

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

BELLFLOWER UNIFIED SCHOOL
DISTRICT.

OAH Case No. 2014040078

DECISION

Parents on behalf of Student filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on March 28, 2014, naming Bellflower Unified School District.

Administrative Law Judge Marian H. Tully heard this matter in Bellflower, California, on May 22, 27, and 28, 2014.

Attorney Marcy Tiffany represented Student. Student's mother attended the hearing.

Attorney Eric Bathen represented District. Tracy McSparren, Special Education Administrator, attended the hearing on behalf of District.

A continuance was granted for the parties to file written closing arguments and the record remained open until June 9, 2014. Upon timely receipt of written closing arguments, the record was closed and the matter was submitted for decision.

ISSUES¹

Did District deny Student a free appropriate public education from March 28, 2012 through Student's March 4, 2014, individualized education program by failing to:

1. Timely assess Student in the areas of speech and language and assistive technology/augmentative communication;
2. Develop appropriate speech and language goals; and
3. Provide an appropriate placement and related services?

SUMMARY OF DECISION

District implemented an individualized education program from another district and conducted a thirty-day review. Student contends District should have reevaluated Student in the area of speech and language because Student's performance levels thirty days after entering District were inconsistent with an assessment conducted four months earlier in another district. Student did not demonstrate reevaluation was warranted. District was not required to conduct an assistive technology/augmentative communication assessment before it provided a picture communication system or other communication device to Student. District timely conducted the assessment when it was requested by the District speech therapist.

Student claimed the speech and language goals in his IEP were not appropriate because the goals did not specifically delineate vocalization skills. Student failed to demonstrate his speech and language goals were based upon inaccurate present levels of performance or that his goals were inappropriate. Student's communication and speech and language goals in each of the IEP's at issue were understandable, measurable, and based upon present levels of performance. Student did not establish that District was required to include a specific goal for verbalization or articulation because, in light of Student's severe developmental delays in all aspects of receptive and expressive language, Student's goals were appropriate and Student's program addressed verbalization or articulation needs in the classroom and in speech therapy.

Student contends he required one-to-one instruction by an aide trained in applied behavior analysis and individual, rather than group, speech and language therapy.

¹ Student withdrew some issues alleged in the complaint before the hearing. The remaining issues were clarified with the parties on the first day of the hearing. Accordingly, the issues pled in Student's complaint and set forth in the prehearing conference order, have been rephrased and reorganized for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

There was no evidence at any time before District obtained the results of a Functional Behavior Analysis in November 2013, that Student could not receive educational benefit in his kindergarten special day class without an aide or individual speech therapy. Given the results of, and recommendations in, the Functional Behavior Assessment, District offered to amend Student's IEP to provide the aide and an appropriate environment for behavioral instruction under the supervision of his teacher. Although Parent preferred more restrictive environments, District was required to provide a placement in the least restrictive environment consistent with Student's IEP. From March 28, 2012, the beginning of the statute of limitations period through the March 4, 2014 IEP, at the time the IEP team developed each of Student's IEP's, District offered Student an appropriate placement and speech and language services in the least restrictive environment on the continuum of placement options.

FACTUAL FINDINGS

1. Student was six years of age at the time of the hearing. Lynwood Unified School District initially found Student eligible for special education at the age of three and developed an IEP for him on June 7, 2011. Student's primary eligibility was autistic-like characteristics with a secondary eligibility of speech or language impairment. Student, with his parents and a sibling, moved within District boundaries in August 2011 and lived within District at all relevant times. Lynwood and District are part of the Mid Cities Special Education Local Plan Area.

Initial Assessments and Eligibility

2. Student's eligibility for special education was based, in part, upon a preschool assessment by Lynwood in May 2011, and a speech and language assessment by Los Angeles County Office of Education (LACOE assessment) in June 2011. The preschool examiner did not observe Student to use words, follow simple directions, maintain eye contact or respond to his name. Mother reported to the preschool assessor that Student babbled and said his first word at about 12 months but that he stopped talking at 14-15 months.

3. The LACOE assessment results showed Student's age equivalent skills in receptive language ranged between 9 to 11 months and in expressive language between 8 and 10 months. The speech pathologist observed Student to grunt and point when he wanted something, vocalize and babble sounds, and produce the word approximation "pam-pam" for pacifier. By Mother's report, Student randomly said "Pablo," his father's name, and by teacher's report Student said "open" and "grapes." Student did not respond to his name at home or at daycare. He did not appear to understand the meaning of words. The assessment concluded Student presented with severe receptive and expressive language delay in the areas of pragmatics (social communication), syntax (sentence length and structure), semantics (vocabulary and meaning), and morphology (word forms). No formal articulation

assessment was administered because Student had limited expressive language skills and difficulty with verbal imitation.

4. Based upon these assessments the Lynwood IEP included a communication goal in which Student would use pointing, picture aides, vocalizations and/or one-word utterances to label, comment, greet, take turns, and request basic needs/wants given one model and/or prompt with 80 percent accuracy eight out of 10 times. The IEP also included a functional vocabulary goal in which, on request, Student would select the correct picture from a field of two, given one prompt with 80 percent accuracy over two sessions.

2011-2012 School Year

5. After Student transferred into District, District implemented the Lynwood IEP and held a thirty-day review IEP team meeting on September 29, 2011. The IEP team considered Student's present levels of performance in all areas. The IEP team affirmed Student's primary and secondary eligibilities. Student's areas of need included social behavior, self-help skills, and speech and language. The team reviewed and revised the goals stated in the Lynwood IEP based upon Student's current levels of performance. Goals to address social behavior and self-help skills included: imitate hand gestures (wave bye-bye, touch body parts, hand movements in circle time), play side-by-side by another child for eight minutes, complete a simple four-piece puzzle with minimal prompts, and scribble on a paper for 10 seconds following initial adult demonstration with no more than two physical prompts and verbal prompts as needed. District's speech pathologist developed, and the IEP included, two goals to address language/communication. The first goal was to understand a one-step request to "give me" when presented two common objects. The second goal was, with physical prompting, to exchange a picture of an actual object when given the verbal cue "What do you want?"

6. The IEP provided placement in a preschool autism special day class, 40 minutes per week of speech and language services and 50 minutes per week of occupational therapy. The IEP was implemented with Mother's consent.

7. Sandra Dubrowskij was Student's preschool autism special day class teacher for the 2011-2012 school year. She was also his case manager, and she participated in IEP meetings held on September 29, 2011, June 4, 2012, and May 30, 2013. Ms. Dubrowskij taught a District preschool class for students with autism for seven years. She also trained and supervised para-educators and provided training and functional academic instruction in the community. Before her employment with District she served on the autism committee for Los Angeles County Office of Education for three years, two years as chairperson, established an autism model classroom, and served as a mentor teacher. She had specialized training in Picture Exchange Communication System (PECS), Visual Schedules, Structured Teaching, Applied Behavior Analysis, Discrete Trial Training, TEACCH (Treatment and Education of Autistic and Communication Handicapped Children) and NCPI (non-crisis prevention/intervention).

8. When Student entered her class he made minimal eye contact and needed physical prompting to transition from one area to another. He could sit during circle time for three to six minutes but he did not imitate gestures or sing along. He did not understand simple one-step directions such as “stand up” or “come here.” He did not respond to his name. Student produced self-stimulatory vocalizations but nothing intelligible, and his vocalizations did not serve a communicative function.²

9. There were eight children in Student’s class. The staff-to-student ratio was one staff for two to three students. All of the staff modeled language and worked with the preschoolers to make eye contact, look at their face, reproduce sounds, and use pictures to help communicate. Receptive and expressive language development was embedded in the program. Staff used verbalization and modeling when using pictures and other communication devices. Students received individual one-to-one instruction on a daily basis for approximately 20 minutes.

10. Ms. Dubrowskij, and her staff, worked with Student using a picture based communication system similar to PECS³ and a speech generating device called Go-Talk⁴. Student responded better to the picture based system. Student’s mother used pictures and an iPad to help Student communicate at home. Mother also attempted to use some sign language at home. She had some success in teaching Student “more,” “help,” “all done,” and “bathroom” although it was sometimes difficult to distinguish between signing and hand-flapping or self-stimulatory behavior. Mother talked with Ms. Dubrowskij on a daily basis. Mother informed Ms. Dubrowskij that she was using an iPad with Student at home. Mother began to bring the iPad back and forth to school. Ms. Dubrowskij, speech therapist Brooke Wyatt and Mother attempted to use the iPad to help Student express his wants and needs. The adults would use an application to put photos or icons of familiar things on the iPad screen and attach a sound to the picture. Student could touch the picture and hear the sound. Student was not successful with this strategy at home or at school. He did not use the iPad for communication. When directed to a communication application he would push the iPad away or close the application. He liked to use the iPad for recreation and some puzzle and matching programs.

² At hearing, Mother disagreed with the present levels of performance reflected in the September 29, 2011 IEP and Ms. Dubrowskij's testimony as to his verbal skill level when he entered the District program. Mother observed Student had better verbalization and vocal skills at home.

³ PECS is a trademarked picture exchange communication system. The picture communication system used by District was similar to PECS. The pictures may include icons, drawings or photographs. By touching, the picture or by sequencing several pictures, students make choices and indicate wants and needs. Eventually the necessary pictures are assembled in a binder students can carry from place to place.

⁴ The Go-Talk contains pictures or icons and when the picture or icon was touched, a recorded voice identified the picture or icon.

June 4, 2012 IEP

11. Student's annual IEP team meeting was held June 4, 2012. Student met or made progress on all goals, including his language/communication goals. The team reviewed and revised goals for social emotional skills, vocational skills, fine and visual motor skills, and added pre-academic goals for math and reading. Although Student continued to have severe receptive and expressive language delays, he could understand simple one-step requests and he could exchange a picture for a desired object given one verbal cue. Two new language/communication goals were developed. The first goal was to respond, when a visual cue or gesture prompt was provided, to a teacher question such as "What animal is this?" by touching the appropriate symbol on a speech generating device. The second goal was to choose a preferred toy or activity by selecting a picture from an array of pictures on a speech generating device. A "speech generating device", as used in these goals, included the picture communication system, the Go-Talk and the iPad. Each of these communication systems is based on the ability of the student to choose and point to or touch a picture from a display of two or more pictures either on the student's own initiative or in response to a cue or prompt.

12. The IEP team agreed the least restrictive environment for Student continued to be a preschool special day class with related services. Related services included 40 minutes per week of speech and language services, occupational therapy, and extended school year. Although the IEP did not specify individual or group speech and language services, these services were most often provided on an individual basis. Student would be in the special education environment approximately 84 percent of his day but the placement included some opportunity for exposure to typical peers. Mother consented to the IEP.

13. Student continued in Ms. Dubrowskij's preschool autism special day class for the 2012-2013 school year. The children in that class ranged from age three to five. Ms. Dubrowskij, Ms. Wyatt and staff always tried to encourage vocalization while doing any activity by modeling the expected response, and trying to get some sort of sound production from Student. By the end of the school year, Student was beginning to use some word approximations such as "ch" for "lunch." He was trying to say words such as "open" and "recess." His behavior improved in several areas. He whined less and had fewer tantrums than he had during the 2011-2012 school year. Student made better eye contact and responded to his name. He transitioned appropriately using a visual schedule. Student was more engaged and enjoyed clapping to songs in circle time. Student turned five years old in April of the school year.

May 30, 2013 IEP

14. The IEP team met on May 30, 2013, for Student's annual review and to provide for Student's transition to kindergarten. The team reviewed Student's strengths and weaknesses in the areas of pre-academic functional skills, communication development, fine and gross motor development, social emotional behavior, vocational skills, adaptive skills, and daily living skills. The team reviewed his present levels of performance. He could wave

“hello” and “goodbye” with minimal prompting. He could raise his hands, and touch his head and toes during songs in circle time. Student showed some interest in other children and played with the same materials near, but not with others. Student made progress on his language/communication goals. Student could answer “What animal is this?” or “What color is this?” by selecting the correct picture on a speech generating device, although not with the level of consistency, accuracy or prompts set out in the goal. He could choose a snack, toy, or activity by selecting a picture on a speech generating device. Student’s verbal production was limited but improved. He would consistently produce some consonants, but vowel production was inconsistent. He appropriately used a hand signal for “more.” Student met six of his eight goals and partially met two goals.

15. The team considered Mother’s concerns about Student’s limited progress in speech and language. She felt Student continued to be unable to communicate basic wants and needs. Student would cry, tantrum and use other maladaptive behaviors such verbal self-stimulation (“stimming”) and intense hand clapping, to express frustration due to this lack of communication. He clapped his hands intensely and would be redirected to squeeze his hands together. Mother requested, and District agreed to provide, a functional behavior assessment by a non-public agency.

16. The IEP team developed new goals addressing listening, counting, number sense, behavior and task attention, toileting, functional communication, fine and visual motor skills, locomotion, ball skills, and communication. The goals addressed prerequisites to communication and speech and language skills in a variety of ways. Communication goals for listening, task attention and imitation, addressed prerequisites to receptive language. Goals for picture communication, consonant and vowel articulation, and picture selection to communicate the phrases “I want ___” or “I see ___” addressed expressive language skills. Ms. Wyatt recommended an assistive technology/augmentative communication assessment. District agreed to provide that assessment.

17. The May 30, 2013 IEP provided kindergarten placement in a special day class and related services for the 2013-2014 school year. Related services included group speech and language services for 60 minutes per week, occupational therapy, adapted physical education and extended school year, with 20 minutes per week of speech and language services during the extended school year. Student would again be in the special education environment approximately 84 percent of his day but the placement included some opportunity for exposure to typical peers. Mother did not agree with the kindergarten placement. She asked District to retain Student in his preschool class. District agreed to respond to her request for retention in writing within 15 days. Mother took the IEP home to review.

18. On June 12, 2013, District wrote to Mother and declined to retain Student because he was age-eligible for kindergarten and he had met or made progress on his previous goals. The goals in the May 30, 2013 IEP were written to address his specific deficits and could be implemented in District’s kindergarten special day class. District offered Parents a choice between two non-public agencies for the functional behavior

assessment. District also enclosed an assessment plan for language/speech communication development by Kathryn George, a speech and language pathologist. Parents did not consent to the May 30, 2013 IEP before the start of the 2013-2014 school year.

2013-2014 School Year

19. Student attended kindergarten in Leone Torromeo's kindergarten through third grade special day class for the 2013-2014 school year. The class had between six and nine students, one teacher and between two to three additional staff. At that time there were no third graders in the class.

20. Student's teacher and speech therapists continued to use picture communication and the iPad in the classroom and in speech therapy. There was a Go-Talk available in the classroom but it was rarely used because it was difficult for Student. Student's speech therapist Ms. Wyatt worked with Student in 2012 and from January 2014 through the date of the hearing. Ms. Wyatt's practice when working with Student was to hold up a picture from the picture communication system, model the word corresponding to the picture and expect some production, or word approximation, from Student. She considered picture communication to be a "no tech" system and the other devices to be "high tech systems." Student preferred, and she had better results, using the "no tech" system with Student.

21. The IEP team met on September 9, 2013. The purpose of the meeting was to consider Mother's concern about placement, the assessment plans for behavior and communication, and the May 30, 2013 IEP. The team discussed the reasons for Mother's preference to retain Student in the preschool autism special day class. District did not agree that retention was appropriate. District did agree to consider Mother's request to have the functional behavior assessment conducted a non-public agency preferred by Parent rather than the two choices offered by District, and to respond to Mother by September 16, 2013. Mother requested 40 minutes of individual and 20 minutes of group speech therapy per week and goals to address independence. The team agreed to revisit goals after the assessments were completed.

22. On September 16, 2013, District sent Mother an assessment plan for a functional behavior assessment by JBA Institute, a non-public agency. Mother signed both assessment plans on September 27, 2013.

23. JBA Institute assessed Student in October 2013 and produced a report dated November 15, 2013. Elizabeth Damiano performed the assessment. Ms. Damiano was the Director of Research and Development for JBA Institute. She was a Board Certified Behavior Analyst, with a master's degree in psychological research and extensive experience working with children with autism. Ms. Damiano observed Student at school and at home and interviewed his teacher and Mother. She reviewed the June 4, 2012 and May 30, 2013 IEP's and records from Student's home program provider. Ms. Damiano described very difficult problem behaviors: tantrums, crying, loud vocalization, self-hitting, groin squeezing,

mouthings, dropping to the floor, indiscriminate kicking, banging his fists together, and other stereotypical motor behaviors. She believed that some, but not all, of these behaviors served a communicative function. For example, tantrums, crying, loud vocalization and dropping to the floor resulted in gaining positive attention, escape or avoidance, and reinforcement of the behavior. The number, frequency, and severity of Student's maladaptive behaviors could not be adequately addressed in the classroom. As reported to Ms. Damiano by Ms. Torromeo, these behaviors had been problematic since the beginning of the school year. Even though Ms. Damiano felt the teacher and staff were knowledgeable, diligent, positive and level-headed, the classroom was not staffed to provide the level of support needed. She observed that Student also had deficits in precursor "learning to learn" skills such as eye contact, responsiveness, attention to tasks, and serious deficits in social and play skills.

24. Ms. Damiano concluded Student required a one-to-one aide trained in applied behavior analysis from "bell to bell" in the school setting. She recommended that all staff working with Student should be trained in applied behavioral analysis. Ms. Damiano recommended that the behavior services begin in a highly structured one-to-one setting in the home, and progress to a small group setting as Student's behaviors improved and his skills increased. She recognized the opportunity for Student to interact with same-age peers was vital and felt he should return to school part time once he acquired some play skills. Ms. Damiano recommended 14 goals for Student's next annual IEP in May 2014.

25. Kathryn George performed a Language/Speech Communication Development assessment during November 2013. Ms. George was a highly qualified and experienced speech and language pathologist with a specialty in the area of alternative augmentative communication. Ms. George used a variety of assessment tools including formal and informal diagnostics, campus observations in class and on the playground, consultations with Student's teacher and speech service providers, and record review. She concluded Student functioned at the sensorimotor level, an age equivalency of birth to 24 months. His communicative functioning level was at an age equivalency of 12 to 18 months with some skills below and some skills in the 18 to 24 month level. In Ms. George's opinion, communicative functioning levels parallel the child's cognitive development.

26. Ms. George determined Student effectively used non-verbal communication such as facial expression, eye contact and eye gaze, varying vocal intonation and loudness, body movements and tension, pointing, reaching, touching, and placing an adult's hand on a desired item. Student was beginning to acquire the foundational skills for language development. These foundational skills included: understanding cause and effect, the Primack principle (e.g., first do what the adult says then get the preferred item or activity), representational play, object permanence (visual attention span), imitation of gross motor activities (e.g., clapping in circle time), and vocal/verbal imitation. Student attempted to imitate sounds and make word approximations when adults verbalized words and used pictures, visual cues, gestures and auditory cues. His vocal imitations of vowel and consonant sounds were accurate less than 50 percent of the time. He sometimes imitated "hi" and "bye", and signed for "more" to indicate that he wanted something within view. Student responded significantly better to visual cues than to verbal prompts or directions.

Student demonstrated higher levels of these foundational skills with known adults one to one, and in therapy. Student did not transfer or generalize skills from one person to another or from one environment to another.

27. Ms. George found that Student required alternative augmentative communication to benefit from his educational program. Her clinical impression was that Student's speech difficulties indicated apraxia, a neurological disorder characterized by the inability to perform the movements necessary to form and sequence sounds to make words. She recommended a consistent picture communication system be used at school and at home. She believed a picture communication system was appropriate because during the assessment Student used this method to initiate communication, he quickly learned a new strategy to form a simple sentence with pictures, and he was more attentive to this mode of communication than to the other systems that had been used. She believed multiple devices at the same time likely overwhelmed Student and limited his progress, and therefore recommended that the picture communication system be used exclusively for one year. She also recommended "pull-out" individual speech and language services for 40 minutes per week and "push-in" group speech and language services for 20 minutes per week.

28. The IEP team met on November 22, 2013, to review the assessments. Ms. Damiano and Janet Yi from JBA Institute attended the meeting. Ms. George attended the meeting and presented the results of her assessment and her recommendations. With Mother's permission, Ms. George's written report was finalized and dated December 15, 2013. The team considered the JBA Institute report and Ms. George's presentation. As the result of these assessments, District amended the May 30, 2013 IEP. As amended, District offered a special day class with related services, six hours a day of one-to-one support by aides trained in applied behavior analysis, and a separate quieter classroom nearby his regular classroom and under the teacher's supervision for the individual use of Student and his aides. Parent requested and District agreed to have JBA Institute prepare a behavior support plan and a training plan for District staff.

29. Except for Mother, the IEP team, including JBA Institute, felt that the program could be provided in the least restrictive environment by full day one-to-one trained aides using the separate quiet environment under the teacher's supervision. Mother preferred behavior service in the home and a shortened day to avoid Student feeling isolated in a separate environment. JBA Institute noted that because of Student's level, he might not be aware of classmates and feel isolated if he was in a separate classroom. Mother asked that Student be retained in kindergarten, with three hours of behavior services provided at school and three hours at home, and that speech and language services be provided in the morning at school. She asked that occupational therapy and adaptive physical education be discontinued. Parents did not consent to the IEP amendment at the November 22, 2013, meeting.

30. The IEP team met again on December 11, 2013, to review the JBA Institute behavior support plan and staff training plan. The team agreed to the behavior support plan with some modifications and reviewed the training plan. Mother requested retention in

kindergarten for September 2014. District declined to recommend retention. The May 30, 2013 IEP was again amended. As amended, District offered placement in a special day class with related services. The related services included: 40 minutes of individual and 20 minutes of group speech and language services per week; occupational therapy; adaptive physical education; a one-to-one behavior aide trained in applied behavioral analysis by a non-public agency for the full school day; 18 hours of behavior intervention service supervision per month provided by a non-public agency; a block of up to 42 hours of behavior intervention training by the non-public agency to be used as needed to train new staff; a separate space/quieter isolated environment to be used by Student and his aides under the teacher's supervision; and extended school year with speech and language services. The quieter environment was a partitioned section of the classroom for individual use by Student and his aide with a separate classroom available if needed. Parents did not consent to the IEP amendment at the meeting.

31. On February 21, 2014, District wrote to Mother. The letter contained an invitation to an IEP team meeting on March 4, 2014. The purpose of the meeting was to address Mother's concerns about Student's placement and services in hopes of obtaining parental consent to implement the December 11, 2013 amendment to the May 30, 2013 IEP. The letter also contained a proposal to amend the May 30, 2013 IEP to address a change in placement and services for the remainder of the 2013-2014 school year and extended school year. District further proposed to hold Student's annual IEP team meeting as scheduled in May 2014 and hold an amendment meeting before the start of the 2014-2015 school year to reassess progress on goals, retention, and transition from a one-to-one non-public agency aide to a District aide, after Student had the benefit of additional intensive support services provided by District from February through the end of the extended school year.

March 4, 2014 IEP

32. The IEP team met on March 4, 2014. District's offer was as follows: Student would remain in the full day kindergarten special day class for the remainder of the 2013-2014 school year with a separate space/quieter environment for use with a one-to-one aide under the teacher's supervision; six hours per day of one-to-one aide support provided by a non-public agency under contract with District or Mid Cities SELPA; and 12 hours per month of supervision provided by the non-public agency. When school was not in session during spring break, District would provide six hours per day (30 hours) of non-public agency one-to-one aide support in the home. District would provide three hours of school per day during the extended school year and six hours per day of non-public agency one-to-one aide support. The six hours of one-to-one aide during the extended school year included three hours to be provided at school and three hours to be provided in the home. At the end of the extended school year and continuing until one week before the start of school, District would provide six hours per day (120 hours) of non-public agency one-to-one aide support in the home. Related services included speech and language services, occupational therapy, adaptive physical education, and a behavior support plan as set forth in the May 30, 2013 IEP and amended on December 11, 2013.

33. JBA Institute believed Student did not have the skills to learn in the special day classroom full time. Effective behavior training must take place when the behavior occurs. The team visited the separate classroom/quieter environment proposed by District. JBA Institute approved of the size of the room and the close proximity to the teacher's classroom. JBA Institute informed the IEP team that the classroom "could possibly work well."

34. District proposed, given that Student would turn six in April and that his triennial IEP was due, that the triennial be held as scheduled by May 30, 2014, and an amendment meeting be held late in the summer to reevaluate Student's progress. Whether Student was ready for first grade, transition from the non-public agency aide to a District aide, half day or full day, and adjustments to Student's behavior support plan could be better addressed at that time because the team would have more information about Student's response to the intensive support provided for the rest of the school year and through the summer.

35. On March 7, 2014, Student's parents sent District written consent to implement certain portions of District's offer but did not agree that the offer provided a free appropriate public education. Parents did not consent to any occupational therapy and did not agree to the block of 42 hours of training for District staff by JBA Institute. The March 4, 2014 IEP was implemented consistent with Parent's partial consent. JBA Institute began providing intensive one-to-one behavioral services in the school setting on March 10, 2014. Student successfully attended his kindergarten special day class full time with bell-to-bell behavior intervention services provided by JBA Institute and related services according to his IEP. JBA Institute also provided 30 hours in the home setting over spring break.

Student's Expert

36. Andrea Trow conducted an independent speech and language assessment in May 2014. Ms. Trow obtained a B.A. in speech and hearing therapy and began her career as a speech and hearing therapist in 1964. She obtained an M.S. in speech pathology and began working as a speech pathologist in 1978. She was qualified to conduct the assessment, interpret the data and make recommendations for speech and language services. She evaluated Student in her office for one hour on May 10, 2014, and for up to two hours on May 13 and 14, 2014. She administered several appropriate standardized tests, interviewed Mother, and collected informal data through clinical observation. She did not observe Student at school or at home, and she did not contact anyone that worked with Student at school. She reviewed Student's educational records after she conducted the assessment. She produced a written report on May 14, 2014.

37. Ms. Trow concluded Student's overall language functioning was four to five years below his chronological age. Ms. Trow observed Student to use word approximations for "no," "ball," "train," "popcorn," and "toy." By the time of Ms. Trow's assessment, Student's phoneme production had significantly improved over his last assessment. Ms. Trow opined Student struggled to produce sounds intelligibly due to verbal apraxia. She

described apraxia as an oral motor planning difficulty characterized by uncoordinated oral movements. She believed apraxia typically was not identified until two years of age or older. Student's articulation difficulty from the age of three would be consistent with an apraxia diagnosis.

38. Ms. Trow was generally critical of Student's communication goals. She believed that it was important to identify vocalization in a specific goal because all people that worked with Student needed to know the goal, what the baseline was, how to measure progress, and how to chart progress. Ms. Trow opined Student should have had more goals for articulation and language. In her opinion, goals using pictures and other speech generating devices were not appropriate because Student did not like technology, and picture goals should not take the place of speech or overcome Student's difficulty with articulation. Her specific critique of the May 30, 2013 IEP goals was that that the communication goal to address consonant and vowel production was appropriate, and the goal using picture symbols for phrases was correct but Student also needed to verbalize. She did not feel the communication of wants and needs using pictures was appropriate because Student should have been using approximations for words. Ms. Trow was familiar with PECS and believed it was a good program if used with verbalization.

39. Ms. Trow recommended three goals in her report. The three goals were: increased receptive and expressive vocabulary by adequately identifying and labeling basic concepts including functional verbs, household items or school supplies, prepositions and family members, teachers and peers; increased expressive and social pragmatic language by labeling, requesting, and informing in one to two word approximations; and increased speech intelligibility by adequately producing age appropriate phonemes at the one to two word level. All goals included the number of verbal prompts allowed, the measurement method, and the rate of accuracy required to meet the goal. At the hearing, Ms. Trow testified the first goal in the report should have included vocalization approximations as a method of measuring Student's progress.

40. Ms. Trow was also critical of the speech therapy offered in the June 4, 2012 and May 30, 2013 IEP's. She opined Student did not attend in group therapy and he ignored peers. He was more interested in adults and unless someone was working with him he would roll out of his chair. She felt District should have provided 45 minutes of individual speech therapy twice a week beginning with the June 4, 2012 IEP.

LEGAL CONCLUSIONS

*Introduction – Legal Framework under the IDEA*⁵

1. This hearing was held under the Individuals with Disabilities Education Act (IDEA), its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et seq.; 34 C.F.R. § 300.1 (2006)⁶ et seq.; Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child’s IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).) “Special education” is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) “Related services” are transportation and other developmental, corrective, and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [In California, related services are also called designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA’s procedures with the participation of parents and school personnel that describes the child’s needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d); Ed. Code, § 56032.)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (“*Rowley*”), the Supreme Court held that “the ‘basic floor of opportunity’ provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to” a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to “maximize the potential” of each special needs child “commensurate with the opportunity provided” to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated

⁵ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

⁶ All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

to “confer some educational benefit” upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so].) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit,” or “meaningful educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 950, fn. 10.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56505, subd. (i).) Subject to limited exceptions, a request for a due process hearing must 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 for the request. (20 U.S.C. § 1415(f)(3)(C), (D).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].)

Issue One – Timing of Speech and Alternative Communication Assessments

5. Student contends District failed to timely assess Student in two areas: speech and language, and assistive technology/augmentative communication. District contends it was not required to reevaluate Student in the area of speech and language because it was less than three years before his last assessment and District was not required to conduct an assistive technology/augmentative communication before providing a picture communication system or speech generating device to address Student’s communication needs. For the reasons set forth below, Student did not meet his burden of proof on this issue.

6. Student first argues that the LACOE assessment adopted in the Lynwood IEP, demonstrated that Student was verbalizing and using words at the time of the assessment and that the present levels of performance observed and reported by District members of the IEP team were wrong. According to Student, if his present levels of performance upon entering District were below the levels reported by Lynwood, District should have reevaluated Student because it was possible he regressed between June 2011 and September 2011. District contends no reevaluation was required because Student’s IEP’s provided appropriate speech and language services.

7. Assessments are required in order to determine eligibility for special education, and what type, frequency and duration of specialized instruction and related

services are required. In evaluating a child for special education eligibility and prior to the development of an IEP, a district must assess him in all areas related to a suspected disability. (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) The IDEA provides for periodic reevaluations to be conducted not more frequently than once a year unless the parents and district agree otherwise, but at least once every three years unless the parent and district agree that a reevaluation is not necessary. (20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).) A reassessment may also be performed if warranted by the child's educational or related service needs. (20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).)

8. A school district's failure to conduct appropriate assessments or to assess in all areas of suspected disability may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High School Dist.* (9th Cir. 2007) 464 F.3d 1025, 1031-1033.) A procedural violation does not automatically require a finding that a FAPE was denied. A procedural violation results in a denial of a FAPE only if the violation: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see, Ed. Code, § 56505, subd. (f)(2); *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

9. District implemented the Lynwood IEP upon Student's transfer to District. District was required to review the Lynwood IEP and develop a new IEP within 30 days of the transfer. (Ed. Code § 56325, subd. (a).) District held the thirty-day review, reviewed the LACOE assessment and the Lynwood IEP, considered Student's present levels of performance in District's special education autism preschool class, and developed a new IEP on September 29, 2011. The September 29, 2011 IEP is not at issue. The statute of limitations for due process complaints in California is two years prior to the date of filing the request for a due process hearing. (Ed. Code, § 56505, subd. (l); see also 20 U.S.C. § 1415(f)(3)(C).) Accordingly, the IEP's dated June 4, 2012, May 30, 2013 as amended in December 2013, and March 4, 2014, are the IEP's at issue in this case. The June 4, 2012 IEP was developed after a full school year of progress in Ms. Dubrowskij's autism special day class and the related services provided by the September 29, 2011 IEP. Student's teacher and speech pathologist participated in the development of each IEP and Student continued to make progress in verbal and non-verbal communication, there was no evidence of a change in Student's educational or related service needs that would have warranted reevaluation. District was not required to reevaluate Student in the area of speech and language until June 2014 because District and Parents did not agree otherwise and reevaluation was not warranted.

10. Student next argues District should have conducted an assistive technology/augmentative communication assessment before using a picture based communication system or any other speech generating device. District contends there is no express requirement that District perform an assistive technology/augmentative communication assessment and District provided appropriate assistive technology to Student in any case.

11. When developing a pupil's IEP, the IEP team shall "[c]onsider the communication needs of the pupil," (20 U.S.C. § 1414(d)(3)(B)(iv); Ed. Code, § 56341.1, subd. (b)(4)) and shall consider whether the pupil requires assistive technology services and devices. (20 U.S.C. § 1414(d)(3)(B)(v).) An "assistive technology device" is defined as "any item, piece of equipment or product system [other than a surgically implanted device]. . . that is used to increase, maintain or improve functional capabilities of an individual with exceptional needs." (20 U.S.C. § 1401(1); Ed. Code, § 56020.5.) Assistive technology devices or services may be required as part of the child's special education services, related services, or supplementary aids and services. (34 C. F. R. § 300.105.)

12. District considered Student's communication needs each time it developed an IEP for Student. There was no evidence that District should have conducted an assistive technology/augmentative communication assessment before providing any assistive technology to help Student develop communication skills. District established communication goals related to using pictures or other speech generating devices and his teachers and speech therapists used a picture communication system, an iPad, and another speech generating device to that end. Student preferred and made progress with the picture communication system. He was not able to effectively use the iPad or Go-Talk for communication. Student would exit communication programs on the iPad and use it for recreation. From the time Student entered District, through the March 4, 2014 IEP, alternative and augmented communication systems were implemented and adjusted to Student's needs, such that ultimately, the use of the picture communication system was reasonably calculated to provide educational benefit to Student.

13. Even if it might have been prudent to conduct an assistive technology/augmentative communication assessment when Student had difficulty with the iPad and Go-Talk, District's failure to conduct the assessment before any assistive technology/augmentative communication system was introduced to Student did not impede Student's right to a FAPE, significantly impede Parents' right to participate in decision-making, or deprive Student of educational benefits. Student's teachers and speech therapists were using the picture communication system with some success. The picture communication system was the most effective of the assistive technology options considered and the only communication device recommended by the assessor. Ms. Trow approved of using picture symbols for phrases but felt that Student also needed to verbalize. Ms. Trow believed PECS was a good program if used with verbalization. Student's teachers and speech therapists used picture communication along with modeling words and expecting word or word approximation from Student. Although Ms. George believed that multiple devices likely overwhelmed Student and limited his progress, there was no evidence Student's progress was actually affected by the attempted use of devices Student did not like and did not use for communication purposes. District's implementation of various alternative communication strategies and maximization of the one that worked with Student fulfilled any function of a formal assessment. There was no evidence produced at hearing of what if, anything, a more formal assessment in this area would have required. Accordingly, Student did not meet his burden of proof on this issue.

Issue Two - Speech and Language Goals

14. Student contends his speech and language goals were inappropriate because the goals were based upon erroneous present levels of performance and did not specifically address articulation and vocalization. District generally contends, as to all the IEP's at issue, Student's goals were appropriate. For the reasons set forth below, Student did not meet his burden of proof on this issue.

15. An IEP must contain a statement of measurable annual goals related to "meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum" and "meeting each of the child's other educational needs that result from the child's disability." (20 U.S.C. § 1414(d)(1)(A)(i)(II); Ed. Code, § 56345, subd. (a)(2).) The IEP must also contain a statement of how the child's goals will be measured. (20 U.S.C. § 1414(d)(1)(A)(i)(III); Ed. Code, § 56345, subd. (a)(3).) The IEP must show a direct relationship between present levels of performance, the goals, and the educational services to be provided. (Cal. Code Regs., tit. 5, § 3040, subd. (c).)

16. All of Student's communication and speech and language goals in each of the IEP's at issue were understandable, measurable, and based upon accurate present levels of performance. The IEP team developed new goals and increased mastery levels for goals in which he made progress. For example, Student's goals in the September 29, 2011, were to understand simple one-step requests and exchange a picture for a desired object given one verbal cue. By June 4, 2012, Student understood simple one-step requests and he could exchange a picture for a desired object given one verbal cue, and accordingly, Student's goals were updated. Student's June 4, 2012 IEP included two new language/communication goals: to respond to teacher questions such as "What animal [or color] is this?" by touching the appropriate symbol and to choose a preferred toy or activity by selecting a picture from an array of pictures on a speech generating device. By May 30, 2013, Student could answer "What animal [and color] is this?" by selecting the correct picture, although not with proficient consistency, accuracy or prompts, and could choose a snack, toy or activity by selecting a picture of what he wanted. The team then developed new goals to further Student's communication and speech skills by addressing listening, task attention and imitation, consonant and vowel articulation, and picture selection to communicate the phrases "I want ___" or "I see ___." For each year at issue the IEP contained a sufficient number of comprehensive goals to address Student's needs.

17. The IDEA does not require a particular number of goals nor does it require goals for every particular manifestation of the Student's disability. Student's goals were reviewed and revised annually to reflect Student's acquisition of functional communication skills and the prerequisites for symbolic language and speech. Articulation is one manifestation of Student's speech and language deficits. Student was provided vocalization encouragement as part of the class activities and curriculum and his articulation improved over time. By May of 2013, after having shown improved vocalization, the articulation goal was appropriate and was incorporated into his IEP. Accordingly, Student failed to demonstrate by a preponderance of the evidence that he was denied a FAPE because his

IEP's did not contain an articulation goal until May of 2013. In light of the developmental delays in all aspects of receptive and expressive language, Student's goals were reasonable at the time.

Issue Three - Placement and Related Services

18. Student contends District failed to provide Student a sufficient level of one-to-one instruction so that Student could make meaningful progress in the area of verbal communication. Student argues that the only appropriate placement for him was one-to-one applied behavior analysis services in a home setting until his behaviors improved and he developed sufficient "learning to learn" skills to be gradually reintroduced into the classroom setting on a part-time basis with a "bell-to-bell," one-to-one aide trained in applied behavior analysis in both the school and home environments. Student also argued that District should have provided individual speech therapy instead of group therapy in the June 4, 2012 and May 30, 2013 IEP's. District contends it offered Student a FAPE in the least restrictive environment and provided appropriate speech services. For the reasons set forth below, Student did not meet his burden of proof on this issue.

19. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (See *Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, the offer of educational services and/or placement must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. (*Ibid.*) Whether a student was denied a FAPE is determined by looking to what was reasonable at the time, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Board of Education* (3d Cir. 1993) 993 F.2d 1031,1041.)

20. School districts are required to provide each special education student with a program in the least restrictive environment, with removal from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56031.) If it is determined that a child cannot be educated in a general education environment, then the least restrictive environment analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options. (*Daniel R.R. v. State Board of Education* (5th Cir. 1989) 874 F.2d 1036, 1050.) The continuum of program options includes, but is not limited to: regular education; resource specialist programs; designated instruction and services; special classes; nonpublic, nonsectarian schools; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; and instruction using

telecommunication, instruction in the home or instruction in hospitals or institutions. (Ed. Code, § 56361.)

21. As long as a school district provides an appropriate education, methodology is left up to the district's discretion. (*Rowley, supra*, 458 U.S. at p. 209; *Roland M. v. Concord School Committee* (1st Cir. 1990) 910 F.2d 983, 992.) The methodology used to implement an IEP is left to the school district's discretion so long as it meets a child's needs and is reasonably calculated to provide some educational benefit to the child. (See *Rowley, supra*, 458 U.S. at p. 208; *Adams, supra*, 195 F.3d at p. 1149; *Pitchford v. Salem-Keizer School Dist.* (D. Or. 2001) 155 F.Supp.2d 1213, 1230-32; *T.B. v. Warwick School Comm.* (1st Cir. 2004) 361 F.3d 80, 84.) Parents, no matter how well motivated, do not have a right to compel a school district to provide a specific program or employ a specific methodology in providing education for a disabled child. (*Rowley, supra*, 458 U.S. 176, 208.) *Rowley* requires a school district to provide a disabled child with meaningful access to education; it does not mean that the school district is required to guarantee successful results. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56301, *Rowley, supra*, 458 U.S. at p. 200.) School districts are required to provide a "basic floor of opportunity" that consists of access to specialized instructional and related services, which are individually designed to provide educational benefit to the student. (*Rowley, supra*, 458 U.S. at p. 201.)

22. Given the severity of Student's needs, Student could not be educated in a general education environment. Accordingly, the appropriate analysis is whether District offered the least restrictive environment possible in light of the range of program options. The continuum of options in this case was: a special day class with related services including speech therapy and other services; a designated separate quiet environment with a one-to-one aide trained in applied behavior analysis; a split program between home and school; and full-time home services by a one-to-one aide trained in applied behavior analysis. The evidence shows that, from March 28, 2012, the beginning of the statute of limitations period through the March 4, 2014 IEP, at the time the team developed each of Student's IEP's, District offered Student an appropriate placement in the least restrictive environment on the continuum of placements, such that Student received a FAPE.

23. From March 28, 2012, through the end of the 2011-2012 school year, Student received the program provided in his September 29, 2011 IEP. The contents of that IEP, or whether it was reasonably calculated to provide educational benefit at the time it was developed, are not at issue because it is beyond the two year statute of limitations. By the end of the school year, Student met or made progress on all his goals. The evidence did not demonstrate that, at the time the June 4, 2012 IEP was developed, Student required a one-to-one aide trained in applied behavior analysis or that he could not obtain educational benefit in the preschool autism special day class with speech and language services and occupational therapy. Mother consented to the IEP and Student made progress in the placement with the services provided. There was no evidence that problematic behaviors, due to his frustration when he could not communicate, rose to a level that interfered with his continued progress on his goals. According to Ms. Dubrowskij, Student's behavior improved over the course of the school year, he whined less and had fewer tantrums. Each student in the preschool class

received individual one-to-one instruction for 20 minutes daily. Verbalization strategies to address receptive and expressive language skills were practiced in the classroom by a highly trained and very experienced teacher, classroom aides, and Student's speech therapist. The evidence established that, with the level of services provided, Student made progress on his communication, speech and language goals, and intelligible words or approximations of words increased. Student did not produce any evidence to contradict Ms. Dubrowskij's testimony and there was no evidence that Student's behavior service levels did not meet his needs at that time. Accordingly, the preschool autism special day class with the speech services provided in June 4, 2012, IEP was reasonably calculated to provide educational benefit in the least restrictive environment.

24. Student's next annual IEP team meeting was held on May 30, 2013. Student was continuing to make progress on his goals, including verbal production in the classroom setting. At the time of the meeting, Student's maladaptive behaviors included tantrums, verbal protests, verbal "stimming," and intense hand clapping. Mother requested and District agreed to provide a functional behavior assessment by a non-public agency. There was no evidence presented that, at the time of the May 30, 2013 team meeting, Student's behaviors were so interfering that he could not make progress on his goals. District offered kindergarten placement in a special day class with related services. Parents did not consent, and the May 30, 2013 IEP was not implemented. Thus, Student continued to receive two 20-minute sessions of individual speech and language per week.

25. The functional behavior assessment was conducted in October 2013 and a report prepared on November 15, 2013. Classroom observations made on October 14 and 15, 2013, by Ms. Damiano, documented in the report and credibly explained during the hearing, demonstrated that Student was not able to learn in the special day class kindergarten setting. Her recommendation that Student required a one-to-one applied behavioral analysis trained aide was well supported by the report. No witness testified that District should have provided such a trained aide at any time before Mother requested and District provided the functional behavior assessment.

26. The inference from the evidence is that sometime after meeting his goals and making good progress in preschool, Student's ability to benefit from his program declined and his needs increased. Ms. Dubrowskij taught Student for two years. She was a knowledgeable, highly trained and experienced teacher with training in applied behavioral analysis, PECS and structured teaching. According to Ms. Dubrowskij Student met or made progress on all goals, and his problematic behaviors improved. The only evidence of an increase in the nature, frequency and severity of Student's maladaptive behaviors at school was the functional behavior assessment report conducted after Student had changed placements to a kindergarten class. Although Ms. Damiano's report contained a hearsay statement that Ms. Torromeo told her Student had these behaviors from the start of the school year, Ms. Torromeo did not testify and there was no direct evidence of the nature, frequency, and severity of Student's behaviors at any time before the behavior was observed by Ms. Damiano.

27. The IEP team met to discuss the functional behavior assessment and the assistive technology/augmentative communication assessment on November 22, 2013. At the conclusion of the meeting, District offered to amend the May 30, 2013 IEP to include a one-to-one applied behavioral analysis trained aide for the six-hour school day (one aide in the morning and another aide in the afternoon). Staff training and a behavior support plan were to be provided by a non-public agency, which at that time was JBA Institute. District offered a separate quiet classroom for use under the teacher's supervision. JBA Institute agreed that this arrangement could work. Rather than isolate Student at home, District's offer met Student's needs while still exposing him to school to the maximum extent possible. A quiet separate environment in close proximity and under the supervision of Student's teacher was far less restrictive than one-to-one instruction in the home and served much the same purpose of reducing distractions and providing full time one-to-one applied behavioral analysis instruction. The above facts demonstrate that District's offer was reasonably calculated to provide educational benefit in the least restrictive environment, given the results of the functional behavior assessment. Mother did not accept this offer.

28. The team met again on December 11, 2013. District offered another amendment to the May 30, 2013 IEP. District again offered the one-to-one applied behavioral analysis trained aide, and the separate quieter environment, this time in a partitioned section of the classroom and with a separate classroom also available. In addition, District offered 18 hours per month of behavior intervention service supervision and a block of 42 hours of behavior intervention training by the non-public agency, which at that time was JBA Institute. District increased speech and language services and provided the behavior support plan agreed to by Mother. The evidence showed that at the time, District's amended offer was reasonably calculated to provide educational benefit in the least restrictive environment. The offer addressed Mother's concerns by providing for staff training by a non-public agency and an additional level of behavior support through implementation of the behavior support plan.

29. The team met again on March 4, 2014, at which time District offered a comprehensive amendment that would take effect for the remainder of the school year and extended school year, and provide intensive services when school was not in session, all services through a non-public agency, and in a separate quieter environment. District proposed to defer discussion of Student's placement for the 2014-2015 school year, whether Student would attend part-time or full-time, and adjustments to the behavior support plan until the IEP team had information about Student's response to the intensive program. Again, District's amended offer was reasonably calculated to provide educational benefit in the least restrictive environment and remove obstacles to obtaining Mother's consent to implement the IEP.

30. From the IEP team meeting on May 30, 2013, through the IEP team meeting on March 4, 2014, Mother preferred retention, limited hours or home services rather than any of the less restrictive environments offered by District. District was not required to accept Mother's preferred placement and was required to offer a program in the least restrictive environment consistent with Student's IEP. Within days of Mother's consent to the March 4,

2014 IEP, JBA Institute began to successfully implement the program full-time in a partitioned section of the classroom under the teacher's supervision. On this record, there is no basis upon which to find District denied Student a FAPE by failing to provide a one-to-one applied behavioral analysis trained aide any sooner, or that Student should have been placed in a more restrictive environment.

31. As to speech therapy, Student contends District denied him a FAPE by offering group but not individual speech therapy for 60 minutes per week in the June 4, 2012, IEP and the May 30, 2013 IEP. However, Student actually received individual therapy under the June 4, 2012 IEP. Because Parents did not consent to the May 30, 2013 IEP, Student continued to receive individual speech therapy until the March 4, 2014 IEP. The March 4, 2014 IEP provided one hour of speech therapy a week split into two 20-minute sessions of individual and one 20-minute session of group therapy. Student's expert testified that Student should have been offered two 45-minute sessions per week of individual therapy beginning with the June 4, 2013 IEP. However, Ms. Trow's criticisms of the speech therapy provided and the level of therapy she recommended were not given great weight because she did not observe Student at school, did not speak to anyone at school concerning the services actually provided, and did not know the methods and strategies used in his classroom or by Student's therapists during his sessions. The level and frequency of service was based upon Student's present levels of performance, the goals adopted by the IEP team, the level of speech and language encouragement in the classroom placement, Mother's concerns, and input of the IEP team. Ms. Trow did not offer a credible explanation of why 45 minutes a week of individual therapy was required, and 40 minutes of individual with 20 minutes of group speech and language was insufficient, given that she did not observe Student in the classroom or during therapy and did not speak to the providers of the services. Other than Ms. Trow's opinion, which was not persuasive, Student failed to offer any evidence the speech therapy provided to Student was not appropriate to support the specialized instruction called for in Student's IEP's.

32. Student's different presentation in his home environment, as opposed to at school, does not alter the analysis. *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. Thus, District was legally obligated to address Student's needs in the educational setting. Accordingly, Student did not prove that the level of speech services actually provided before the March 4, 2014 IEP and offered in that IEP were not reasonably calculated to provide some educational benefit to Student.

33. Student did not prove by a preponderance of the evidence that District's offer of placement and services as contained in the IEP's of June 4, 2012, May 30, 2013 as amended in December 2013 and March 4, 2014, failed to offer Student a FAPE in the least restrictive environment.

ORDER

All requests for relief are denied.

PREVAILING PARTY

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

RIGHT TO APPEAL

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

DATED: June 25, 2014

/s/
MARIAN H. TULLY
Administrative Law Judge
Office of Administrative Hearings