelligence, Third Edition, Student achieved a standard score of 85 which placed him in the low average range. On the KABC-II, Student's performance on the Nonverbal Scale placed him in the below average range. Cathryn Harris administered the Weschler Individual Achievement Test, Second Edition (WIAT-II) to test Student's academic achievement. On the WIAT-II, Student obtained borderline to extremely low scores on the subtests. Ms. Harris found that Student could not write the letters of the alphabet, could not write his name, could match only the letters c, m and o, could name only the letter x, and knew that the number seven came next in sequence but could not write the number 7. Carol Murray, a District adapted physical education specialist, assessed Student's psychomotor development, and determined that Student's basic gross motor skills and development were within the low to average range when compared with other pupils.

#### *The June 3, 2009 IEP*

13. On June 3, 2009, the District convened an IEP meeting for Student (June 2009 IEP). The IEP team included Mother and her attorney. At the outset of the meeting, a District team member offered to review with Mother the Procedural Safeguards attendant in special education matters. The Procedural Safeguards included a description of the right to bring an administrative due process complaint in the event of a dispute with the District. Mother declined the offered review.

14. At the June 2009 IEP meeting, team members discussed the District's initial evaluation and reevaluation of Student. The team formulated 15 goals in the areas of reading readiness, number sense, writing, following directions, adapted physical education (object control and physical fitness), occupational therapy (bilateral coordination, fine motor, functional playground skills, visual motor integration and postural control), physical therapy (stair climbing and static balance), and receptive and expressive language.

15. The team then made a formal offer of special education and related services for the 2009-2010 school year, and the extended school year. The offer placed Student in a special day class (sometimes "SDC") five days a week for 200 minutes each day. The offer also provided the following related services: (1) one 45 minute individual occupational

therapy session each week, (2) one 30 minute occupational therapy consultation each month, (3) two 30 minute group speech and language sessions each week, (4) two 45 minute individual physical therapy sessions each week, (5) one 30 minute group adapted physical education session each week, and (6) transportation to and from school.

16. Mother expressed disagreement with the IEP offer. She wanted the District to place Student in a regular education setting with more support. Mother and her attorney requested the District to provide an independent educational evaluation, but did not specify the area of assessment. At the conclusion of the meeting, Deborah Miller, a District Special Education Program Specialist, asked Mother to place her requests and concerns in writing. On June 22, 2009, Ms. Miller sent to Parents a prior written notice letter. The letter informed Parents that the District had decided to defer to their request for placement in a general education kindergarten class, with related services that included the support of an instructional assistant.

17. Through the summer of 2009, the parties exchanged correspondence concerning the June 2009 IEP offer, and the IEE request. In a letter dated July 14, 2009, the attorney representing Mother informed the District that “[o]ur client’s position remains that the District has not offered a program that is appropriate for (Student’s) unique needs” and of “our client’s intent to fund the necessary independent educational evaluation and to seek reimbursement from the District for the costs in doing so.” On August 3, 2009, the District received from Mother a written statement of her opposition to the June 2009 IEP offer. The conclusion of this statement provided that “I believe that the Mardan School in Irvine, California has a program that is appropriate for (Student). If the District does not agree to fund such a placement for the 2009-2010 school year, it is my intent to do so, and I will be seeking reimbursement from the District.” In fact, Parents had already enrolled Student at Mardan, and Parents later brought a due process complaint against the District that included a challenge to the appropriateness of the June 2009 IEP.

#### *The 2009-2010 School Year*

18. For the 2009-2010 school year, Parents enrolled Student at the Mardan Center for Educational Therapy (Mardan). Mardan is a private school, specializing in the education of disabled pupils, and is certified by the state Department of Education as an approved non-public school. Like most special day classes at public schools, Mardan offers small classrooms with a low teacher-to-student ratio. Student entered the kindergarten class at Mardan. At the time, he was six years and six months of age. The tuition for kindergarten at Mardan was \$21,000. However, Parents obtained a scholarship for Student, and paid Mardan a reduced tuition. From July 2009 to August 2010, Parents paid Mardan a total of \$9,235, which included tuition and the cost of speech and language services.

19. In many respects, Mardan operates like a school district that must provide a special education program for a disabled child. In November 2009, after having an opportunity to assess and educate him, Mardan staff established Student’s present levels of performance. In academics, Mardan staff determined that Student demonstrated areas of

need in language arts and math. For communication development, Mardan provided Student with a small group speech and language session one day a week for 30 minutes. In the social/emotional domain, Mardan staff determined that Student needed work on engaging with his peers. In pre-vocational matters, Mardan staff observed that Student often lost focus in class and required teacher redirection.

20. At the same time, Mardan developed 15 goals to guide Student's kindergarten year. For the most part, the goals developed by Mardan staff were similar to and addressed the same unique needs as the goals formulated by the District in Student's June 2009 IEP. Seven Mardan goals addressed academics, and the following classroom skills: (1) identifying letters of the alphabet, (2) matching letter phonemes, (3) writing letters, (4) writing his name, (5) counting to 30, (6) matching objects to spoken numbers, and (7) identifying colors. One Mardan goal addressed Student's social/emotional needs, and required him to play reciprocally with peers. Two Mardan goals addressed pre-vocational needs, and required Student to remain focused longer than two to three minutes and better transition between activities. Two Mardan goals addressed Student's psychomotor needs, seeking improvement in his body management and ball playing skills. Three Mardan goals addressed Student's speech and language deficits, and the following communication skills: (1) increasing his expressive vocabulary, (2) producing grammatically correct simple sentences, and (3) and following two-step unrelated directions.

21. In November 2009, Mother removed Student from Mardan and took him to Florida for an intensive physical therapy program. A private company called Therapies 4 Kids, Inc., provided Student with physical therapies for two weeks, five days a week, three hours each day. The cost was \$7,500.

22. In the same office, Mother met Patricia LaBella who is a speech and language pathologist in Florida. On December 4, 2009, Ms. LaBella conducted an assessment of Student and prepared a report (LaBella Evaluation). Thereafter, from December 7 to 29, 2009, Ms. LaBella provided Student with in an intensive speech and language therapeutic intervention program which included cognitive therapy. The program consisted of 15 daily sessions that lasted 7.5 hours each day. The total cost of Ms. LaBella's services, including the LaBella Evaluation and the therapeutic sessions, was \$19,545.

23. The LaBella Evaluation was thorough and assessed Student's level of functioning with speech and language. Ms. LaBella performed the assessment through a clinical interview, a review of prior records, a classroom observation and the administration of standardized tests, which included the Goldman Fristoe Test of Articulation (GFTA-2), the Expressive Vocabulary Test, Second Edition [Form A] (EVT-2A), the Peabody Picture Vocabulary Test, Fourth Edition [Form A](PPVT-4A), the Comprehensive Assessment of Spoken Language (CASL) and the CELF-4. Clinically, Ms. LaBella observed that Student was a pleasant, friendly and outgoing boy, but that he displayed weaknesses in organization skills, listening skills and following directions. She noted that he has a relative strength in the area of pragmatic language.

24. On the GFTA-2, Student obtained a standard score of 104 on the Sounds-in-Words section, placing him in the average range and indicating normal development in the area of speech production. On the EVT-2A, Student obtained a standard score of 74, indicating that his expressive vocabulary functioning was in the moderately low range. On the PPVT-4A, Student obtained a standard score of 94, placing his receptive vocabulary in the average range, and indicating a relative strength. On the CASL, in the Core Composite, which provides a global measure of language performance, Student obtained a standard score of 55, indicating that his oral language functioning was in the very low range. On the CELF-4, in Core Language, Student obtained a standard score of 44, placing him in the very low range of functioning.

25. The LaBella Evaluation concluded with a determination that Student had a moderate expressive language disorder and a severe language processing deficit. Ms. LaBella made numerous recommendations, including “maximum intervention” from a speech and language pathologist, a structured school environment with a multi-faceted learning modality, cognitive remediation to improve study strategies and organization skills, an increase in Student’s vocabulary, and classroom accommodations that reduce distractions. Notably, Ms. LaBella did not suggest that Student required a one-to-one instruction, or a classroom limited to five pupils. Instead, she provided suggestions that Student’s teacher should follow during “whole group instructions.”

26. On December 11, 2009, the District agreed to provide an independent educational evaluation for Student in the area of psychoeducation. The parties agreed that Dr. Robert Patterson would perform the IEE. Dr. Patterson started work on the evaluation, but he did not complete the IEE because he became sick and was hospitalized.

27. Starting in April 2010, Mother took Student to Karina Poirier, M.A., for cognitive therapy. Ms. Poirier operates a company called the Center for Social Cognition in Irvine, California. Student presented to Ms. Poirier from April to September 2010, for a total of 261 individual hour long cognitive therapy sessions. The majority of the sessions occurred during the summer months. The sessions took place during the morning hours, such that Student missed at least 90 minutes of school time at Mardan each time he went to the Center for Social Cognition. Ms. Poirier charged \$125 per session, and Parents paid her a total of \$26,620, which included an assessment of Student.

28. In May 2010, Ms. Poirier prepared an Individual Learning Plan for Student. The plan set forth goals and objectives for the cognitive therapy sessions. For Language Comprehension, the plan had goals and objectives in the areas of verbal reasoning, sequencing, problem solving, casual relationships and narrative thinking. For Cognitive Development, the plan had goals and objectives in the areas of attention processes and perception. For Academic Development, the plan had goals and objectives in the areas of letter and numeral identification and social interaction. The Individual Learning Plan set high expectations for Student. However, for the most part, the plan reflected the academic readiness goals in both the District’s June 2009 IEP, and Mardan’s November 2009

kindergarten plan, such as in the area of letter identification. Despite this overlap, the Individual Learning Plan made no mention of collaboration between Mardan and Ms. Poirier.

29. On May 21, 2010, the attorney representing Mother sent a letter to Deborah Miller. The letter concerned the ongoing dispute between the parties over the independent educational evaluation of Student. The letter stated that, a month previously, Dr. Patterson had indicated that he was unsure how to proceed with the IEE given inconsistencies that he found in his assessment results. The letter informed the District that “our clients will be engaging Dr. Robert Gray to conduct an evaluation and will be seeking reimbursement from the District.”

30. On June 26, 2010, Kathryn Majewicz prepared a Student Assessment Report that concerned Student’s letter formation and handwriting skills (Majewicz Report). Karina Poirer had referred Parents to Ms. Majewicz, who is a handwriting specialist doing business as OC Handwriting in Huntington Beach, California. The Majewicz Report contained the results of an assessment that she performed called “Check Readiness” which utilizes the methodologies of the Handwriting Without Tears program. Ms. Majewicz recommended that Student practice daily the learning and writing of letters and numbers, using the multi-sensory approach in the Handwriting Without Tears program. She provided Student with remediation sessions during July and August 2010. The total cost of her assessment and therapy sessions was \$1,235.

31. In June 2010, Mardan issued a Progress Report regarding Student’s kindergarten year (Mardan Progress Report). Student had achieved seven of 15 goals: writing his name, identifying colors, playing reciprocally with peers, remaining focused longer than two to three minutes, better transitioning between activities, and improvement in body management and ball playing skills. Student did not achieve eight goals: identifying letters of the alphabet, matching letter phonemes, writing letters, counting to 30, matching objects to spoken numbers, increasing expressive vocabulary, producing grammatically correct simple sentences, and following two-step unrelated directions. The Mardan Progress Report noted that Student made great improvement in his social and emotional development, and on his pre-vocational goals. He had matured socially and played daily with peers. But, the report also noted that Student “continues to struggle to grasp the kindergarten curriculum” and that his “struggles involve retention of concepts that are repeated and practiced daily such as letter skills, number skills and calendar skills.” The Mardan Progress Report noted that, in class, Student “is easily redirected and will sit with whole body listening throughout group lesson.” The report made no mention of collaboration between Mardan and outside therapy providers, including Patricia LaBella and Karina Poirier.

32. On July 1, 2010, Ms. Poirier prepared a Sixty Day Progress Report concerning her cognitive therapy training of Student. From April through June 2010, Student had attended 146 hours of cognitive educational therapy at the Center for Social Cognition. The report described Student’s progress on goals and objectives in various areas, including memory processes, organizing knowledge, concept development, behavioral regulation and pre-academics. Student had achieved many goals. For example, in the area of organizing

knowledge, he demonstrated the ability to group objects based upon physical attributes. But, Ms. Poirier found the same basic impediment as Mardan. She concluded that Student's "lack of visual memory processing skills is critically inhibiting him from being ready and able to learn to read individual letters or numbers" and that he demonstrated "difficulty storing, retrieving, and expressing his reasoning using language." Ms. Poirier recommended a continuation of cognitive therapy for Student, but a reduction in the length of the sessions from four hours to two and a half hours.

33. Also, on July 1, 2010, Dr. Robert Gray prepared a Confidential Neuropsychological Evaluation Follow-Up Report, after a reassessment of Student (Gray Evaluation). Dr. Gray is a licensed psychologist and a board certified clinical neuropsychologist who practices at Advanced Neurobehavioral Health of Southern California in Mission Viejo, California. Dr. Gray initially had assessed Student in February 2008. The Gray Evaluation was the independent educational evaluation that Parents wanted the District to fund after Dr. Patterson did not complete the agreed-upon IEE.

34. The Gray Evaluation reported on Student's level of neurobehavioral functioning and made recommendations for treatment and interventions. In conducting his reassessment, Dr. Gray performed a records review, made clinical observations and administered standardized tests, which included the Weschsler Intelligence Scale for Children, Fourth Edition (WISC-IV), the WIAT-II, and the Adaptive Behavior Assessment System, Second Edition (ABAS-2). Clinically, Dr. Gray observed that Student was friendly and social, but that he demonstrated frequent hyperactive, inattentive and impulsive behaviors. Student displayed significant difficulties with expressive and receptive language. In particular, Dr. Gray noted that Student was unable to comprehend basic instructions and struggled to express his needs.

35. The Gray Evaluation noted Student's improvement in behavioral regulation and his relative strength on measures of short term attention. Otherwise, Dr. Gray's report was a stark assessment of the disabling conditions caused by the illness in his infancy. On the WISC-IV, which measures general intellectual abilities, Student obtained a full-scale IQ score of 60, placing him in the well below average range. On the WIAT-II, which measures basic academic achievement skills, Student obtained a standard score of 52 on the Word Reading subtest and a standard score of 48 on the Numerical Operations subtest, placing him in the well below average range. On the ABAS-2, which measures adaptive skills, Student's scores indicated persistent deficits in daily living skills which were becoming more marked over time.

36. Dr. Gray concluded that, like most persons who experience early-acquired bacterial meningitis and subsequent neurological damage, Student "continues to struggle with severe impairments across most domains of neuropsychological and adaptive behavioral functioning." For school, Dr. Gray recommended that Student "will continue to require intensive special educational services with a focus on development of language/communication, pre-academic skills, and motor and adaptive/daily living skills, in a small classroom/small group or one to one setting." In particular, Dr. Gray suggested a

placement that contains the following features: the opportunity for one-on-one learning periods, small group instruction, related services such as occupational and speech therapies, and opportunities for supervised socialization with typically developing peers; a classroom environment with reduced distractions; a teaching approach that involves patience, repetition, massed practice and reduced language and motor demands; and the provision of behavioral reward programs to help improve self-regulation. The Gray Evaluation recommended that Student receive individual speech and language services, but noted that “[s]mall group speech and language therapy may be considered as supplemental to (Student’s) individual therapy to provide him with a supervised opportunity to use and practice skills with peers.” Dr. Gray’s 2008 report had recommended that Student receive behavioral psychology services. However, the Gray Evaluation neither mentioned a behavior plan or further suggested that Student required such services.

37. On July 10, 2010, Robyn Rakov, O.D., prepared an Optometric Vision Report after performing a functional vision examination of Student (Rakov Report). Karina Poirier had referred Student to Dr. Rakov who operates the Vision Development Center in Laguna Hills, California. Dr. Rakov concluded that Student demonstrated severe delays in the area of eye movement skills, and moderate deficiencies related to depth perception and eye teaming and focusing skills. Dr. Rakov proposed therapy sessions to improve Student’s visual processing abilities. Student presented to Dr. Rakov on five occasions during July and August 2010. The cost of her services, including the vision examination, was \$695.

38. On August 6, 2010, Karina Poirier prepared a Learning Propensity Assessment Report after an evaluation of Student (Poirier Assessment). Mother had requested Ms. Poirier to perform the evaluation. The purpose of the Poirier Assessment was to evaluate Student’s cognitive functioning and to improve his academic functioning. For the evaluation, Ms. Poirier administered the Learning Propensity Assessment Devise (LPAD) which is a series of tests or activities designed to assess how a person learns and to identify the types of teaching that will improve the person’s ability to learn. The LPAD is not a traditional assessment instrument, in part, because the examiner uses mediation (teaching the subject how to solve problems and respond correctly) to identify helpful teaching methods. In her assessment, Ms. Poirier concluded that Student has a “lack of perceptual skills and impaired memory skills [that] hinders his ability to learn academic tasks,” but that he was very responsive to mediation. Accordingly, Ms. Poirier recommended that Student participate in daily cognitive therapy sessions, and that he “should participate in small classroom instruction to bridge his newly acquired skills to a group setting.” As with her Individual Learning Plan, the Poirier Assessment made no mention of any collaboration between Ms. Poirier and Mardan on helping Student achieve academic goals.

39. On August 24, 2010, Karina Poirier prepared a Ninety Day Progress Report concerning her cognitive therapy training of Student. During July and August 2010, Student had attended 106 hours of cognitive educational therapy at the Center for Social Cognition. Like the Sixty Day Progress Report, this report described Student’s progress in various areas. Student had achieved many goals. For example, in the area of memory processes, Student met the goal of demonstrating the ability to recall the names of objects from memory after

both short and long periods. In the area of concept formation, he met the goal of demonstrating that pairs of words have opposite meanings. Student also had partially met many goals. For example, in the area of concept formation, Student demonstrated an evolving ability to recognize the spatial relationships associated with prepositions. In the area of attention processes, he showed improvement in sustaining his attention on instruction.

40. On August 25, 2010, Dr. Gray prepared an Addendum to the Gray Evaluation. In the Addendum, Dr. Gray reported the “multiple factual errors and points of clarification” that Mother had found in the Gray Evaluation. The Addendum is a highly unusual document for a professional assessor to prepare, and clearly reflects Mother’s attempt to influence the District through Dr. Gray. In this attempt, Mother wanted to make two basic points. First, she wanted Student to remain at Mardan. In the Addendum, Dr. Gray noted that Mother “feels that [the Gray Evaluation] did not emphasize clearly that in order to support [Student’s] developmental gains, he should be kept in his current school placement.” Second, Mother wanted Student to continue receiving cognitive therapy. In this regard, the Addendum noted that Mother “felt that it was important to emphasize further that in order for [Student] to continue to build his foundation for learning, he needs repetition and intensity, requiring a cognitive therapist to work with him on a one-to-one daily, intensive basis, and that he has made remarkable progress in a short period of time in response to cognitive therapy.”

41. The cost of Gray Evaluation was \$2,150. Parents have paid this amount. During the summer of 2010, the attorney representing the District attempted without success to learn the cost of the Gray Evaluation so that the District could consider whether or not to reimburse Parents. Eventually, at an undetermined date, the District agreed to reimburse Parents for the Gray Evaluation. The District requested Parents to sign forms that were necessary to follow administrative protocols for such payment. Parents did not cooperate in this process, and the District has not made the reimbursement.

#### *The October 4, 2010 IEP Meeting*

42. On October 4, 2010, the District convened an IEP meeting for Student (October 2010 IEP). At the time, Student was attending first grade at Mardan. The IEP team consisted of Mother and her attorney, Mary Halonen, and District personnel, including Deborah Miller, Cathryn Harris, Carol Murray, Anna Berezin, Connie Erickson and Caprice Pelonis. The team also included Erin Rosenthal (formerly Gibbons), Student’s teacher at Mardan, and Rosemarie Kagik, a program specialist at Mardan. Ms. Rosenthal and Ms. Kagik participated in the IEP meeting by telephone. The purpose of the meeting was to review private assessments and offer Student a special education program for the 2010-2011 school year and extended school year.

43. The District initially wanted to hold an IEP meeting to review the independent educational evaluation of Dr. Patterson. On March 1, 2010, the District sent to Parents a notice which scheduled an IEP meeting for March 25, 2010, a meeting that did not occur. In May 2010, Parents informed the District that they wanted Dr. Gray to perform the IEE. On

June 25, 2010, Mother responded to the earlier notice by suggesting IEP dates in July 2010, in order to allow Dr. Gray to complete his reassessment. On June 28, 2010, the District sent to Parents a notice which scheduled an IEP meeting for July 20, 2010, and Mother consented to this date. However, on July 16, 2010, Parents, through their attorney, cancelled the July 20, 2010 IEP meeting, with the excuse that Dr. Gray had not finished his report. Actually, at this time, Dr. Gray had completed the Gray Evaluation, but he had not prepared the Addendum. The District then proposed to hold an IEP meeting on August 30, 2010, and Parents consented to this date. But, the District cancelled the August 30, 2010 meeting, because Parents had not provided the Gray Evaluation and Addendum in a timely manner, and had not provided the Poirier Assessment. On September 3, 2010, the District sent to Parents a notice which scheduled an IEP meeting for October 4, 2010, the date in which the meeting finally occurred.

44. The District engaged in thorough preparation for the October 2010 IEP meeting. District personnel had performed an initial evaluation of Student in May 2008, and a reassessment in May 2009. Otherwise, District teachers and service providers had not been able to work with Student. Consequently, in order to fulfill their obligations as concerns an IEP for Student, District team members had to rely chiefly upon third party information. Accordingly, from July through September 2010, the District requested Parents to give consent for reports and records concerning Student, and collected as much information as Parents permitted.

45. The District received and considered the following documentary information concerning Student: (1) the District's initial assessment and reassessment of Student; (2) the Faulkner Report; (3) the Bass Report; (4) the Schirmuhly Report; (5) the LaBella Evaluation; (6) the Mardan Progress Report; (7) the Majewicz Report; (8) the Rakov Report; (9) the Individual Learning Plan, Sixty Day Progress Report, Ninety Day Progress Report and the Assessment prepared by Karina Poirier; and (10) the Gray Evaluation and his Addendum. Prior to the October 2010 IEP meeting, District team members also consulted with Mardan staff. Both Cathryn Harris and Mary Halonen conferenced with Ms. Rosenthal to learn about Student's classroom performance. Connie Erickson called the speech and language pathologist at Mardan to learn about Student's speech needs.

46. In addition, a District team member observed Student. On September 28, 2010, Anna Berezin, a District occupational therapist, viewed Student at Mardan and prepared a short report of her observation. Ms. Berezin observed that Student was in a classroom with seven pupils, one teacher and one aide. Most of the observation occurred during an art lesson, though Ms. Berezin also watched Student with his teacher, Ms. Rosenthal, and on the playground. Ms. Berezin noted that Student held a thick crayon in a functional grasp pattern and that, when painting, his arm seemed to tremor slightly. She also noted, from reviewing Student's work booklet, that he could not spell his name, that when writing he sometimes worked in a right to left direction, and that he had difficulty copying letters directly from a model. She observed that Student stayed on-task during the art lesson, that he took good direction from the art teacher, and that he followed the directions of Ms.

Rosenthal. Ms. Berezin testified that Student's class at Mardan had the same size and features of the SDC class of Ms. Harris at Linda Vista Elementary School.

47. At the October 2010 meeting, Student's IEP team discussed his strengths and established his present levels of performance. Mother reported that Student made progress in cognitive therapy and that her son had a great sense of humor. Erin Rosenthal reported that Student had a good personality and a strong desire to have friends. Ms. Rosenthal also reported that Student's oral and listening comprehension are a strength, and that he seems to be an auditory learner. The team based Student's present levels of performance on the many assessments of him, including the Faulkner Report, the Schirmuhly Report, the LaBella Evaluation, the Gray Evaluation and the Majewicz Report. The team also established Student's present levels and needs through Ms. Rosenthal who informed that he did not have a consistent understanding of symbols, numbers or letters, that he had forgotten how to write his name, that he had no sight words, that he could rote count to 12, and that he stayed focused 50 percent of the time with one verbal prompt.

48. Student's IEP team then developed 13 goals. The goals addressed Student's areas of need in academics, adapted physical education (sometimes "APE"), occupational therapy, physical therapy, and speech and language development. Each goal contained a baseline derived from information concerning Student. Each goal described the District personnel who would work with Student to achieve the mark. Each goal contained short term objectives which allowed the District to measure Student's progress over the course of the year. The final IEP document contained the following accommodations to help Student achieve the goals: extra time, prompts to refocus, repeated directions with demonstrations, and modified sequence when new skills are presented.

49. The District personnel who would be responsible for providing services for Student formulated the goals in their respective areas of expertise. Cathryn Harris is an SDC teacher at Linda Vista Elementary School which is Student's home school within the District. Ms. Harris developed the academic goals in the October 2010 IEP. Goal number one addressed reading readiness, and required Student to name upper case letters. Goal number two addressed number sense, and required Student, when given 20 objects, to count, recognize, represent, name and order the objects with accuracy. Goal number three addressed the need to listen and follow directions during small group instruction. Ms. Harris based the three academic goals upon her review of the academic test results in the assessments of Student, and upon her consultation with Ms. Rosenthal concerning his present levels of performance at Mardan.

50. Carol Murray, a District adaptive physical education specialist, formulated the APE goals for the October 2010 IEP. Goal number four addressed object control skills, and required Student to show an increased ability to kick a stationary ball. Goal number five addressed Student's physical fitness by seeking to increase his ability to complete a standing long jump. Ms. Murray based the two APE goals on her review of pertinent records, including her May 2009 evaluation of Student's psychomotor development and the Mardan Progress Report.

51. Anna Berezin formulated the occupational therapy goals for the October 2010 IEP. Goal number six addressed bilateral skills and Student's proclivity to cross midline, or work from right to left when copying letters on a piece of paper. Goal number seven addressed fine motor skills and finger dexterity in terms of moving coins, pencil grasp, coloring and copying letters. Goal number eight addressed Student's functional handwriting skills, and sought to improve his pencil grip and the recognition of letters so that he could write his first name. Ms. Berezin based the three occupational therapy goals upon her observation of Student and review of his work samples at Mardan, and upon the review of pertinent records, including the Majewicz Report. The three occupational therapy goals indicated that the persons responsible for helping Student to achieve the marks included his special education teacher and occupational therapist.

52. Mary Halonen, a licensed physical therapist in California, formulated the physical therapy goals for the October 2010 IEP. Goal number nine addressed Student's gross motor needs as concerns climbing stairs and curbs. The purpose of the goal was to prevent the risk of fall while Student navigated the school environment. Goal number 10 also addressed gross motor needs as concerns static balance, and required Student to stand independently for seven seconds without losing his balance. Ms. Halonen based the two physical therapy goals upon her consultation with Ms. Rosenthal regarding Student's needs at school, and upon her review of pertinent records, including the Schrimuhly Report. The physical therapy goals indicated that the persons responsible for working with Student included the physical therapist and teaching staff.

53. Connie Erickson, a District speech and language pathologist, formulated the speech and language goals for the October 2010 IEP. The goals addressed Student's receptive and expressive language delays. Goal number 11 sought to improve Student's expressive language skills by having him categorize, name and explain items. Goal number 12 sought to improve Student's understanding of the concepts associated with common prepositions and adjectives, such as "under," "over," "long," "different," and "first." Goal number 13 sought to improve Student's ability to describe actions involving the same concepts. Ms. Erickson based the three speech and language goals upon her review of pertinent records, including the Bass Report and the LaBella Evaluation. In fact, the baseline for the three goals made direct reference to the test results in the LaBella Evaluation. Ms. Erickson also based the goals upon a consultation with her counterpart at Mardan who informed that she was providing Student with 30 minutes of group speech and language therapy each week, and who approved of the goals developed by Ms. Erickson. The speech and language goals indicated that the persons responsible for helping Student to achieve the marks included the speech and language therapist and classroom staff.

54. After development of the 13 goals, the District then offered Student a special education program which covered the 2010-2011 school year, extending to October 2011, and summer school which occurred from July 5 to 29, 2011. The offered program contained the following placement and related services: (1) specialized academic instruction in a special day class five days a week for 240 minutes each day; (2) two 30 minute group speech and language sessions each week; (3) one 45 minute individual occupational therapy session

each week; (4) one 30 minute occupational therapy consultation each month; (5) two 45 minute individual physical therapy sessions each week; (6) one 30 minute group adapted physical education session each week; (7) two 60 minute individual vision therapy sessions each week; and (8) transportation. The District proposed to provide each related service during the school day, except for the vision therapy services which would occur in the afternoon after school at an off-campus site. The IEP notes specified that the placement was in a Special Day Class Program – Learning Center, and that the class had seven pupils, one teacher and two instructional assistants.

55. The proposed special day class placement was at Linda Vista Elementary School, and followed the District’s Learning Center Model (Learning Center). The Learning Center combines a special day class with the school’s resource specialist program (sometimes “RSP”). Certain SDC and RSP pupils can move in and out of the special day class and general education classes, depending upon their abilities and needs. The Learning Center operates on a multi-disciplinary basis with the SDC teacher and her aides consulting and collaborating with the related service providers on a regular basis. The instructors and related service providers work at one school site as a team to help pupils with their goals. Student’s October 2010 IEP goals for occupational therapy, physical therapy and speech and language development made direct reference to this team approach by indicating that both the service provider and the classroom staff were responsible for working with Student on the particular goal.

56. Mother took the October 2010 IEP home for review and consideration. On October 21, 2010, Mother sent to the District a document entitled “Parent Comments” in which she informed that Parents did not consent to the IEP. In the Parent Comments, Mother expressed disagreement with the goals in the October 2010 IEP. In her opinion, the District had failed to develop goals that outside assessors had recommended and that addressed certain areas, including behavior, executive functioning and cognitive development. In her opinion, the IEP offered an insufficient amount of related services for occupational therapy, physical therapy and speech and language development. She also expressed her disappointment with the proposed SDC placement because it did not “provide focused, individualized support and intervention for (Student’s) specific needs.” Mother informed the District that Parents were placing Student in an appropriate non-public school, and seeking reimbursement. In fact, Student remained at Mardan in first grade for the 2010-2011 school year.

57. The parties presented conflicting testimony on the appropriateness of the October 2010 IEP. Student presented three witnesses on this subject: Mother, JoQueta Handy and Dr. Chris Davidson. The District presented five witnesses: Caprice Pelonis, Mary Halonen, Anna Berezin, Connie Erickson and Cathryn Harris.

58. Mother has been in a continual search for school placements and therapy providers who can help Student learn. She firmly believes that, due to his disabling conditions, Student requires one-to-one academic instruction and individualized therapy sessions. Mother’s testimony regarding the October 2010 IEP largely reflects the Parent

Comments that she sent to the District several weeks after the meeting. She testified that Parents did not provide consent because, except for the offer of vision therapy services, the IEP did not incorporate the recommendations set forth in the LaBella Evaluation, the Gray Evaluation, the Majewicz Report and the Poirier Assessment and Ms. Poirier's progress reports. For Mother, these recommendations included Student's need for one-to-one academic instruction and behavior psychology services. Mother testified that the District also failed to offer a sufficient level of related services. After the October 2010 IEP meeting, Mother visited the proposed special day class at Linda Vista Elementary School. She testified that she saw that the class was large, that the pupils were working in groups, and that there was a lot of commotion. Her observation confirmed her concerns that the District placement did not offer the one-to-one instruction that Student required.

59. JoQueta Handy is a speech and language pathologist with 17 years of experience in the field. She operates a private practice called Speech & Motion, Inc., located in Irvine, California. Ms. Handy testified that she has provided speech therapy for children with special needs for the past 22 years. Ms. Handy is the founder and owner of Children's Opportunity for Brilliance (COB). COB is a learning model which is designed for disabled children and utilizes non-traditional and multi-sensory methodologies in the classroom.

60. Ms. Handy is the principal at Briosio, the private school where Student now attends. Ms. Handy testified that this is an unpaid position. Briosio is a COB model school founded in 2009 by a wealthy family. Briosio is located in the back of a Mercedes-Benz car dealership in Newport Beach, California. The school has a large playroom and an adjoining classroom. Briosio currently has three pupils, including Student and two children with autism. There are two teachers and one aide that serve as instructors. The pupils learn from an on-line curriculum, and the teachers assess their progress through daily lesson plans. Briosio also features mixed martial arts lessons, field trips in the community such as to the Long Beach Aquarium, and individual speech and language sessions provided by Ms. Handy. There is no tuition, but parents must pay for materials, field trips, the martial arts sessions, and a reduced amount for Ms. Handy's services. Parents did not establish the precise cost of Briosio. Mother testified that the cost was \$1,000 per month, but Ms. Handy testified that the expenses were far less than this amount. Briosio is not certified by the state Department of Education as a non-public school, but Ms. Handy testified that the school has made application for this status.

61. On November 2, 2010, Ms. Handy performed an evaluation of Student and prepared a report (Handy Report). The evaluation involved a records review which included Student's medical history, the Gray Evaluation, the LaBella Evaluation, the Poirier Assessment and the Mardan Progress Report. The evaluation did not involve the administration of standardized test instruments. Instead, Ms. Handy chose to focus on Student's strengths and corresponding learning strategies, rather than on the weaknesses reflected in the test scores from prior assessments. In her report, Ms. Handy expressed the belief that "the brain has the ability to rewire itself" and she recommended teaching Student in non-traditional ways to accomplish this result. She suggested that kinesthetic programs, such as Zoophonics, Touch Math and Interactive Metronome, by using rhythm, visualization

and movement, would help Student overcome his problems with memory and motor coordination. Ms. Handy expressed the belief that Student had great potential, and could become an independent competent learner. The Handy Report concluded by “recommending a one-on-one learning environment as well as support services through speech therapy, cognitive training, occupational therapy, sensory integration training, and physical therapy.”

62. Starting in December 2010, Ms. Handy has provided speech and language services for Student. Her therapy includes cognitive training. The cost of her services is \$135 per hour. Ms. Handy attended an IEP meeting for Student at Mardan in December 2010. Otherwise, there is no indication that she collaborated with Mardan in providing her services. In January, September and October 2011, Student presented to Ms. Handy two or three times a week for hour long sessions. Thereafter, at Brioso, Ms. Handy testified that she works with Student seven hours each week, either alone or in conjunction with his teacher, but only charges Parents for one hour of her time. To date, Parents have paid Ms. Handy \$2,625 for her services.

63. On September 9, 2011, Ms. Handy prepared an Addendum to the Handy Report. The Addendum recommended placement of Student at Brioso because Student would receive individual teaching. On September 19, 2011, Student started attending Brioso. Ms. Handy testified that he has made great progress. He has learned the upper and lower case letters of the alphabet. He can copy letters. He is learning sight words. He pays attention in class. Ms. Handy further claimed that Student has reached the beginning level of the standard first grade curriculum. Brioso has not prepared reports of standardized tests to confirm these results.

64. Ms. Handy testified that the October 2010 IEP was inappropriate for two reasons. First, she stated that the proposed SDC placement at Linda Vista Elementary School was not appropriate because Student requires one-to-one academic instruction with the help of multi-sensory teaching methodologies. This opinion was informed by visits that Ms. Handy has made to special day classes both at District schools and other educational agencies in Orange County. In those visits, which were in classes for older grade levels than Student, Ms. Handy saw children with multiple disabilities who were functioning at different levels, and she considered that it would not be humanly possible to meet Student’s needs in such a setting. Second, Ms. Handy testified that the District offer of group speech and language services was not sufficient, as he requires three one hour individual sessions each week to access his education.

65. Dr. Chris Davidson is an exceptionally well-qualified expert witness. Dr. Davidson is a licensed educational psychologist in California. She served in the public school system from 1977 to 2001 in various roles, including teacher, counselor, school psychologist, assistant superintendent and director of special education. Dr. Davidson is a board certified behavioral analyst. She has served on the faculty at California State University, Long Beach. Since 1993, Dr. Davidson has worked as an educational psychologist through her company, Education Testing and Assessment, Inc., where she has performed hundreds of psychoeducational assessments of children.

66. In September 2011, Dr. Davidson completed a Psycho-Educational Report Confidential after an evaluation of Student (Davidson Report). In her evaluation, Dr. Davidson performed a wide-ranging records review which included Student's medical history, the numerous assessments of him, information from Mardan, and IEP's proposed by the District. Her evaluation involved observations of Student and classrooms at Mardan, Brioso and Linda Vista Elementary School. Dr. Davidson interviewed Parents, Dr. Handy and Student's teacher at Mardan, Erin Rosenthal. Dr. Davidson also administered 11 standardized test instruments and collected nine surveys rated by Parents and five surveys rated by Ms. Rosenthal. The Davidson Report is 240 pages. The cost of the evaluation was \$6,187.50.

67. Dr. Davidson obtained test results that differed from prior assessments of Student. The most significant difference occurred in the administration of the WISC-IV. In May 2010, Dr. Gray administered the WISC-IV, and Student obtained standard scores of 69 for verbal comprehension, 80 for working memory, 63 for perceptual reasoning and 62 for processing speed. These scores generated a full scale IQ of 60. The Gray Evaluation concluded that this measure of intelligence placed Student in the range of mild mental retardation/intellectual disability. A year later, Dr. Davidson administered the WISC-IV, and Student obtained standard scores of 98 for verbal comprehension, 71 for working memory, 112 for perceptual reasoning and 75 for processing speed. These scores yielded a full scale IQ of 89, placing Student in the upper limits of low average. At the hearing, Dr. Davidson admitted that this convergence in scores was highly unusual, and that a person with average intelligence normally does not have Student's very low academic skills. She testified that cognitive therapy likely has operated to rewire Student's brain, leading to higher cognitive ability scores.

68. In performing her evaluation of Student, Dr. Davidson had access to information not available to the District at the October 2010 IEP meeting. In particular, Dr. Davidson had information concerning Student's first grade year at Mardan. In the Davidson Report, she described the 15 goals that Mardan had developed to guide his education for the 2010-2011 school year. For the most part, the Mardan goals were similar to the goals in the October 2010 IEP. For example, the Mardan goals sought improvement in Student's ability to identify letters, count, handwrite, focus in class, manage his body, and express concepts. Goal numbers one, two, three, six, eight, nine, 10, 11, 12 and 13 in the October 2010 IEP addressed the same needs. Dr. Davidson also had Mardan progress reports, dated December 2010 and March 2011, and a report card dated June 2011. The December 2010 progress report noted that Student had become more socially aware and loved to play with classmates, but that he required one-on-one assistance to complete all work. The March 2011 progress report showed a slight improvement in academic skill, but stated that Student received one-on-one instruction in both language arts and math. The June 2011 report card showed further slight improvement: Student was able to identify 20 letters and he could rote count to 20. In May 2011, Dr. Davidson also had an opportunity to visit and discuss matters with Ms. Rosenthal. She learned that Ms. Rosenthal has a Level II Education Specialist Instruction Credential, and she saw that Student's special day class at Mardan had nine pupils, one teacher and one aide. Of her interview, Dr. Davidson reported that "Ms. Rosenthal expressed

to this examiner that (Student) needs one-to-one instruction and review of taught concepts,” and, further, that “even with all the various therapies (Student) has received, the carry-over of taught concepts does not occur, due to his severe memory deficits and learning deficits.”

69. The Davidson Report concluded with detailed recommendations concerning Student’s education. She suggested a number of goals that proposed to lift Student into first grade curriculum standards. Dr. Davidson recommended that Student receive his schooling in a one-on-one educational setting with no more than five pupils. She suggested that the educational placement utilize interventions and programs such as the COB model, Interactive Metronome, Lindamood Bell, Zoophonics and Touch Math. She recommended that Student receive five hours per week of intensive Lindamood Bell training in order to improve his academic skills. She suggested numerous programs for use at school, such as the Fast ForWord Language programs to increase language and listening skills and the No-Glamour programs to increase memory skills. For related services, Dr. Davidson recommended two hours per week of social skills training, three hours per week of individualized speech and language therapy with specified teaching programs, two 45 minute sessions per week of occupational therapy with use of the Handwriting Without Tears program, and further services in the areas of physical education, adapted physical education and vision therapy.

70. Dr. Davidson testified that the October 2010 was inappropriate for two reasons. First, she emphasized that the proposed special day class placement at Linda Vista Elementary School did not have the required one-to-one instruction that Student required. She stated that she thought that Mardan was an appropriate placement for Student for the 2010-2011 school year, but decided he needed a more restrictive environment after her discussion with Ms. Rosenthal. In May 2011, during her visit to Mardan, Dr. Davidson observed that Student was lost during group instruction. In September 2011, when she visited Linda Vista Elementary School, she observed Ms. Harris and the aides teaching in groups. She concluded that, like Mardan, Student would be lost in the proposed District placement. Second, consistent with her report, Dr. Davidson testified that the level of speech and language and occupational therapy services in the October 2010 IEP was insufficient. She stated that Student requires intensive one-to-one services in every area. Dr. Davidson acknowledged that, in her opinion, the level of APE, physical therapy and vision services in the October 2010 IEP was appropriate.

71. Caprice Pelonis is a school psychologist with 21 years of experience in the field. Ms. Pelonis has worked as a school psychologist for the District since 1995. She was part of the District evaluation team that reassessed Student in May 2009, and she has been a member of his IEP teams. Ms. Pelonis testified that, for the October 2010 IEP meeting, she reviewed all the information available concerning Student, and paid special attention to the Gray Evaluation. She stated that the October 2010 IEP team identified Student’s needs and formulated goals to address his needs. She testified that the proposed placement in the SDC at Linda Vista Elementary School, together with the offered related services, was sufficient to allow Student to make progress on the goals. Ms. Pelonis stated that the Learning Center followed in the proposed placement aligned with the recommendations in the Gray Evaluation. In particular, Ms. Pelonis testified that the Learning Center provided Student

with the opportunity for instruction in a small classroom, in small groups, and in a one-to-one setting. She stated that the Learning Center also provided Student with teaching methods that include patience, repetition, massed practice and reduced language and motor demands. Ms. Pelonis testified that the proposed placement practiced language skills throughout the day, utilized multi-sensory instruction methods, contained behavioral reward programs for the pupils, and provided opportunities for interaction with typically developing peers.

72. Cathryn Harris is a special education teacher with 13 years experience in the field. Ms. Harris holds a Level II Education Specialist Instruction and clear Multiple Subject Teaching credentials. She has served as a special education teacher for the District at Linda Vista Elementary School since 2002. Ms. Harris was part of the District team that performed the initial evaluation and reassessment of Student. She has also served as a member of his IEP teams. She has experience teaching pupils with Student's disabling conditions. She testified that, in her opinion, the October 2010 IEP addressed Student's needs and provided him with an opportunity to make educational progress. She stated that the Learning Center followed in the proposed placement had many beneficial features that could help Student. She testified that the Learning Center emphasized regular consultation and collaboration between herself, her aides, and the service providers. Ms. Harris testified that she and her aides typically break pupils into small groups and that the instructors can provide one-to-one instruction if needed. She stated that she utilizes many different teaching methods that include ABA techniques, Touch Math, Zoophonics and Lindamood Bell. She stated that she uses the Handwriting Without Tears program in her class in conjunction with Anna Berezin in order to help pupils with their functional handwriting skills. Ms. Harris corroborated the testimony of Ms. Pelonis, stating that her class aligns with the recommendations in the Gray Evaluation. She recognized the challenges caused by Student's memory deficits, and testified persuasively that she has experience engaging pupils in multiple and creative ways to promote the learning of pre-academic skills. She noted that Student requires repetition on a daily, weekly, monthly and yearly basis to learn and retain basic skills such as letter and number identification. Ms. Harris also noted that, in the proposed placement and unlike Brioso, Student would be part of the school community, interacting with pupils in general education and participating in activities like art, physical education, library time and going on field trips.

73. Mary Halonen is a licensed physical therapist in California. She has over 40 years experience in the field. Ms. Halonen is a senior pediatric physical therapist at Orange County Therapy Services which contracts with the District to conduct assessments and provide therapy services. She was part of the District team that performed the initial evaluation of Student, and she has been a member of his IEP teams. Ms. Halonen developed the two physical therapy goals in the October 2010 IEP. The team adopted her recommendation of offering Student two 45 minute individual physical therapy sessions each week. Ms. Halonen testified that, in her opinion, the offered level of service was appropriate to assist Student in benefitting from his special education program. She stated that Student would receive the physical therapy both in the classroom and the playground to help him make progress on the physical therapy goals in the IEP. Ms. Halonen testified that, as part of

the Learning Center, she also would consult regularly with Student's teacher and aides, and make suggestions that his instructors could follow to further help Student make progress overall.

74. Anna Berezin is a licensed occupational therapist in California. She has over 27 years of experience in her profession. Ms. Berezin has served as an occupational therapist for the District since 2004. She was part of the District team that performed the initial evaluation of Student, and she has been a member of his IEP teams. Ms. Berezin formulated the three occupational therapy goals in the October 2010 IEP. The team adopted her recommendation of offering Student one 45 minute individual occupational therapy session each week, and one 30 minute occupational therapy consultation each month. Ms. Berezin testified that, in her opinion, the offered level of occupational therapy services was sufficient to permit Student to benefit from his special education program. She stated that she was aware that the Faulkner Report recommended that Student receive two individual 45 minute occupational therapy sessions each week. In response, Ms. Berezin testified persuasively that the teaching methodology followed in the Learning Center in the proposed SDC placement was superior to an emphasis on an individual service plan because, through collaboration with Student's teachers, aides and other service providers, she could more effectively help Student generalize into the classroom the skills that she would be teaching him.

75. Connie Erickson is a licensed speech pathologist in California. She holds a Certificate of Clinical Competence in Speech. Ms. Erickson has worked in special education as a speech and language pathologist (sometimes "SLP") and teacher since 1977. Ms. Erickson has worked as an SLP for the District since 2005, and she is trained in Lindamood Bell methodologies. Ms. Erickson performed a speech and language assessment as part of the District's initial evaluation of Student, and she has been a member of his IEP teams. Ms. Erickson formulated the three speech and language goals in the October 2010 IEP. The team adopted her recommendation that the District offer Student two 30 minute group speech and language therapy sessions each week. She testified that, in her opinion, the offered level of speech and language services was appropriate to help Student benefit from his special education program. Ms. Erickson stated that the group sessions would consist of three pupils and give Student an opportunity to practice what he had learned with his peers. She testified that, as part of the Learning Center, she also visited the SDC classroom of Ms. Harris and worked with the pupils twice a week in 30 minute segments. Ms. Erickson testified persuasively that the Learning Center involves a multi-disciplinary approach in which teachers, aides and service providers collaborate and consult on a regular basis to help the pupils work on their respective goals. She provided an example. She stated that, with Student, she envisioned working with him in a small group, and requesting him to write or draw an answer to a question. If he had trouble with a letter, or wrote from right to left, she could help. Such an exercise would help Student with the academic, occupational therapy, and speech and language goals in his IEP. Ms. Erickson corroborated Ms. Pelonis, and testified that the proposed placement practiced language skills throughout the school day.

76. The testimony of each witness on the appropriateness of the October 2010 IEP was credible and compelling. In particular, each witness with a professional degree has extensive experience and qualifications, and has dedicated her career to the education and improvement of disabled children. Nevertheless, the ALJ finds that the District witnesses were more persuasive on this issue for the following reasons.

77. First, the District based the October 2010 IEP on a balanced consideration of the information concerning Student available at the time of the meeting. The District IEP team members carefully reviewed such information, established Student's needs, formulated goals to address the needs, and offered a program designed to help Student make progress on the goals. Notably, none of the outside assessments, including the LaBella Evaluation, the Gray Evaluation and the Poirier Assessment, insisted that Student required a one-to-one educational setting. Ms. LaBella made recommendations that included "whole group instructions." Dr. Gray recommended that Student required special education "in a small classroom/small group or one to one setting." Ms. Poirier suggested that Student "should participate in a small classroom instruction to bridge his newly acquired skills to a group setting." The proposed special day class at Linda Vista Elementary School and, in particular, the Learning Center practiced by the District, satisfied these recommendations. In addition, Ms. Rosenthal, Student's first grade teacher at Mardan, participated in the October 2010 IEP meeting, and she likewise did not insist that Student required a one-to-one educational placement.

78. Second, Dr. Davidson based her opinion, in part, upon information that the October 2010 IEP did not have. This information included the Handy Report and Dr. Davidson's observation of Student at Brioso. The post-IEP facts also included information that Dr. Davidson received from Mardan in May 2011. Dr. Davidson testified that she was in favor of Student's placement at Mardan until she spoke with Ms. Rosenthal and Rosemarie Kagik, a program specialist at Mardan. Dr. Davidson stated that she was shocked to learn from these women that Mardan was not going to invite Student to return for second grade. While Student did not establish with precision the reason for this decision, a large factor appeared to be that he failed to make appreciable academic progress during the 2010-2011 school year and was not ready for the second grade curriculum. Dr. Davidson determined that, in two school years at Mardan, Student had learned 18 letters. From this information, Dr. Davidson concluded that Student required the type of one-to-one instruction that he receives at Brioso. However, the October 2010 IEP team did not have this information. Instead, the team included Ms. Rosenthal and Ms. Kagik, and they did not object to the proposed placement of Student in the SDC at Linda Vista Elementary School.

79. Third, there was a basic inconsistency in the testimony of Dr. Davidson. She testified that the October 2010 IEP was inappropriate, but that the Mardan program for the 2010-2011 school year was appropriate. However, upon comparison, the District program was equal or superior to Mardan. The October 2010 IEP contained goals that addressed the same needs as the Mardan goals for Student's first grade year. The proposed special day class at Linda Vista Elementary School was similar to Student's classroom at Mardan. The proposed District class had seven pupils, one teacher and two aides. Student's class at

Mardan had nine pupils, one teacher and one aide. Both Ms. Harris and Ms. Rosenthal have a Level II Education Specialist Instruction credential. In the proposed placement, the District offered related services in the areas of speech and language, occupational therapy, physical therapy, adapted physical education and vision therapy, and the majority of related service providers were part of a multi-disciplinary team that would work with Student. At Mardan, Student received one 30 minute group session of speech and language therapy. Dr. Davidson did not consider or explain her inconsistent views of the two programs, a failure which reveals a bias for private school over public school settings.

80. Fourth, the Student witnesses evinced a superficial view of the proposed special day class placement. Each Student witness had visited either the actual SDC at Linda Vista Elementary School, or other SDC classes in Orange County. Ironically, such visits placed blinders on their view of the District offer. Both Mother and Ms. Handy saw only a large class size and much commotion. Dr. Davidson saw only small group instruction. The Student witnesses failed to look beneath the surface and see the true nature of the Learning Center followed in the proposed placement. They did not see or consider that Ms. Harris and her aides can provide one-to-one academic instruction if a pupil requires such attention with a lesson. They did not see or consider the collaboration and consultation between teachers, aides and service providers. They did not see or consider that, like Ms. Handy at Brioso, Connie Erickson provided direct speech and language assistance in the classroom. They did not see or consider that the proposed classroom was a language-rich environment. They did not see or consider that Ms. Harris and her aides utilized many of the multi-sensory teaching methods that Ms. Handy and Dr. Davidson have recommended for Student. In short, the Student witnesses based their negative opinions on an incomplete understanding of the program offered in the October 2010 IEP.

81. Finally, the Student witnesses based their opinions on standards that the District need not satisfy. Mother has insisted that Student must receive his education and related services only through an individual delivery model. The District, though, is not held to a standard of parental preference. JoQueta Handy based her opinion, in part, upon the belief that Student can become an independent competent learner. Dr. Davidson based her highly customized recommendations upon the objective of having Student meet first grade curriculum standards. But, the District is not held to a standard of maximizing Student's potential. Instead, the District must design an educational program geared to Student's capabilities. Student is capable of slow and halting progress. As recognized by Cathryn Harris, Student requires repetition over the course of days, weeks, months and years in order to learn basic concepts. As recommended by Dr. Gray, this repetition can occur in a small classroom setting, in group instruction and with one-to-one attention. The proposed SDC placement at Linda Vista Elementary School met this criteria.

#### *The 2011-2012 School Year*

82. The District did not have an IEP in place for Student at the beginning of the current school year. Parents, and particularly Mother, were responsible for this omission. Starting in April 2011, and continuing through the filing of the Due Process Complaint and

the conclusion of the due process hearing in this matter, Parents refused to cooperate with the District's attempts to perform a triennial reassessment of Student and schedule an IEP meeting for the review of the triennial and the development of an educational program for the 2011-2012 school year.

83. On April 5, 2011, the District sent to Parents a notice that the District wanted to perform a triennial reassessment of Student. The District had performed the initial evaluation of Student in May 2008. The notice contained an assessment plan which informed that the triennial reassessment would cover the following areas: (1) academic achievement; (2) intellectual development; (3) language/speech/communication development; (4) psychomotor development; (5) health/vision/hearing; (6) social/emotional behaviors status; (7) an occupational therapy evaluation; (8) a physical therapy evaluation; (9) an assistive technology evaluation; (10) an audiological evaluation; (11) a vision therapy evaluation; and (12) an adapted physical therapy evaluation. The assessment plan also informed Parents that the District would consider the LaBella Evaluation and the Gray Evaluation as part of the triennial reassessment.

84. On April 12, 2011, Mother signed consent to the assessment plan. However, on April 29, 2011, the attorney representing Parents informed the District by letter that Parents had revoked consent for the District to perform the triennial reassessment of Student. No reason was given. In actuality, Parents revoked consent because they had retained Dr. Davidson to perform her evaluation of Student, and they wanted to give her preference in the assessment process. In May 2011, the District's attorney attempted without success to persuade Parents' counsel to have Parents provide consent for the triennial reassessment. In early June 2011, the District filed a due process complaint seeking an order permitting it to perform the triennial.

85. In late August 2011, Student's counsel informed District's counsel that Dr. Davidson was evaluating Student and preparing a report. On August 25, 2011, the District sent to Parents a notice scheduling an IEP meeting for September 12, 2011. The purpose of the meeting was to review Dr. Davidson's report. At the same time, District's counsel requested Student's counsel to provide a release of information that would allow the District to communicate with Dr. Davidson. Parents did not consent to the proposed September 12, 2011 IEP meeting. Parents also provided a limited release, permitting the District to provide information to Dr. Davidson, but preventing the District from obtaining information from her. At the same time, Parents completely restricted the District from having access to Student's records and teachers at Mardan. Further, Parents failed to provide the District with the Handy Report, and Ms. Handy's September 9, 2011 Addendum, which recommended placement of Student at Brioso.

86. On September 6, 2011, counsel for Student informed the District that Parents intended to place Student at Brioso and seek reimbursement from the District for such placement. Several days later, District's counsel requested from Student's attorney that Parents sign a release of information concerning Brioso. On September 13, 2011, Mother provided a limited release, permitting the District to obtain written information from Brioso.

At a later date, Parents provided consent for District personnel to observe Brioso, and several of Student's IEP team members visited the school.

87. On September 23, 2011, Student's counsel sent to the District's attorney a letter which included Mother's renewed consent for the April 2011 assessment plan pertaining to the triennial reassessment of Student. Mother provided such consent on the eve of the due process hearing in the administrative action that the District had brought regarding the triennial reassessment. Despite the consent, Parents blocked the District's attempt to perform the triennial reassessment by refusing to cooperate in the scheduling of dates for the various evaluations. In fact, by the time of the conclusion of the due process hearing in this matter, the District still had not been able to obtain cooperation to conduct the audiological and vision therapy evaluations in the April 2011 assessment plan.

88. On October 12, 2011, through his attorney, Student filed the Due Process Complaint in this matter. This makes October 13, 2009, as the cut-off date for the limitations period under the two year statute of limitations that applies in special education matters.

89. On October 26, 2011, Student's counsel sent to the District attorney a letter concerning the Davidson Report. The letter stated, in part: "As you are aware, the District previously agreed to fund an IEE but has never done so. Therefore, my client will provide the report to the District if the District agrees to fund Dr. Davidson's report." The letter requested \$6,187.50 for a copy of the Davidson Report. The District did not make this payment. Parents did not provide the District with a copy of the Davidson Report until five business days before the start of the due process hearing in this case as part of the disclosure requirements under state law.

90. Starting in December 2011, the District has attempted without success to schedule and hold an IEP meeting for Student. On December 12, 2011, the District sent to Parents a notice that scheduled an IEP meeting for January 4, 2012. The purpose of the meeting was to discuss the triennial reassessment of Student and hold an annual review. On December 15, 2011, Student's counsel informed the District's attorney that Parents would not attend the proposed meeting. For several weeks thereafter, District's counsel attempted without success to obtain acceptable alternate dates from Student's counsel. On January 6, 2012, the District sent to Parents a notice that scheduled an IEP meeting for January 10, 2012. Parents did not agree to this date. After further efforts to obtain an acceptable alternate date, on February 7, 2012, the District sent to Parents a notice that scheduled an IEP meeting for February 24, 2012. Parents did not agree to this date because their attorney was unavailable. On February 27, 2012, the District sent to Parents a letter that scheduled an IEP meeting for March 9, 2012. It is unknown whether a meeting took place on that date.

## LEGAL CONCLUSIONS

### *Burden of Proof*

1. In a special education administrative proceeding, the party seeking relief has the burden of proof. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 163 L.Ed.2d 387] (*Schaffer*)). Here, Student has brought the complaint and has the burden of proof.

### *Framework for Decision*

2. Special education law derives from the Individuals with Disabilities Education Act (IDEA or Act). (20 U.S.C. § 1400 et seq.) The IDEA is a comprehensive educational scheme that confers upon the disabled child a substantive right to public education. (*Honig v. Doe* (1988) 484 U.S. 305, 310 [108 S.Ct. 592, 98 L.Ed.2d 686] (*Honig*)). The primary goal of the IDEA is to “ensure that all children with disabilities have available to them a free appropriate public education that emphasizes public education and related services.” (20 U.S.C. § 1400(d)(a)(A); see *J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 947 (*Mercer Island*)).

3. Under the IDEA, a free appropriate public education (FAPE) is defined as follows: special education and related services that (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the school standards of the state educational agency; (C) include an appropriate pre-school, elementary school, or secondary school in the state involved; and (D) are provided in conformity with the individualized education program (IEP) required under section 1414(d) of the Act. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17 (2006); Cal. Code Regs., tit. 5, § 3001, subd. (p).)

4. The term “special education” means specially designed instruction that meets the unique needs of the child. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39 (2006); Ed. Code, § 56031, subd. (a).) The term “related services” means transportation and developmental, corrective or other supportive services required to assist a child with a disability to benefit from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34(a) (2006).) In California, “related services” are called “designated instruction and services.” (Ed. Code, § 56363, subd. (a).) In this case, the related services contained in Student’s proposed IEP’s included occupational therapy, physical therapy, adapted physical education, speech and language therapy, vision therapy and transportation. (Factual Findings 15, 54.)

5. In 1982, the United States Supreme Court rendered the guiding decision in special education law. (*Board of Educ. of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*)). The primary issue in the case was “What is meant by the Act’s requirement of a ‘free appropriate public education’?” (*Id.* at p. 186.) In deciding this issue, the Supreme Court noted that the predecessor statute of the IDEA did not contain any substantive standard prescribing the level of education that a handicapped child must receive. (*Id.* at p. 189.) Instead, the Court determined that Congress established procedures to guarantee disabled children access and

opportunities, not substantive outcomes. (*Id.* at p. 192.) If a school district acts in compliance with the procedures set forth in the IDEA, especially as regards the development of the child's IEP, then the assumption is that the child's program is appropriate. (*Id.* at p. 206.) Accordingly, the Court determined that an educational agency must provide the disabled child with a "basic floor of opportunity." (*Id.* at p. 200.) Stated otherwise, the educational agency must offer a program that "confers some educational benefit upon the handicapped child." (*Id.* at p. 200.)

6. To assist courts and administrative tribunals, the Supreme Court established a two-part test to determine whether an educational agency has provided a FAPE for a disabled child. (*Mercer Island, supra*, 592 F.3d at p. 947.) "First, has the State complied with the procedures set forth in the Act? And, second, is the individualized education program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" (*Rowley, supra*, 458 U.S. at pp. 206-207.) "If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more." (*Id.* at p. 207.)

7. An IEP meets the *Rowley* standard and is substantively adequate if the plan is likely to produce progress, not regression, and is likely to produce more than trivial advancement such that the door of public education is opened for the disabled child. (*D.F. v. Ramapo Central School Dist.* (2nd Cir. 2005) 430 F.3d 595, 598.) The IEP must be reasonably calculated to enable the child to receive educational benefit in light of the child's intellectual potential. (*R.E. v. New York City Dept. of Educ.* (S.D.N.Y. 2011) 785 F.Supp.2d 28, 42.) The focus must be on the placement of the school district, not the alternative preferred by the parents. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314 (*Gregory K.*)) An educational agency need not prepare an IEP that offers a potential maximizing education for a disabled child. (*Rowley, supra*, 458 U.S. at p. 197, fn. 21.) Instead, "(T)he assistance that the IDEA mandates is limited in scope. The Act does not require that States do whatever is necessary to ensure that all students achieve a particular standardized level of ability and knowledge. Rather, it much more modestly calls for the creation of individualized programs reasonably calculated to enable the student to make some progress towards the goals in that program." (*Thompson R2-J School v. Luke P.* (10th Cir. 2008) 540 F.3d 1143, 1155.)

8. In addition to providing a FAPE, a school district must ensure that "To the maximum extent appropriate, children with disabilities. . . are educated with children who are not disabled." (20 U.S.C. § 1412(5)(A); see also 34 C.F.R. § 300.114 (2006); Ed. Code, § 56342, subd. (b).) This "least restrictive environment" (LRE) provision reflects the preference by Congress that an educational agency educate a child with a disability in a regular classroom with his or her typically developing peers. (*Sacramento City School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1403.) Under the LRE mandate, a school district must consider a continuum of alternative placements which proceed from "instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions." (34 C.F.R. § 300.115(b) (2006); see also Ed. Code, § 56342, subd. (b).)

Also, the school district must attempt to make a placement decision that is at the child's home school. (34 C.F.R. § 300.116(a) (2006); see also Ed. Code, § 56342, subd. (b).)

*Issue No. One: Has the District Denied Student a FAPE during the 2009-2010 School Year (to the Extent that Year Falls within the Statute of Limitations)?*

9. At the outset of the due process hearing in this matter, the ALJ questioned the propriety of deciding Issue No. One, based upon the fact that the IEP that controlled Student's 2009-2010 school year was developed in June 2009, which was outside the two year statute of limitations. The parties adjourned from the first day of hearing and briefed the issue. Exhibit 150 is Student's Memorandum Regarding the Statute of Limitations. Exhibit 151 is the District's Reply to Petitioner's Memorandum Regarding the Statute of Limitations and Motion to Dismiss Issue No. One Related to the 2009-2010 School Year. Exhibit 152 is Student's Opposition to Saddleback Valley Unified School District's Motion to Dismiss. On the second day of hearing, the parties reconvened and the ALJ dismissed Issue No. One. That dismissal is based upon the following factual findings and legal determinations.

10. An IEP for a disabled child is measured at the time that it was created. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149; *Tracy N. v. Dept. of Educ., State of Hawaii* (D.Hawaii 2010) 715 F.Supp.2d 1093, 1112.) This evaluation standard is known as the "snapshot rule." (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 439 (*J.W. v. Fresno*)). Under the snapshot rule, the decision concerning an IEP is not evaluated retrospectively or in hindsight. (*Ibid.*; *JG v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801.)

11. Both federal and state law contain a two year statute of limitations for special education administrative actions. (20 U.S.C. § 1415(b)(6)(B); 34 C.F.R. § 300.507(a)(2)(2006); Ed. Code, § 56505, subd. (1).) The state statute provides as follows: "A request for due process hearing arising under subdivision (a) of Section 56501 shall be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis of the request. In accordance with Section 1415(f)(3)(D) of Title 20 of the United States Code, the time period specified in this subdivision does not apply to a parent if the parent was prevented from requesting the due process hearing due to either of the following (1) Specific misrepresentations by the local educational agency that it had solved the problem forming the basis of the due process hearing request; (2) The withholding of information by the local educational agency that was required under this part to be provided to the parent." (Ed. Code, § 56505, subd. (1).)

12. The statute of limitations operates to bar claims based upon facts outside of the two year period. (*J.W. v. Fresno, supra*, 626 F.3d at pp. 444-445; *Breanne C. v. Southern York County School Dist.* (M.D. Pa. 2009) 665 F.Supp.2d 504, 511-512; *E.J. v. San Carlos Elementary School Dist.* (N.D.Cal. 2011) 803 F.Supp.2d 1024, 1026, fn. 1.)

13. Here, Student's IEP team made the decision regarding his 2009-2010 school year at the June 3, 2009 meeting. (Factual Findings 13-16; Legal Conclusion 10.) Parents knew or had reason to know of their dispute with the substance of the June 2009 IEP, either at the time of the meeting or shortly thereafter. At the June meeting, the District offered to review the Procedural Safeguards of special education law, and Mother declined. At the same meeting and afterwards, Mother and her attorney demanded that the District fund an IEE. On August 3, 2009, the District received from Mother a written statement that expressed disagreement with the FAPE offer in the June 2009 IEP, and concluded by informing the District that Parents intended to place Student at Mardan School, and seek reimbursement from the District. Parents eventually brought an administrative action based upon the June 2009 IEP. (Factual Findings 16, 17.)

14. Parents filed the Due Process Complaint in this matter on October 12, 2011, making the two year period in this case start on October 13, 2009. (Factual Finding 88; Legal Conclusion 10.) The facts underlying the basis for Issue No. One occurred more than four months prior to this cut-off date. (Factual Findings 13-16.) Accordingly, Issue No. One was dismissed as outside the statute of limitations. (Legal Conclusion 12.)

15. Student contended that Issue No. One had viability after October 13, 2009, because the June 2009 IEP covered the 2009-2010 school year and the District's alleged denial of FAPE continued through this time period. (Exhibit 152, p. 2.) The contention lacks merit. It is true that "an IEP is a program, consisting of both the written IEP document, and the subsequent implementation of that document. While we evaluate the adequacy of the document from the perspective of the time it is written, the implementation of the program is an ongoing, dynamic activity, which obviously must be evaluated as such." (*O'Toole v. Olathe Unified School Dist. No. 233* (10th Cir. 1998) 144 F.3d 692, 702.) Here, the Due Process Complaint did not raise issues of implementation because there were no IEP's for the District to implement. (Factual Findings 7, 16, 17, 56.) Otherwise, special education law does not recognize the doctrine of continuing violations as an exception to the two year statute of limitations. (*J.L. v. Ambridge Area School Dist.* (W.D.Pa. 2008) 622 F.Supp.2d 257, 268-269; 71 Fed.Reg. 46697 (Aug. 13, 2006).)

*Issue No. Two: Has the District Denied Student a FAPE during the 2010-2011 School Year?*

16. For Issue No. Two, Student contends that the District denied him a FAPE because the October 2010 IEP did not provide for one-to-one educational instruction, did not offer a sufficient amount of related services in the areas of speech and language therapy and occupational therapy, and did not contain a behavior plan and behavioral psychology services. The *Rowley* FAPE standard governs the resolution of this issue. (Legal Conclusions 5-7.)

17. The October 2010 IEP was appropriate because it was reasonably calculated to provide Student with educational benefit. The reasonable calculation appears in the connection between the information concerning Student and the program proposed in the IEP. In preparing for the October 2010 IEP, the District team members carefully reviewed

all available information, including outside assessments, the viewpoint of Student's teacher at Mardan, and an observation of Student in his private school classroom. (Factual Findings 5-6, 8-10, 12, 20, 22-25, 27-40, 44, 46.) The District team members used this information to establish Student's present levels of performance and to develop 13 goals that addressed his needs. (Factual Findings 47-53.) The provision of educational benefit in the IEP appears in the proposed educational program. The District offered Student placement in a special day class with support from related services in the areas of speech and language, occupational therapy, physical therapy, adapted physical education and vision therapy. (Factual Findings 54-55.) The SDC had a low pupil-to-adult ratio which guaranteed that Student would receive attention throughout the school day. (Factual Finding 54.) The proposed placement followed the Learning Center which emphasizes a multi-disciplinary team approach in which the classroom teacher and aides consult and collaborate with the related services providers on a regular basis. (Factual Findings 55, 71-75.) The professionals who developed Student's goals would be the persons teaching and providing related services for him. (Factual Findings 48-53, 71-75.) Except for the vision therapy services, Student would receive his teaching and related services at one school location. (Factual Finding 55.) The SDC teacher, her aides and related service providers utilized many of the multi-sensory teaching methods recommended by Student's experts. (Factual Finding 72.) The District witnesses testified unanimously that Student would receive educational benefit in the proposed placement. (Factual Findings 71-75.) The District witnesses were more persuasive in this regard than the Student witnesses who criticized the placement. (Factual Findings 76-81.)

18. The determination that the October 2010 offered Student educational benefit is supported through a comparison of the District program and Student's first grade year at Mardan. For the 2009-2010 school year, Student had made progress according to his capabilities in kindergarten at Mardan. He met seven goals, while not achieving eight goals. (Factual Findings 19-20, 31.) The October 2010 IEP essentially picked-up where Student's kindergarten year left-off. The IEP contained 13 goals in basic areas such as letter identification, number counting and body management. (Factual Findings 47-53.) For the 2010-2011 school year, Mardan developed 15 goals that addressed the same areas of need. (Factual Finding 68.) In other respects, including the class size, the ratio of instructors to pupils and the credential of the teachers, the proposed SDC class at Linda Vista Elementary School was similar to Student's educational setting at Mardan. (Factual Findings 46, 54, 68, 72.) In fact, the proposed District placement was in some respects superior to Mardan, because the District offered Student a greater amount of related services and the Learning Center emphasized a multi-disciplinary team approach in working the pupils. (Factual Findings 54-55, 71-75, 79.) Dr. Davidson testified that she thought that Mardan was appropriate for Student for the 2010-2011 school year. (Factual Findings 70, 79.) The Davidson Report, through progress reports and a report card, showed that Student progressed according to his capabilities at Mardan. (Factual Finding 68.) In fact, Student contended in his Closing Brief that he received educational benefit at Mardan during his first grade year. (Exhibit 165, pp. 4, 23.) In sum, if Mardan was appropriate for Student for his first grade year, the proposed placement in the October 2010 IEP was equally appropriate.

19. The October 2010 IEP also satisfied the preference in the law that an educational agency place a disabled child in the least restrictive environment. (Legal Conclusion 8.) The parties did not place much emphasis on the LRE in this case. Nevertheless, the District proposed a placement in the Student's home school where he would have an opportunity to learn alongside regular education pupils, participate in group activities with typically developing peers, and be a part of the school community. (Factual Findings 49, 54-55, 71-72.) Student does not have the intellectual or academic ability for placement in a regular education classroom. (Factual Findings 2-3, 6, 31, 34-36, 47-53, 68.) In terms of the LRE, the proposed special day classroom is the next step on the continuum of placements. (Legal Conclusion 8.)

20. Student contends that the October 2010 IEP was inappropriate because the plan did not provide him with continuous one-to-one academic instruction. (Exhibit 165, pp. 10-12.) The contention is not well-taken. The October 2010 IEP must be judged by information available to the team at the time of development. (Legal Conclusion 10.) At the time of the October 2010 meeting, not one outside assessor or educator indicated that Student required full-time one-to-one instruction. The LaBella Evaluation provided suggestions for "whole group instructions." (Factual Findings 25, 77.) The Poirier Assessment recommended that Student participate in small classroom instruction. (Factual Findings 38, 77.) The Gray Evaluation recommended that Student receive his education in a small classroom, small groups and one-to-one instruction. (Factual Findings 36, 77.) Erin Rosenthal, Student's teacher at Mardan, participated in the October 2010 IEP, and she did not object to the proposed special day class. (Factual Findings 42, 45, 54-55, 77-78.) In fact, the District's proposed placement aligned with the recommendations in the Gray Evaluation, and contained the opportunity for one-to-one instruction. (Factual Findings 36, 54-55, 71-72.) It was only after the October 2010 IEP meeting that Dr. Davidson learned from Ms. Rosenthal that Student required one-to-one instruction for the latter part of his first grade year at Mardan. (Factual Finding 68.) Student's IEP team was never given an opportunity to consider this information. (Factual Findings 85, 90.)

21. Student contends that the October 2010 IEP was inappropriate because the District did not offer a sufficient level of speech and language services to assist him with his severe expressive and receptive communication delays. (Exhibit 165, pp. 12-15.) The Bass Report recommended that Student receive three or four individual 50 minute sessions of speech and language therapy each week. (Factual Finding 9.) The LaBella Evaluation recommended "maximum intervention" with a speech and language pathologist. (Factual Finding 25.) JoQueta Handy testified that Student's needs required three one hour individual speech and language therapy sessions each week. (Factual Finding 64.) Dr. Davidson supported Ms. Handy's recommendation. (Factual Findings 69-70.) In the October 2010 IEP, the District offered Student two 30 minute group sessions of speech and language therapy each week. (Factual Finding 54.)

22. An IEP must offer related services, such as speech and language therapy, that are required to assist a child with a disability to benefit from special education. (Legal Conclusion 4.) The District offer met this standard. Connie Erickson was the professional

who recommended the level of speech and language services in the October 2010 IEP. (Factual Finding 75.) Ms. Erickson had evaluated Student, discussed his progress with her counterpart at Mardan, and developed the speech and language goals in the IEP. (Factual Findings 6, 45, 49, 53, 75.) Ms. Erickson testified that the two group sessions each week would have three pupils and give Student an opportunity to practice with his peers. (Factual Finding 75.) The Gray Evaluation recognized the value in such an approach. (Factual Finding 36.) In addition, as part of the Learning Center followed in the proposed placement, Ms. Erickson visited the classroom of Ms. Harris twice a week to work with the pupils. (Factual Findings 54-55, 75.) The Learning Center featured close collaboration and consultation between teacher, aides and related service providers. (Factual Findings 55, 71-75.) Ms. Harris and her aides also practiced language skills throughout the day. (Factual Findings 71-72, 75.) In sum, the offered group speech and language therapy sessions complimented the Learning Center approach in the proposed placement and thereby would assist Student to benefit from special education.

23. Student contends that the October 2010 IEP was inappropriate because the District failed to offer a sufficient level of occupational therapy services. (Exhibit 165, pp. 15-16.) The Faulkner Report recommended that Student receive two 45 minute individual occupational therapy sessions each week to address gross and fine motor deficits. (Factual Finding 8.) Although she is not an occupational therapist, Dr. Davidson made the same recommendation. (Factual Findings 69-70.) In the October 2010 IEP, the District offered Student one 45 minute individual occupational therapy session each week, and one 30 minute occupational therapy consultation each month. (Factual Finding 54.)

24. As with the speech and language sessions, the District offer of occupational therapy services met the standard applicable for related services. (Legal Conclusion 4.) Anna Berezin was the professional who recommended the level of occupational therapy services in the October 2010 IEP. (Factual Findings 49, 74.) Ms. Berezin had evaluated Student, observed him at Mardan, and developed the occupational therapy goals for him in the IEP. (Factual Findings 6, 46, 49, 51, 74.) Ms. Berezin testified that, in the context of the Learning Center team approach practiced in the proposed placement, one weekly 45 minute individual occupational therapy session with Student was sufficient for him to progress on this goals. Ms. Berezin stated that, by collaborating and consulting with Student's teacher and aide, she could better generalize skills that she taught him into the classroom. (Factual Finding 74.) She suggested that the Learning Center approach was superior to the individual delivery model preferred by Parents, a point well-taken since there was a notable lack of collaboration between Mardan and Student's therapy providers, including Patricia LaBella, Karina Poirier and JoQueta Handy. (Factual Findings 28, 31, 38, 62, 74.)

25. Student contends that the District was prevented from establishing that the proposed placement in the SDC at Linda Vista Elementary School included the opportunity for one-to-one instruction by the holding in *Union School District v. Smith* (9th Cir. 1994) 15 F.3d 1519 (*Union*.) *Union* held that, when offering a special education program through an IEP, an educational agency must make a formal written offer to the parents. (*Id.* at p. 1526.) Student attempts to use this holding as a rule of evidence preclusion, but the requirement of a

formal written offer is a procedure that school districts must follow. (*Ibid.*; *J.W. v. Fresno, supra*, 626 F.3d at p. 460.) While the Due Process Complaint in this matter did not charge that the District committed procedural violations, nevertheless, the October 2010 IEP satisfied the *Union* rule. The IEP specified that placement was in an SDC denominated the Learning Center, and further specified the nature and frequency of the offered related services. (Factual Finding 54.) Such specification was sufficient to stand as a formal offer of placement. (*K.D. v. Dept. of Educ., State of Hawaii* (9th Cir. 2011) 665 F.3d 1110, 1127.) Moreover, an IEP need not set forth methodologies, including teaching methods such as group and one-to-one instruction, that are used in an offered educational placement. (*Mercer Island, supra*, 592 F.3d at p. 952; *S.M. v. State of Hawaii, Dept. of Educ.* (D.Hawaii 2011) 808 F.Supp.2d 1269, 1279 (*S.M. v. Hawaii*).

26. Student contends that the District erred because the October 2010 IEP did not reflect outside assessment reports in general, and did not adopt the substance of the recommendations in the Gray Evaluation in particular. (Exhibit 165, pp. 9-10.) Federal and state law require that an IEP team must consider certain information, including the results of the initial or most recent evaluation of the child. (20 U.S.C. § 1414(d)(3)(A)(iii); 34 C.F.R. § 300.324(a)(1)(iii) (2006); Ed. Code, § 56341.1, subd. (a)(3).) This procedure requires an educational agency to “consider” outside assessments of a child; it does not mandate that the agency incorporate recommendations from the assessments when developing an IEP. (*K.E. v. Independent School Dist. No. 15* (8th Cir. 2011) 647 F.3d 795, 805-806; *G.D. v. Westmoreland* (1st Cir. 1991) 930 F.2d 942, 947.) Here, the Due Process Complaint did not charge that the District committed procedural violations in relation to Student. This point aside, the District clearly met its duty to consider evaluations of Student in developing the October 2010 IEP. The District team members reviewed all information obtained through permission of Parents. (Factual Findings 44-45.) The District team members utilized this information to establish Student’s present levels of performance and develop the IEP goals. (Factual Findings 48-53.) The speech and language goals made direct reference to the test results in the LaBella Evaluation. (Factual Findings 22-24, 53.) The proposed special education plan included vision therapy services which adopted the recommendation in the Rakov Report. (Factual Findings 37, 54.) In addition, several district witnesses testified that the proposed SDC placement satisfied the recommendations in the Gray Evaluation by offering an educational setting in a small classroom with group teaching and one-to-one instruction, and with teaching methods that included patience, repetition, massed practice and reduced language and motor demands. (Factual Findings 33-36, 71-72.)

27. Student contends that the October 4, 2010 IEP was inappropriate by failing to contain a behavior plan and offer him behavioral psychological services. (Exhibit 165, p. 10.) There is no evidentiary support for this argument. In his February 2008 report, Dr. Gray did recommend that Student receive behavioral psychology services. (Factual Finding 36.) Student failed to place this report in evidence, so the precise reason for the recommendation is not known. However, the Gray Evaluation did not mention the need for a behavior plan and did not suggest that Student required behavior psychology services. (Factual Finding 36.) In fact, the Gray Evaluation noted that Student showed improvement in his behavioral regulation. (Factual Finding 35.)

*Issue No. Three: Has the District Denied Student a FAPE during the 2011-2012 school year (and prospectively)?*

28. Student contends that the District denied him a FAPE for the 2011-2012 school year because the District did not prepare an IEP for him. (Exhibit 165, p. 17.) The Due Process Complaint in this matter alleged that the District denied Student a substantive FAPE for the current school year, and did not give proper notice that such denial was based upon a procedural violation of the law. Putting this pleading deficiency aside, though, Issue No. Three is easily decided. The District did not have an IEP in place for the 2011-2012 school year because Parents failed to cooperate in the process. Parents cannot claim relief for a violation that they caused to happen. There are two lines of authority that support this determination.

29. The first line of authority concerns the triennial reassessment of a child with a disability. Federal and state law mandate that a school district must reassess a child with a disability every three years, unless the parents and district agree that a reassessment is unnecessary. (20 U.S.C. § 1414(a)(2)(B)(ii); 34 C.F.R. § 300.303(b)(2) (2006); Ed. Code, § 56381, subd. (a)(2).) Parents who do not allow a school district to perform a triennial reassessment cannot claim that the district has denied their child a FAPE. (*Gregory K.*, *supra*, 811 F.2d at p. 1160; *M.T.V. v. DeKalb County School Dist.* (11th Cir. 2006) 446 F.3d 1153, 1160; *Andress v. Cleveland Independent School Dist.* (5th Cir. 1995) 64 F.3d 176, 178.)

30. Here, starting in April 2011, the District attempted to conduct the mandated triennial reassessment of Student. (Factual Finding 83.) Parents initially gave consent to the process, but then withdrew such consent. Parents forced the District to expend valuable resources bringing a due process complaint to enforce its right to perform the triennial reassessment. (Factual Finding 84.) On the eve of the hearing in that matter, Parents then provided consent. But, this consent was a chimera, as Parents failed to cooperate with the District to schedule the various evaluations that were part of the triennial reassessment. By the time of the filing of the Due Process Complaint in this matter, and through to the completion of the hearing, the District has not been able to complete the triennial reassessment. (Factual Finding 87.)

31. The second line of authority involving lack of parental cooperation concerns the timely preparation of an IEP. The IEP is the “centerpiece” in the law for the delivery of education to disabled children. (*Honig*, *supra*, 484 U.S. at p. 311.) “Each IEP must include an assessment of the child’s current educational performance, must articulate measurable educational goals, and must specify the nature of the special services that the school will provide.” (*Schaffer*, *supra*, 546 U.S. at p. 53; see 20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.320 (a) (2006); Ed. Code, § 56345, subd. (a).) Federal and state law require that a school district must have an IEP in effect for a child with a disability at the beginning of each school year. (20 U.S.C. § 1414(d)(2)(A); 34 C.F.R. § 300.323(a) (2006); Ed. Code, § 56344, subd. (c).) Case law holds that parents who do not permit a school district to perform its duties in relation to the preparation of an IEP cannot claim relief for causing the obstruction.

(*C.H. v. Cape Henlopen School Dist.* (3rd Cir. 2010) 606 F.3d 59, 69 (*Cape Henlopen*); *C.G. v. Five Town Community School* (1st Cir. 2008) 513 F.3d 281, 286-288; *MM v. School Dist. of Greenville County* (4th Cir. 2002) 303 F.3d 523, 535-536; *S.M. v. Hawaii*, *supra*, 808 F.Supp.2d at p. 1275.)

32. The *Cape Henlopen* decision is closely on point with this case. In the decision, parents had placed their minor child in a private academy for the 2005-2006 school year. (*Cape Henlopen*, *supra*, 606 F.3d at p. 63.) The school district wanted to hold an IEP meeting for the 2006-2007 school year. (*Ibid.*) The child's mother attended an initial meeting, but refused to cooperate thereafter. (*Ibid.*) The child's parents also refused to give the school district permission to conduct a speech and language evaluation that was necessary to develop the IEP. (*Id.* at p. 64.) Accordingly, the school district did not have an IEP in effect at the start of the 2006-2007 school year. (*Id.* at p. 68.) The Third Circuit Court of Appeals found that this failure constituted a procedural violation of special education law. (*Ibid.*) However, the court decided that the violation was harmless, ruling that "we decline to hold that a school district is liable for procedural violations that are thrust upon it by uncooperative parents." (*Id.* at p. 69.)

33. Here, the intransigence was far greater. Parents refused to permit the District to perform a triennial reassessment of Student which was necessary in order to prepare an IEP for the current school year. (Factual Findings 83, 84, 87; Legal Conclusion 29.) Parents notified the District in September 2011, at the start of the school year, that they had placed Student at Brioso and expected reimbursement. Thereafter, Parents attempted to focus the District's attention on Brioso and away from more relevant information. (Factual Finding 86.) Specifically, Parents refused to allow the District to obtain information from Mardan, intentionally withheld the Handy Report, and attempted to hold the District hostage over release of the Davidson Report. (Factual Findings 85, 89.) At the time of the filing of the complaint in this matter, Parents had refused to attend an IEP meeting, a refusal that extended into February 2012. (Factual Finding 90.) In sum, Parents purposely kept the District in the dark, made it impossible for the District to develop an IEP for Student, yet want the District to pay their expenses. The law does not allow this result. (*Lessard v. Wilton-Lyndeborough Cooperative School Dist.* (1st Cir. 2006) 513 F.3d 18, 26.)

#### *Claims for Reimbursement*

34. Parents contend that, based upon the District's failure to provide Student with a FAPE for the 2009-2010, 2010-2011 and 2011-2012 school years, they have expended a total of \$83,192.50 in private schools and therapies. (Exhibit 165, pp. 22-26.) In special education cases, parents are entitled to reimbursement for such expenses "only if the court concludes both that the public placement violated IDEA and the private school placement arranged by the parents was proper under the Act." (*Covington v. Yuba City Unified School Dist.* (E.D.Cal. 2011) 780 F.Supp.2d 1014, 1020.) Here, Student failed to establish the first part of this reimbursement standard. (Legal Conclusions 14, 17, 28.) Accordingly, Parents are not entitled to any reimbursement in this case, except for the cost of the Gray Evaluation, as discussed below.

*Issue No. Four: Has the District Unlawfully Refused to Reimburse Student's Parents for an Agreed-Upon Independent Educational Evaluation?*

35. Special education law contains a procedural safeguard that allows the parents of a child with a disability to request from a school district an independent educational evaluation. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (2006); Ed. Code, § 56329, subd. (b).) Under this law, parents can request an independent educational evaluation if they disagree with an assessment performed by the school district, and the district must either fund the IEE or file for due process to defend its assessment. (34 C.F.R. § 300.502(b) (2006); Ed. Code, § 56329, subd. (b), (c).) In this case, Parents have turned the IEE procedural safeguard on its head, from initially demanding an independent educational evaluation but not specifying the area of assessment, to demanding that the District pay for the Gray Evaluation, to changing the terms and demanding that the District pay for Dr. Davidson's Report. (Factual Findings 16, 26, 29, 33, 43, 89.) The law relating to IEE's does not give parents the right to dictate terms to the school district.

36. Here, Student contends that the District has unlawfully refused to reimburse Parents for the cost of an IEE. In actuality, the District agreed to fund the Gray Evaluation, but Parents refused to cooperate in the process needed to accomplish such reimbursement. (Factual Finding 41.) The evidence suggests that Parents did not cooperate when the District agreed to fund Dr. Gray's July 2010 report, both because they were not pleased with the Gray Evaluation and because Dr. Davidson's report was more sympathetic and expensive. (Factual Findings 40, 67.) At any rate, the District did not illegally refuse to reimburse Parents for the Gray Evaluation. In order to resolve this dispute, the Decision will order the District to make good on its agreement, and provide reimbursement for the IEE.

#### ORDER

1. Within 30 days of the date of this Decision, the District shall reimburse Parents in the amount of \$2,150, for the cost of the Gray Evaluation.
2. Student's remaining claims for relief are denied.

#### PREVAILING PARTY

The decision in a special education administrative due process proceeding must indicate the extent to which each party prevailed on issues heard and decided. (Ed. Code, § 56507, subd. (d).) Here, the District prevailed on the three FAPE issues. The District also prevailed on the issue involving the IEE, because Student failed to show that the District unlawfully refused to reimburse Parents for the cost of the Gray Evaluation.

## RIGHT TO APPEAL

The parties in this case have the right to appeal this Decision by bringing a civil action in a court of competent jurisdiction. (20 U.S.C. § 1415(i)(2)(A); 34 C.F.R. § 300.516(a)(2006); Ed. Code, § 56505, subd. (k).) An appeal or civil action must be brought within 90 days of the receipt of the Decision. (20 U.S.C. § 1415(i)(2)(B); 34 C.F.R. § 300.516(b)(2006); Ed. Code, § 56505, subd. (k).)

Dated: April 12, 2012

/s/

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TIMOTHY L. NEWLOVE  
Administrative Law Judge  
Office of Administrative Hearings