

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENT on behalf of STUDENT,

v.

PATTERSON JOINT UNIFIED SCHOOL  
DISTRICT,

OAH CASE NO. 2009110397

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PATTERSON JOINT UNIFIED SCHOOL  
DISTRICT,

v.

PARENT on behalf of STUDENT.

OAH CASE NO. 2009110083

DECISION

Administrative Law Judge Peter Paul Castillo, Office of Administrative Hearings, State of California, heard this matter in Patterson, California, on February 1, 2, 3, 4, 8, 9, 16, and 17, 2010, and by telephone on March 3, 2010.

Student was represented by Tamara L. Loughrey, Attorney at Law, who was assisted by Justin Arnold, Attorney at Law, during portions of the hearing. Student's mother (Mother) was present on all hearing days. Student's father (Father) was only present on February 8, 2010.

Patterson Joint Unified School District (District) was represented by Peter Sturges, Attorney at Law. David Hodge, District Special Education Program Administrator, attended all hearing days.

The District filed its due process request (complaint) on November 2, 2009. Student filed his complaint on November 4, 2009. On November 30, 2009, OAH issued an order that consolidated the District's and Student's complaints. On December 30, 2009, the parties requested and received a continuance of the hearing dates. On December 24, 2009, Student filed an amended complaint. At the close of the hearing, the matter was continued to March 19, 2010, for submission of closing briefs. The District submitted its closing brief on March 19, 2010, and Student its closing brief on March 22, 2010,<sup>1</sup> and the matter was submitted for decision on March 22, 2010.<sup>2</sup>

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<sup>1</sup> At the close of hearing, the ALJ instructed the parties to submit closing briefs to OAH and the opposing party, and that fax transmissions must be completed by 5:00 p.m. on March 19, 2010. Student faxed his brief after 5:00 p.m. on May 19, 2010. Therefore, the brief is considered filed on the next business day, March 22, 2010. (See, Cal. Code Regs., tit. 1, § 1006, subd. (h))

<sup>2</sup> To maintain a clear record, the closing briefs have been marked as exhibits. Student's brief has been marked as Exhibit P4, and District's brief has been marked as Exhibit 49.

## ISSUES<sup>3</sup>

### STUDENT

1) During the 2007-2008 school year (SY), after November 2, 2007,<sup>4</sup> did the District deny Student a free appropriate public education (FAPE) because:

- a) The behavior support plan (BSP) of November 16, 2007, did not address Student's behavioral deficits?
- b) The District failed to timely conduct a functional analysis assessment (FAA) and develop a behavior intervention plan (BIP) from November 16, 2007, through April 4, 2008, which were required to address Student's increased non-compliance, elopement and aggression, which impeded his learning?
- c) The District did not comply with the Hughes Bill requirements because it used inappropriate physical restraints and aversive interventions on Student, did not prepare behavioral emergency reports (BERs), did not notify Parents of emergency interventions, and did not convene individualized educational program (IEP) meetings to discuss the emergency interventions, even though Student had "serious behavior problems"?

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<sup>3</sup> These issues are those framed in the January 26, 2010 Order Following Prehearing Conference and as further clarified at hearing. The ALJ has reorganized the issues for this Decision.

<sup>4</sup> The two-year statute of limitations in this case is November 2, 2007, as 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)(D); Ed. Code, § 56505, subd. (l).) Student did not assert that the statute of limitations was tolled.

2) Did the District deny Student a FAPE during SY 2007-2008, SY 2008-2009 and SY 2009-2010 by failing to conduct timely occupational therapy (OT), pragmatic language, and inclusion assessments?

3) Did the April 4, 2008 IEP deny Student a FAPE because:

- a) It did not contain appropriate reading, math, self-help, pragmatic, expressive and receptive language, fine motor, sensory integration, behavior and social skill goals to meet Student's unique needs?
- b) Contained an offer of placement at a non-public school, Sierra Vista, which was not reasonably calculated to meet Student's unique needs in the least restrictive environment (LRE)?
- c) The District predetermined Student's placement, which denied his Parents the opportunity to meaningfully participate in the educational decision-making process?
- d) The District unilaterally reduced Student's speech and language and OT services?
- e) The District failed to offer appropriate behavior supports and services, including not providing Student with an appropriate FAA and BIP?

4) From April 2008 through June 2008, was Student denied a FAPE because staff at Sierra Vista did not implement Student's April 4, 2008 IEP or BIP?

5) Did the August 26, 2008 IEP deny Student a FAPE because:

- a) The District's offer of placement at Teel Middle School (Teel), including transportation, was not adequate to meet his unique needs in the LRE?
- b) The District failed to offer appropriate behavior supports and services, including not providing Student with an appropriate FAA and BIP?
- c) The District predetermined Student's placement and failed to consider information presented by Mother at the IEP meeting?

- 6) Did the IEP of October 6, 2008, deny Student a FAPE because:
  - a) The District's offer of placement at Teel, including transportation, was not adequate to meet his unique needs in the LRE?
  - b) The District predetermined Student's placement and limited his Parents' ability to observe other possible placements, which denied his Parents the opportunity to meaningfully participate in the educational decision-making process?
  - c) The District failed to offer appropriate behavior supports and services, including not providing Student with an appropriate FAA and BIP?
- 7) Did the IEPs of November 24, 2008, and December 11, 2008, deny Student a FAPE because:
  - a) The District did not propose an appropriate educational placement, which necessitated that Student remain in home/hospital instruction?
  - b) The District failed to offer appropriate behavior supports and services, including not providing Student with an appropriate FAA and BIP?
- 8) Did the IEP of December 11, 2008, deny Student a FAPE because:
  - a) It did not contain appropriate reading, math, self-help, pragmatic, expressive and receptive language, fine motor, sensory integration, and social skill goals to meet Student's unique needs?
  - b) The District unilaterally ceased providing Student with home/hospital instruction after this IEP meeting?
- 9) During SY 2008-2009, did the District deny Student a FAPE by failing to consider information from Student's private assessors and not inviting private assessors to the IEP meetings?
- 10) Did the IEP of March 13, 2009, deny Student a FAPE because:

a) The District's offer of placement at Teel, including transportation, was not adequate to meet his unique needs in the LRE?

b) The District failed to offer appropriate behavior supports and services, including not providing Student with an appropriate FAA and BIP?

11) Did the April 29, 2009 IEP, as modified on July 29, 2009, deny Student a FAPE because:

a) It did not contain appropriate reading, math, self-help, pragmatic, expressive and receptive language, fine motor, sensory integration, and social skill goals to meet Student's unique needs?

b) The District's offer of placement at Teel, including transportation, was not adequate to meet his unique needs in the LRE?

c) The District brought an attorney to attend the IEP meeting of April 29, 2009, despite Parents' objection to his presence, which denied Parents the opportunity to meaningfully participate in the educational decision-making process?

d) The District predetermined Student's placement and limited his Parents' ability to observe other possible placements, which denied his Parents the opportunity to meaningfully participate in the educational decision-making process?

e) The District failed to offer appropriate behavior supports and services, including not providing Student with an appropriate FAA and BIP?

#### DISTRICT

1) During SY 2007-2008 through April 4, 2008, did the District provide Student with a FAPE because the District met Student's unique needs at Apricot Valley Elementary School (Apricot Valley), and took reasonable actions to return Student to a classroom after his Parents removed him from Apricot Valley?

2) Was the IEP of April 4, 2008, reasonably calculated to provide Student with meaningful educational progress in the LRE?

3) During SY 2008-2009, did the District provide Student with a FAPE because the District could meet Student's unique needs at Sierra Vista, and took reasonable actions to return Student to a classroom after his Parents removed him from Sierra Vista?

4) Was the IEP of October 6, 2008, reasonably calculated to provide Student with meaningful educational progress in the LRE?

5) During SY 2009-2010, did the District provide Student with a FAPE because the District could meet Student's unique needs at Teel?

## PROPOSED REMEDY

### STUDENT

As a proposed remedy, Student requests placement in a general education or learning handicapped classroom with support provided by a non-public agency (NPA), which utilizes applied behavior analysis (ABA) methodology. The NPA shall provide Student with a highly trained one-to-one aide during the school day, supervised by a master's-level behavior analyst. The NPA shall develop a transition plan for Student's return to school, oversee data collection, and convene bi-monthly meetings. Student also requests an FAA independent educational evaluation (IEE), at public expense, by a qualified provider of Parents' selection to develop a BIP. As compensatory education, Student requests 10 hours a week of home behavioral services and parent training, provided by a qualified NPA. Additionally, Student asks that the District fund speech and language and OT IEEs, and compensate for speech and language and OT sessions that the District did provide.

## DISTRICT

As a proposed resolution, the District requests an order that it provided FAPE to Student during SY 2007-2008, SY 2008-2009 and SY 2009-2010.

## CONTENTIONS OF PARTIES

Student asserts that the District denied him a FAPE, during all times relevant, because it failed to offer him an educational program that met his behavioral, OT, speech and language, and academic needs. Specifically, Student contends that the District failed to timely conduct an FAA in November 2007, and create a BIP, despite the District's knowledge of his attacks on his teachers and other students. This led District personnel to use frequent physical restraints on Student. Additionally, the District failed to provide Parents with required reports after these physical restraints, and did not hold the required emergency IEP meeting in December 2007 and January 2008. Although the District conducted an FAA and created a BIP in April 2008, Student asserts that the District did not properly conduct the FAA, and the BIP was not adequate to address Student's unique needs. Instead, the FAA improperly focused on negative reinforcement and physical restraints to improve Student's behavior.

Student contends that the District failed to adequately assess Student's OT and speech and language needs for the April 2008 IEP. He claims that the District also underestimated his cognitive abilities and offered inadequate and improperly drafted goals. Additionally, Student argues that the District's April 2008 offer of placement at Sierra Vista, a non-public school for autistic children with behavior problems, was not the LRE, and that Sierra Vista did not implement his BIP. Finally, Student contends that the District failed to ensure that agreed-upon OT and speech and language services were provided to Student at Sierra Vista.



In August 2008, and through July 2009, the District offered Student placement in an SDC at Teel. Student contends the District's placement offer was not the LRE, and would require Student to be on a school bus for over four hours a day. Additionally, Student asserts that the District's proposed placement would not allow Student to make meaningful educational progress because the District underestimated his cognitive abilities. Further, the District's proposed goals were not measurable and not based on correct baseline information. Student claims that his unique needs can be met in a learning handicapped classroom with intensive ABA support to address his behavioral deficits. Finally, Student argues that the District continually failed to consider information and private assessments Parents provided. This information showed that the District underestimated Student's abilities and, therefore, he could be included in a lesser restricted environment, such as a learning handicapped or general education class, with additional behavioral supports from a NPA.

The District asserts that in late 2007 and early 2008, it was meeting Student's behavioral needs through a properly created BSP, and that Student's behavioral problems were the result of changes in his medication. Further, the April 4, 2008 FAA that the District conducted and BIP that it produced were thorough and adequate to address Student's behavioral problems. The District claims that its offer to place Student at Sierra Vista in April 2008 was reasonably calculated to provide him with meaningful educational progress in the LRE based on his behavioral needs, and that Parents overestimated his cognitive abilities. While the District admits that Student did not receive the OT and speech and language services in his IEP, it substantially implemented his IEP and agreed to provide compensatory OT and speech and language services.

The District argues that the proposed placement at Teel would provide Student a FAPE in the LRE. Further, the District claims it did not predetermine this offer, and made the offer of Teel because of Parents' concerns with Sierra Vista. The District argues that

Student cannot be placed in a learning handicapped classroom, because his behavior would be disruptive for other students. Further, the students in the requested class are much higher functioning than Student. The District states that it considered all the information provided by Parents during the IEP process, and that this information supports the District's proposed educational program. Finally, the District asserts that it properly assessed Student, its proposed goals are measurable, and it used correct baseline information when developing these goals.

## FACTUAL FINDINGS

### JURISDICTION AND FACTUAL BACKGROUND

1. Student is a 13-year-old boy who resides with Parents within the District's geographical boundaries and would be in the seventh grade for SY 2009-2010 if he attended school. Student is eligible for special education services under the category of autistic-like behaviors. Student has not attended a District placement since June 2008, when Parents unilaterally removed him from Sierra Vista, and subsequently home-schooled Student.

2. Student did not attend a District school until SY 2006-2007 when the District created a moderate-to-severe SDC for students with autism at Apricot Valley. Previously Student and other students with autism in the District attended regional programs throughout Stanislaus County. When he attended these prior programs, Student's primary eligibility category for special education services was autistic-like behaviors, and mental retardation was his secondary eligibility category. When Student began attending the District's program, mental retardation was removed as an eligibility category.

3. The District SDC teacher for SY 2006-2007 was Richard Lust, who was Student's teacher in the regional SDC for SY 2005-2006. Student had a one-to-one aide

at Apricot Valley, and Mary Nichola was Student's one-to-one aide during SY 2006-2007 and the beginning of SY 2007-2008.

#### NOVEMBER 16, 2007 IEP AND BSP

4. A school district provides a FAPE to a student if its program or placement is designed to address the student's unique educational needs and reasonably calculated to provide meaningful educational benefit in the LRE.

5. Behavior intervention is the implementation of procedures to produce lasting positive changes in the student's behavior, and includes the design, evaluation, implementation, and modification of the student's individual or group instruction or environment, including behavioral instruction, to produce significant improvement in the student's behavior. The IEP team must consider and, if necessary, develop positive behavioral interventions, strategies and supports to address behaviors that impede a child's learning, or that of others. More serious behavioral problems will require a school district to develop a BIP. An IEP that does not appropriately address behavior that impedes a child's learning denies a student a FAPE.

6. The FAA is a creation of California law, developed as part of the state's behavior intervention regulations, which supplement federal special education law.<sup>5</sup> In

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<sup>5</sup> In contrast, a functional behavior assessment (FBA) is a creation of federal law. One significant difference between an FAA pursuant to state law and an FBA under federal law is that the former is required only when a student has a "serious behavior problem." Moreover, state law contains numerous specific requirements for what an FAA must contain, while federal law does not impose similar requirements for what an FBA must contain. An FAA is a type of FBA, but not all FBAs meet the narrow requirements for an FAA.

California, a local educational agency (LEA) must conduct an FAA that results in a BIP when a student develops a "serious behavior problem," and the IEP team finds that the instructional/behavioral approaches specified in the student's IEP have been ineffective. A serious behavior problem is one in which an individual's behaviors are self-injurious, assaultive, or the cause of serious property damage, or the student has other types of severe behavior problems that are pervasive and maladaptive for which instructional/behavioral approaches specified in the pupil's IEP are found to be ineffective.

7. Student asserts that at the time of the November 16, 2007 IEP, the District knew that Student had significant behavioral problems, and it was required to conduct an FAA and develop a BIP to address these behavioral deficits. The District contends that while Student had a couple of behavioral outbursts during SY 2006-2007 and the first part of SY 2007-2008, Student demonstrated appropriate behavior in this SDC and his behavioral needs were not so severe as to require an FAA or BIP.

8. While in Mr. Lust's SDC, Student had a few episodes in which he attempted to hit staff or other students. However, Mr. Lust was able to redirect Student and deescalate him so that it was not necessary to physically restrain Student. Mr. Lust used sensory integration techniques, such as placing a blanket over Student's head or applying deep pressure. Mother was present in Student's SDC numerous times during SY 2006-2007, and she did not report any incident in which Student was out of control. Student's contention that Ms. Nicola's August 8, 2007 written statement proved that Student had serious behaviors during SY 2006-2007 was unpersuasive and uncorroborated.

9. Mr. Lust left the District after SY 2006-2007. The District then hired Carli Brionnes<sup>6</sup> to teach Student's SDC at Apricot Valley. Ms. Brionnes obtained her teaching credential in 2006. Ms. Brionnes taught a moderate-to-severe SDC, which included children with autism, in another district in SY 2006-2007. Ms. Brionnes received training in ABA instruction and data collection,<sup>7</sup> in that district and trained to implement that district's emergency response protocols. Ms. Brionnes did not know what techniques Mr. Lust had used with Student to control his behaviors.

10. On August 7, 2007, the second day of school of SY 2007-2008, Student had a significant behavioral outburst at the end of the school day. He physically attacked Ms. Brionnes and followed her for almost 30 minutes as he continued to hit her. Student became aggressive because he was not going to see a train in another classroom. Ms. Brionnes did not know that someone had promised this to Student, nor of Student's train obsession. Ms. Brionnes did not attempt to physically restrain Student because she had not received training in the method of physical restraint used by the District. Additionally, none of the aides in the SDC had received this training. Ms. Brionnes informed Parents of this incident in a communication journal.<sup>8</sup> On August 8, 2007, Ms. Brionnes created a BSP to address Student's aggressive behaviors.

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<sup>6</sup> Formerly Carli Garzelli.

<sup>7</sup> An ABA program primarily involves intensive behavior modification therapy, one-on-one repetitive drills, or discrete trial training (DTT), by a therapist trained in this methodology, and detailed daily data collection to monitor skill acquisition.

<sup>8</sup> The communication journal was exchanged daily, and Ms. Brionnes would write about Student's day and Mother related any concerns to Ms. Brionnes in the journal.

11. After this incident, Student did not have any other behavioral outbursts during the remainder of the first tract, which ended on October 24, 2007. Mother relayed to Ms. Brionnes concerns she had about Student's aggressive behavior at home, but Ms. Brionnes did not observe this behavior at school with the same intensity. Although Student displayed aggression to staff and classmates on a daily basis, he was easily redirected.

12. Right before the end of the first tract, Mother informed Ms. Brionnes that Student's doctor was going to change his medication, and Student would be removed from his current medication during the transition. Mother expressed concern that based on prior experience, Student might have behavioral problems such as aggression toward staff and fellow students, when he was off medication. The District then held an IEP on November 16, 2007, during a session break, to address Mother's concern, even though Student had not displayed any significant behavioral problems since the incident of August 7, 2007.

13. Ms. Brionnes created a BSP for the November 16, 2007 IEP meeting based on her observations of Student. Ms. Brionnes had not collected formal data because Student had not demonstrated significant behavioral problems. Student's behavior through the end of the first tract did not require the creation of a BIP because, but for the August 7, 2007 incident, Student's behaviors were not seriously impeding his educational progress or the progress of his classmates.

14. Ms. Brionnes appropriately designed the BSP to address Student's behavioral problems that she observed in the classroom based on the antecedent of Student's behavior and the consequences of his conduct. Ms. Brionnes observed that Student would begin to act out and become aggressive when he did not receive attention he wanted, or was required to perform a non-preferred task. The BSP called for staff to redirect Student when he became agitated by giving him breaks or having

him perform another activity. Staff also worked with Student to teach him to ask for breaks to calm down when he felt agitated, and rewarded him for staying on-task. Staff would use verbal prompts to remind Student that he was working for a reward if he stayed on-task. The BSP provided that if staff could not calm Student through verbal prompts and escorting him outside of the classroom, staff would use District-approved physical restraints only as a last resort to protect Student or others.

15. Ms. Brionnes and the classroom aides received the District's restraint training in October 2007. Half of the restraint training focused on techniques to deescalate a student to avoid the use of physical restraints. Staff was to use physical restraints as a last resort to protect the safety of the student, staff or classmates. Physical restraints varied from physically escorting a student to a different location, holding a student in a chair, or restraining the student on the ground. The instruction taught staff how to properly implement the physical holds to prevent injury to the student and that all holds required at least two trained persons.

16. The BSP also included behavioral goals to address Student's aggressive behaviors to reduce these to three or less a week, rather than once or twice a day. Another goal was for Student to ask for breaks or to work on another activity. The District proposed that Student meet these behavioral goals by February 2008. Mother agreed to the District's BSP, and did not express any concerns that the BSP did not properly address Student's aggressive behaviors in class.

17. Student did not require either an FAA or BIP as of the November 16, 2007 IEP meeting because, although he was aggressive towards staff and fellow students, District staff could easily redirect Student before he became assaultive. Student's behaviors were consistent with those demonstrated during the prior school year with Mr. Lust. Additionally, the BSP was appropriate to meet Student's unique behavioral needs as the BSP incorporated strategies that had been effective in Ms. Brionnes's class.

Therefore, Student did not require either an FAA or BIP at the time of the November 16, 2007 IEP meeting.

#### BSP IMPLEMENTATION AND NEED FOR BERS AND IEP MEETINGS

18. Student contends that the District failed to adequately address his increasingly aggressive behaviors after the resumption of school on November 27, 2007, which led to numerous physical restraints on Student. Additionally, Student argues that the District failed to make timely BERS and did not hold the required emergency IEP meetings after physically restraining Student. The District asserts that it appropriately implemented Student's BSP, and only physically restrained Student as a last resort when District staff could not control him through the other techniques mentioned in the BSP to protect staff and other students. Finally, the District contends that because there was a valid BSP in place, it was not required to complete a BER or hold an emergency IEP meeting after staff physically restrained Student based on policy directives from the Stanislaus County Special Education Local Plan Area (SELPA), which were verbally confirmed by the California Department of Education.

19. A school district is to complete a BER after a student has a behavioral emergency, which includes when staff needs to physically restrain a student. A BER must include a description of the incident and the emergency intervention techniques used, and then be forwarded to a responsible administrator. For a student who does not have a BIP, the administrator shall schedule an IEP meeting within two days to discuss the incident and the necessity of an FAA and an interim BIP. A parent is to receive the BER no later than the day after the incident.

20. The next tract began on November 27, 2007. Ms. Brionnes instructed the Student's aide, Yolanda Ledezma, on the BSP, and they implemented it. Student's aggressive behaviors did not immediately increase upon his return. Student was absent from December 4 through 11, 2007, and on December 17, 2008, Student's aggressive



behavior began to escalate in class. Ms. Ledezma followed the BSP procedures, but Student would not deescalate. Eventually, Ms. Ledezma and Ms. Brionnes had to physically restrain Student because he represented a threat to District staff. Ms. Brionnes did not complete a BER and District did not hold an emergency IEP meeting.

21. Student was absent from school from December 18 through 21, 2007, and school did not resume after the winter break until January 7, 2008. Student's aggressive behaviors continued to escalate in Ms. Brionnes's classroom as Student did not respond to the BSP. Ms. Brionnes and Ms. Ledezma had to physically restrain Student to escort him out of the classroom when he began to hit either Ms. Brionnes, Ms. Ledezma or his classmates. They also had to restrain Student on the ground because of his assaultive behavior. These restraints occurred on January 8, 9, 10, 15, 16, 17 and 18, 2007. Student was sent home several times due to his aggressive behaviors. The District did not complete a BER or hold a two-day IEP meeting after any of these restraints. Parents decided after the January 18, 2008 incident that Student would not return to Ms. Brionnes's classroom.

22. The types of holds that Ms. Brionnes and other personnel used on Student as part of the District restraint procedures are designed to avoid injury to the student. At least two persons were required to implement these restraints to ensure control of the student. Student asserted that he was injured during these restraints, but the evidence did not establish this. The photographs taken by his Parents of his upper thigh and arm did not establish that Student was injured during a physical restraint because the poor quality of the photographs did not allow an observer, without expert knowledge, to determine the possible age of the bruising or to speculate as to the cause of the bruising.

23. The District did not use physical restraints as a form of aversive punishment to control Student's behavior. The District attempted the procedures in the

BSP first to deescalate Student, and only used physical restraints as a last resort when Student presented a serious threat to the safety of District staff or other classmates. However, the District failed to complete the required BERs after physically restraining Student, and a BER is required after the restraint of a student who has either a BSP or BIP. Additionally, because Student did not have a BIP, the District needed to schedule an emergency IEP meeting within two days of the incident. The District's failure to schedule a meeting prevented Parents from meaningfully participating in Student's educational decision-making process because Parents did not have sufficient information to determine whether the District should perform an FAA to develop a BIP, or provide additional supports or services to have Student remain in Ms. Brionnes's SDC before Parents removed him.

#### FAA BY CINNAMON SIMPSON

24. The District offered to perform an FAA to examine the causes of Student's increased aggressive behaviors, and to develop a BIP on January 10, 2008, before Parents removed Student from Ms. Brionnes class on or about January 18, 2008. Mother gave the District consent to conduct the FAA. Cinnamon Simpson from the SELPA would conduct the FAA. Parents agreed to have Student attend Ms. Brionnes's class on the days that Ms. Simpson needed to observe Student in a classroom.

25. Student asserted that the FAA that Ms. Simpson completed was inadequate because it failed to contain sufficient information regarding her observations and data collected, especially because Ms. Simpson did not review the data collected by Ms. Brionnes. Additionally, Student contends the BIP was not adequate because it was too punitive and did not provide sufficient opportunities for Student to succeed because the District's inclusion of restraints in the BIP reinforced Student's attention-seeking behaviors. Further, Parents objected to the BIP because it required staff to use the word "no" to control Student's behaviors. The District asserted that the FAA contained

sufficient information regarding Student's behaviors, and how the information was obtained, the BIP did focus on positive reinforcement, and it was unrealistic to avoid the use of the word "no" simply because Student did not like to hear this word.

26. An FAA must include environmental analysis of the settings in which the student's behaviors occur most frequently. Factors to consider should include the physical setting, the social setting, the activities and the nature of instruction, scheduling, the quality of communication between the student and staff and other students, the degree of independence, the degree of participation, the amount and quality of social interaction, the degree of choice, and the variety of activities. An FAA must include a review of records for health and medical factors that may influence behaviors. An FAA must include a review of the history of the behavior to include the effectiveness of previously used behavioral interventions.

27. Ms. Simpson received her Bachelor of Arts degree in ABA in 2003, and became a board-certified behavior analyst (BCBA) in 2004. Ms. Simpson is employed by the SELPA as an autism inclusion specialist and a behavior intervention case manager (BICM), and has been in this position for four years. Ms. Simpson was qualified to conduct the FAA and develop the BIP based on her education, training and experience.

28. Ms. Simpson observed Student three or four times in Ms. Brionnes's class during group and individual instruction, independent work, recess, lunch, library and his speech and language sessions over several days. Ms. Simpson collected data during her observations regarding the targeted behaviors to examine the causes of Student's behaviors, and determine what interventions the District could put in place to reduce the maladaptive behaviors. She also interviewed Parents, Ms. Brionnes and classroom staff. Ms. Simpson also worked directly with Student. Ms. Simpson conducted the FAA and drafted the BIP with the intent that Student would most likely return to Ms. Brionnes's classroom.

29. Ms. Simpson's FAA accurately identified four targeted behaviors that interfered with Student's ability to participate in the class. The targeted behaviors were Student's non-compliance in following directions and class rules, elopement, verbal outbursts and physical aggression. The antecedents of Student's behaviors were when staff made a demand, transitioning to a new activity, wanting access to a preferred activity, performing difficult tasks, and to seek attention.

30. The intensity of Student's non-compliance was mild to severe as the non-compliance would occur five to 15 times an hour and last from 30 seconds to 45 minutes. The intensity of Student's elopement behavior was mild to moderate, as the eloping behavior would occur from zero to five times per hour. Student's verbal outbursts were mild to severe as they occurred between two to 25 times per hour and lasted from 30 seconds to five minutes until he was successfully redirected. Student's aggression ranged from mild to severe, mild when he attempted, and severe when he actually struck another person and had to be physically restrained if staff could not deescalate him. These incidents lasted from 10 seconds to 45 minutes.

31. To reduce the targeted behaviors, Ms. Simpson recommended teaching Student skills to increase his ability to communicate his wishes to others, stay on-task, social skills, and frustration tolerance. Ms. Simpson prepared an extensive set of 27 program recommendations that focused on positive strategies. These strategies centered on giving Student positive reinforcement for proper behavior. Because of Student's difficulty with transitions, Ms. Simpson recommended a visual schedule to permit Student to anticipate how his day would progress. Staff would teach Student simple, rote phrases to allow him to express himself, and staff would check in with Student to ensure that he understood directions and to reinforce his listening skills.

32. Ms. Simpson recommended that a token-reward system be implemented. Student would earn tokens for performing preferred behaviors and could then redeem

the tokens for a break or a preferred activity. If Student engaged in physical contact with staff after one warning, he would lose all his tokens and be escorted by two staff, using approved physical techniques if needed, to a safe location so he could deescalate. Student would not lose tokens for assaulting a peer. Staff would only use physical restraints if Student continued to be aggressive and was a threat to the safety of staff, peers or himself. The FAA also stated that staff would complete a BER, if required.

33. The FAA proposed behavioral goals to monitor Student's progress in reducing the maladaptive behaviors. Regarding non-compliance, Ms. Simpson proposed that Student engage in noncompliant behavior no more than five times per hour with mild intensity in three out of four days observed. For elopement behavior, Student's goal was to approach staff upon request in eight out of 10 opportunities, and sit for a nonpreferred activity for two minutes without leaving in nine out of 10 opportunities observed. Regarding vocal outbursts, the goal was for Student to cease or reduce his self-talk upon request in eight out of 10 opportunities observed, and he would use pre-taught rote phrases to express his feeling about non-preferred demands in eight out of 10 opportunities observed. Finally, for aggression, the goal was that Student would engage in aggression no more than five times a day with minimal intensity, with each episode lasting no more than 10 seconds.

34. Student's expert, Keith Storey, Ph.D., reviewed Ms. Simpson's FAA and opined that her FAA was not adequate. Dr. Storey is a professor of special education at Touro University in Vallejo, California, and was a special education teacher for six years, ending in 1986. Dr. Storey has done research with children who have behavior problems, including children with autism, and has drafted numerous FAAs. Dr. Storey is also a co-author of *Functional Analysis of Problem Behavior: A Practical Assessment and Intervention Strategies*, which includes the functional assessment data collection form Ms. Brionnes used.

35. Dr. Storey criticized Ms. Simpson's FAA for not including the dates and times she observed Student, and copies of data sheets that she collected regarding Student's targeted behaviors. This would allow a reviewer to analyze the information to determine the antecedents of Student's behavior. Dr. Storey also disapproved of Ms. Simpson's BIP recommendation that Student lose all tokens if staff had to escort him out of the classroom due to his continued assaultive behavior to staff because that removed Student's incentive to act appropriately. Dr. Storey felt that the BIP's proposal that staff remove Student to a safe location, or as a last resort to physically restrain him for assaultive behaviors, only reinforced Student's attention-seeking behavior. Finally, Dr. Storey stated that the BIP's use of the word 'no' to correct Student's conduct was not a positive reinforcement technique.

36. Dr. Storey had neither met Student, nor performed an evaluation of him. Dr. Storey based his opinions on a review of Ms. Simpson's FAA and BIP, and data collection forms regarding Student's behavior collected by Ms. Brionnes and Sierra Vista. While Dr. Storey challenged the form of Ms. Simpson's FAA and BIP and program recommendations and modifications, he did not challenge whether the FAA and BIP would improve Student's targeted behaviors. Dr. Storey's critique of Ms. Simpson's FAA and BIP was more of a methodological criticism of the BIP being too punitive, not a conclusion that the FAA and BIP would not work. Student's expert, John Brown, Ph.D., from the University of California, Davis, Medical Investigation of Neurodevelopmental Disorders (MIND) Institute, stated that the use of punitive consequences can be effective in controlling behavior and this is supported by data. Dr. Storey offered no explanation as to what he would recommend be included in an FAA and BIP about how to handle an assaultive student who represented an immediate threat to staff or other students. Not using the word 'no' to correct Student is unrealistic because Student will need to get used to understanding the concept of 'no' and modifying his behavior. While Dr.

Storey's recommendation may represent the best practices, his critique of Ms. Simpson's FAA and BIP did not establish that the FAA was not properly conducted and drafted, nor that the BIP was insufficient to address Student's targeted maladaptive behaviors.

37. Although Ms. Simpson's FAA should have contained more information regarding her observations of Student, her failure to include that information does not invalidate the accuracy of the information contained in the FAA regarding Student's aggressive and non-compliant behaviors and the possible causes. Additionally, the BIP included proper positive behavior techniques to redirect Student when needed, reinforce proper behavior, and to teach Student appropriate behaviors. The BIP recommended that Student's tokens be removed, or physical restraints be used only when Student demonstrated assaultive behavior, and only after all other attempts to deescalate Student had not worked. Regarding the four proposed behavioral goals in the BIP, Dr. Storey did not opine whether the goals were inadequate to meet Student's needs. Therefore, Ms. Simpson's FAA and BIP, including the behavioral goals, were properly created and adequately designed to address Student's problem behaviors.

#### DISTRICT'S APRIL 2008 TRIENNIAL ASSESSMENT

39. Assessments of educational needs must be conducted at least every three years in all areas related to any suspected disability that a student with special needs may have. Student contends that the District needed to assess him in areas related to his OT needs, especially in the area of sensory integration, and pragmatic language deficits. Student also asserts that the District needed to have an inclusion specialist assess him to examine how the District could include him more frequently in the general education environment. The District asserts that it properly assessed Student in all areas of suspected disability, and that his behavior deficits were so significant he could not succeed in general education.

## Occupational Therapy

39. Student's April 27, 2007 IEP included 20 minutes a week of direct OT services, and 60 minutes a month of consultative services. Student also received adaptive physical education (APE) services for 40 minutes a week, and only had OT goals in the area of gross motor skills. However, Student's math, reading and health goals included OT components for Student to write numbers, to attend to a story read to him, brushing his teeth and eating new foods.

40. Student's OT provider, Wayne Stevenson, provided Student with sensory integration and fine and gross motion therapy when Student attended Mr. Lust's and Ms. Brionnes's classes. Mr. Stevenson developed a sensory diet for Mr. Lust's classroom, such as deep pressure, movement, and use of equipment such as a therapy ball or beanbag, to help Student attend and to reduce behavioral problems as Student would occasionally slap at others due to his sensory processing deficits. As noted above, Mr. Lust used sensory techniques to deescalate Student when he became agitated. Ms. Stevenson did not observe Student having behavioral problems, and Ms. Brionnes did not contact him for assistance when Student's behavioral problems began to escalate in December 2007 and January 2008.

41. The District did not ask Mr. Stevenson to assess Student as part of the triennial assessment, nor offer to conduct any OT assessment during all times relevant in this case. The District offered to conduct an APE assessment, but did not do so. The District did not offer an explanation why it did not perform an OT assessment, despite Student's receipt of OT services during SY 2007-2008, and knowledge that sensory integration techniques had worked in the past in deescalating Student. Additionally, at the April 4, 2008 IEP meeting the District recommended reducing Student's OT services to just consultative services for 60 minutes a month, although it had not conducted an OT assessment. The District needed to perform an OT assessment before changing



Student's OT services. Additionally, the District needed to conduct an OT assessment to examine if Student's increased aggression was caused in part by his sensory integration deficits, and whether OT techniques could be effective in deescalating Student.

#### Pragmatic Language

42. Pursuant to Student's April 27, 2007 IEP, he received speech and language services, two sessions a week, 20 minutes a session in a small group, provided by speech and language therapist Gale Norton. Student had goals to improve his receptive, expressive and pragmatic language to improve his ability to communicate with his peers, repeat phrases and make requests. Ms. Norton ceased providing Student with speech and language services on February 13, 2008, because Parents had removed Student from Apricot Valley.

43. Ms. Simpson's FAA indicated that a possible cause of Student's aggressive behaviors was the problem he had communicating, and she recommended improving Student's ability to communicate his needs. The District's triennial assessment plan included a speech and language assessment. The District's April 1, 2008 psychoeducational report stated on the cover page that it included information from Ms. Norton; however, this was not a formal assessment. Ms. Norton did not complete a speech and language assessment because he no longer attended Apricot Valley.

44. There was no evidence that the District attempted to schedule a speech and language assessment of Student during the triennial assessment, or at any time relevant to this case. Nor was there evidence that such an assessment was scheduled and that Parents did not make Student available. Therefore, the District failed to assess Student in all areas of suspected disability for the April 2008 triennial IEP because it did not conduct a speech and language assessment of Student's pragmatic language deficits.

### Inclusion Assessment

45. Student asserts that the District needed to have an inclusion specialist assess him to examine possible services that would allow Student to have more time with general education students and to be placed in a less restrictive environment. At the November 16, 2009 IEP meeting, Mother did request a referral for a SELPA inclusion specialist<sup>9</sup> to examine more mainstream opportunities for Student. The District agreed to contact the SELPA about this. Mr. Hodge, the District's Special Education Program Administrator, did this, but due to a backlog, the SELPA's inclusion specialist Ms. Simpson was not available for several months, and then it was not done because of the FAA. However, Student did not present any evidence that the District needed to conduct an inclusion assessment for the April 2008 triennial assessment, especially because his aggressive behaviors prevented him from attending a less restrictive environment than his then present SDC. Therefore, the evidence did not establish a need for an inclusion assessment for SY 2007-2008.

### Psychoeducational Assessment

46. Student contends that the District underestimated Student's cognitive abilities in its psychoeducational assessment, because it claimed that Student, in addition to being eligible for special education services under the category of autistic-like behaviors, was also eligible under the category of mental retardation. Student contends that because the District underestimated Student's cognitive abilities, the District developed inappropriate goals for him, and continued to offer him restrictive

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<sup>9</sup> An inclusion specialist observes students and programs and gives recommendations for students to be successful in inclusion with regular education students, including mainstreaming into general education classes.

placements. The District asserts that its psychoeducational assessment accurately portrayed Student's cognitive abilities.<sup>10</sup>

47. Karen Bailey and Lidia Buriel conducted the psychoeducational assessment. Both are school psychologists with master's degrees and pupil services credentials that permit them to be school psychologists and conduct psychoeducational assessments. The District did not conduct any formal cognitive testing of Student due to time constraints to complete the triennial assessment. The District relied on prior cognitive assessments, the Woodcock-Johnson Test of Achievement, Third Edition (WJ-III) administered by Ms. Rouppet, and classroom and testing observations. Ms. Bailey and Ms. Buriel also conducted the Vineland Adaptive Behavior Scales (VABS) survey.

48. A 2005 psychoeducational assessment, conducted when Student was eight years old, showed that Student had significant cognitive delays as he was approximately five years behind his peers. The 2008 psychoeducational assessment showed that Student still had significant cognitive delays based on Ms. Bailey's and Ms. Buriel's observations, Student's classroom performance, and academic testing.

49. To measure Student's academic performance, Ms. Rouppet administered the WJ-III. Student cooperated with Ms. Rouppet's testing, but needed breaks every five to 10 minutes. The breaks lasted 10 to 15 minutes. Student was able to request breaks

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<sup>10</sup> Student's complaint does not challenge whether the District properly conducted the psychoeducational assessment, qualifications of the assessors or whether the District should not have found Student eligible for special education in April 2008 under the category of mental retardation. The issue for hearing is whether the District underestimated Student's ability in developing the April 2008 IEP, which led to improper goals and an inappropriate placement.

when tired and was not aggressive to either Ms. Rouppet or Ms. Buriel, who observed the testing.

50. Student's reading and math abilities on the WJ-III were in the kindergarten to first-grade range. Student did not like performing any written tasks and became irritated when asked to use pencil and paper. When testing Student's ability to read sight words, he would not stay still and wandered around the room. Ms. Rouppet walked around the room with Student showing him the sight words and asking him to read the words that were at the kindergarten to first-grade level.

51. For the VABS, Ms. Brionnes and Ms. Ledezma completed a classroom questionnaire that asked questions regarding Student's adaptive functioning in the areas of communication, daily living skills, socialization, and motor skills. Ms. Bailey interviewed Mother on March 4, 2008, using structured questions.

52. Student's scores regarding communication, daily living and socialization skills subareas all showed significant deficits. According to the VABS, Student had significantly delayed adaptive skills that confirmed his extremely low level of functioning in Ms. Brionnes's class. Mother's overall adaptive skills standard score was 56, 0.2 percentile; Ms. Brionnes's score was 57, first percentile; and Ms. Ledezma's score was 48, 0.1 percentile. Student's delays regarding his adaptive skills at school and home mirrored his cognitive delays that impaired his ability to perform tasks, communicate and attain typical academic achievement.

53. Student challenged the District's description of Student's cognitive abilities in the psychoeducational assessment, based on testing conducted by the MIND Institute. Student attended a social skills workgroup at the MIND Institute in the summer of 2008. The program director was Dr. Brown. In August 2008, the MIND Institute performed the Differential Ability Scales, Second Edition (DAS-II) to assess Student's cognitive ability. Although Dr. Brown did not administer the DAS-II, he testified to the

results as he supervised Andrea Schneider, Ph.D., who did. The DAS-II measures verbal skills, non-verbal reasoning and spatial skills to assess cognitive abilities.

54. The DAS-II was administered over a 90-minute period, and Student was able to maintain his attention over several five-minute intervals, with a 10-minute break midway through the evaluation when given immediate positive feedback, which was a technique recommended in Ms. Simpson's FAA. From the report and Dr. Brown's testimony, it was not clear if Dr. Schneider followed the DAS-II test protocols and if the results were valid.<sup>11</sup> The DAS-II results did show a large disparity between Student's non-verbal reasoning and spatial skills compared with his verbal skills. Student's standard score on the non-verbal reasoning subtest was 84, which placed him in the 14th percentile, and he had a standard score of 71 for spatial reasoning, which placed him in the third percentile. Student's verbal skills were significantly lower with a standard score of 33, which is below the 0.1 percentile. According to Dr. Brown, the divergence between the scores is not atypical for children with autism who often have divergent verbal and non-verbal reasoning skills.

55. The testing results from the MIND Institute did not establish that the District underestimated Student's cognitive ability by using information from its psychoeducational assessment in developing the April 2008 IEP. Student did not establish the validity of the test scores from the MIND Institute evaluation. Even if these scores were valid, they do establish that Student has at least low-average cognitive ability, borderline to mild mental retardation, even though these scores are not low

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<sup>11</sup> In his closing brief, Student cites to the DAS-II to show that Dr. Schneider administered the DAS-II according to the required protocols. However, Student should have presented this evidence during Dr. Brown's testimony, and not after the testimony had concluded.

enough to make Student eligible for special education services under the category of mental retardation. Additionally, the results from the MIND Institute's testing do not contradict the results of the WJ-III, which placed Student's academic ability in the kindergarten to first-grade level. Therefore, the evidence established that the District's psychoeducational assessment did not significantly underestimate Student's cognitive ability, and the District developed its goals and placement decision on accurate present levels of performance for Student.

#### APRIL 4, 2008 IEP

56. Student asserts that the District predetermined his placement at Sierra Vista, which denied his Parents the opportunity to meaningfully participate in the IEP meeting. Student also challenges the appropriateness of the IEP goals as not adequately addressing his speech and language, fine motor, sensory integration and social skills deficits. Student contends that the District unilaterally reduced his speech and language and OT services. Student also contends that the District's proposed placement at Sierra Vista was not in the LRE. The District disputes all of Student's contentions and contends that its offer was reasonably calculated to permit Student to make meaningful educational progress in the LRE.

57. Student did not attend a District class, other than for Ms. Simpson's FAA observations, after Parents removed Student from Ms. Brionnes's class in January 2008. Because Student did not have a medical reason for not attending school, the District was not required to provide Student with home instruction.

58. The District convened an IEP meeting on April 4, 2008. Ms. Simpson presented her FAA and BIP, and Ms. Buriel presented the psychoeducational assessment. Ms. Norton presented information regarding Student's present levels of performance for speech and language. Mr. Stevenson did not attend the IEP meeting. The IEP team discussed the proposed goals, speech and language and OT services, and placement

options. Mother did not initially consent to the IEP because she wanted to visit the proposed Sierra Vista. Mother consented to the IEP on April 8, 2008, after visiting Sierra Vista.

#### Predetermination

59. Under the Individuals with Disabilities in Education Act (IDEA), parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. A district must fairly and honestly consider the views of parents expressed in an IEP meeting. While school officials may discuss a child's programming in advance of the IEP meeting, they may not arrive at an IEP meeting with a "take it or leave it" attitude, having already decided on the program to be offered. A district that predetermines the child's program and does not consider the parents' requests with an open mind has denied the parents' right to participate in the IEP process.

60. While the District was conducting the FAA and psychoeducational assessment, Mr. Hodge was examining other possible placements for Student because of Parents' concerns about Ms. Brionnes's ability to control Student without the use of restraints. Due to Student's previous secondary special education eligibility under the category of mental retardation, and information from the assessors that Student might meet this eligibility criteria, Mr. Hodge began to explore placement in a program for students with mental retardation rather than keeping Student in Ms. Brionnes's SDC. Mr. Hodge also explored Sierra Vista.

61. At the IEP meeting, the District and Mother discussed various placement options. SELPA program manager, Kim Kelley, attended the IEP meeting because the District was considering non-public school (NPS) placements and Stanislaus County Office of Education (SCOE) placements. Ms. Kelley assists school districts who wish to place students in either an NPS or SCOE school. She was familiar with Sierra Vista

because she worked there for one year as an aide, and seven years as a teacher, and regularly visited Sierra Vista as part of her program manager duties. During the IEP meeting, Ms. Kelley recommended Sierra Vista as a possible placement and contacted Sierra Vista to find out if Sierra Vista would accept Student. Ms. Kelley informed the IEP team of her phone conversation with Sierra Vista, and the team members then discussed this information. Mother agreed to visit Sierra Vista.

62. The District established that it did not predetermine its placement offer of Sierra Vista. Mr. Hodge explored several different placement options prior to the IEP meeting. Placement at Sierra Vista was just one of several placement options discussed at the meeting. The District invited Mother to visit Sierra Vista, and she did not sign the IEP placing Student there until after the visit. Therefore, the evidence established that the District did not predetermine placement of Student at Sierra Vista, and Mother actively participated in the IEP process in regards to this proposed placement.

#### Goals

63. In addition to the behavior goals in Ms. Simpson's FAA, the District proposed goals in the areas of reading, math, writing, speech and language and gross motor skills. Student challenged the District's goals, through the testimony of his expert, Michal Post, for not having adequate baseline information about Student. Ms. Post teaches special education at Touro University, and is a credentialed special education teacher. Ms. Post's expertise is in the area of educating children with autism.

64. The baseline information in the District's goals is a bit vague, such as stating in a reading goal that Student reads many sight words. While Ms. Post focused on information in the baseline section on the goal pages, she ignored information in other portions of the IEP, including the FAA, which gave specific information regarding Student's present levels of performance from which the District developed its goals. Ms. Post had not assessed Student, and could not give an opinion whether the District's



goals were adequate to meet Student's unique needs. Therefore, her testimony was given limited weight. The IEP identified how many sight words Student knew, reading and math abilities and speech and language deficits. The IEP document itself contains specific information regarding Student's present levels of performance for the District to develop the goals, and then to be able to examine Student's progress in meeting these goals in a year.

65. Regarding the adequacy of the goals themselves, one District reading and language arts goal is for Student to blend three to four sounds into words or syllables with 80 percent accuracy in three out of four trials. The other goal was for Student to write and spell correctly 10 sight words he knew with 80 percent accuracy in three out of four trials. The District based the proposed goals on state standards. The District properly developed these goals based on Student's present levels of performance regarding his reading, writing and verbal skills, and the goals were measurable.

66. The District based its two math goals on Student's ability to perform two-digit addition and single-digit subtraction without regrouping, and his ability to count by fives to 100 in a previous goal. The District's proposed goal was that Student complete 10 two-digit addition problems with regrouping with 80 percent accuracy in three out of four trials. The other math goal was for Student to count by threes and fours to 100. The District based both math goals on state standards and Student's present levels of performance, and the goals were measurable and met his unique needs.

67. Regarding the District's behavioral goals, as noted above in the discussion regarding Ms. Simpson's FAA and BIP, these goals were adequate to meet Student's behavioral needs. Regarding Student's need for self-help goals, Student did not present sufficient evidence to establish he had self-help needs that the proposed goals did not meet.

68. Regarding Student's social skills and speech and language deficits, the April 2008 IEP only contained one combined goal. The goal stated that Student would improve his receptive, expressive and pragmatic language skills regarding peer interaction, requesting and repeating. The April 2008 IEP did not include sufficient present levels of performance in this area as there was little information regarding Student's progress on his prior goals, his ability to communicate in Ms. Brionnes's class, and no speech and language assessment.

69. The speech and language and social skills goal contained measurable short-term objectives for Student's progress in initiating and maintaining a conversation with peers, asking a question about a picture given to him, and repeating back simple sentences and phrases. However, the District did not present sufficient information at the IEP meeting to establish that the goal was adequate to meet Student's needs. Although Ms. Simpson's FAA noted that Student's difficulties in communicating with staff were a significant reason for his aggressive behaviors, there was little discussion about changing the April 2007 speech and language goal, and there was little difference between the April 2008 goal and the previous goal. The District's April 2008 speech and language goal did not meet Student's speech and language and social skills needs because the goal only slightly modified the April 2007 goal with no explanation why a continuation of this goal would assist Student in communicating with others sufficiently to decrease his aggressive behaviors.

70. The April 2008 IEP did not contain any fine motor or sensory integration goals. Mr. Stevenson did not attend the April 2008 IEP meeting. Although the District did not conduct an OT assessment, Student did not establish that he required any fine motor goals. Mr. Stevenson's testimony established that, based on his work with Student, he did not require any fine motor goals. Regarding sensory integration, the techniques recommended by Mr. Stevenson were successful in Mr. Lust's class in

deescalating Student. Because of Student's escalating aggressive behaviors and the prior success of sensory integration techniques, the April 2008 IEP needed to include a sensory integration goal to assist Student in regulating the sensory information he processed. This would have enabled Student to better self-regulate himself, which could reduce his escalating behaviors.

71. Student did not establish that the District's April 2008 reading, math and fine motor goals were not measurable and adequate to meet Student's unique needs, or that Student required a self-help goal. Regarding the April 2008 pragmatic, expressive and receptive language, and social skill goals, Student established that the goals were not adequate to meet Student's unique needs because the District had not assessed Student's speech and language needs, and the IEP contained inadequate information regarding Student's speech and language present levels of performance. Further, the April 2008 speech and language goal merely repeated with little change and without explanation Student's April 2007 speech and language goal. Regarding sensory integration, Student established his need for one or more goals in this area based on the prior success that sensory integration techniques had in deescalating Student. Further, there was a need to explore all avenues to reduce his increasingly aggressive behaviors. Therefore, the District's April 2008 IEP denied Student a FAPE because the District did not have adequate pragmatic, expressive and receptive language, sensory integration and social skill goals to meet his unique needs.

#### Speech and Language and OT Services

72. Student asserts that the District unilaterally reduced his speech and language and OT services at the April 2008 IEP meeting. Regarding speech and language services, the District maintained the same level of services as Student would continue to receive 40 minutes a week of service. Although not specified, speech and language services would be administered in small groups as done pursuant to the April

2007 IEP. Student did not present sufficient evidence to make a determination that this level of services was inadequate.

73. Regarding OT services, the April 2007 IEP provided Student with a weekly 20-minute session, and 60 minutes a month of consultative services. The April 2008 IEP kept the same level of consultative services, but removed the direct service. Because Mr. Stevenson neither attended the April 2008 IEP, nor assessed Student, the District presented no information at the IEP meeting to justify the reduction of service. Therefore, the District denied Student a FAPE by removing the 20 minutes a week of direct OT service.

#### Placement at Sierra Vista

74. A special education student must be educated with nondisabled peers to the maximum extent appropriate, and may be removed from the general education environment only when the nature or severity of the student's disabilities is such that education in general classes with the use of supplementary aids and services cannot be achieved satisfactorily. The IDEA requires that a student with a disability be placed in the LRE in which the student can be educated satisfactorily. The environment is least restrictive when it maximizes a student's opportunity to mix with typical peers. Whether a student is placed in the LRE requires the consideration of four factors: (1) the educational benefits of placement full-time in a less restrictive setting; (2) the non-academic benefits of such placement; (3) the effect the student would have on the teacher and children in the regular class, and (4) the costs of the less restrictive setting.<sup>12</sup> Student asserts that the District's placement offer of Sierra Vista was not reasonably

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<sup>12</sup> Neither the District nor Student makes any argument concerning the cost of Student's placement, so that subject is not addressed here.

calculated to permit Student to make meaningful educational progress in the LRE. Student asserts that the District failed to consider less restrictive school placements. The District asserts that Sierra Vista's program was reasonably calculated to permit Student to make meaningful educational progress because it addressed Student's behavioral and academic needs in the LRE.

75. Sierra Vista is a NPS, located in Turlock, which specializes in educating autistic children with significant behavioral problems and cognitive deficits. According to its Director of Educational Services, Kim Hamby, Sierra Vista has small classes with 10 to 12 students and a high student-to-staff ratio. Sierra Vista assigns a behavioral clinician to each classroom. Sierra Vista provides students with a functional curriculum that follows the state's standards and incorporates ABA methodology into its instruction with staff that has ABA training. Group therapy and social skills training are imbedded in its program. Sierra Vista is approximately 20 miles from Student's home and approximately a 75-to-90-minute bus ride, one-way, as the bus picks up other students.

#### ACADEMIC BENEFITS

76. Student does not assert that he belonged in a general education classroom in April 2008. Student contends that Sierra Vista is a more restrictive setting than Ms. Brionnes's SDC at Apricot Valley, a regular education school, and that Student could have been properly educated in an SDC with proper behavioral supports. Both Ms. Brionnes's SDC and Sierra Vista's academics focus is functional life skills. Sierra Vista's teachers are credentialed, like Ms. Brionnes. Sierra Vista is a more restrictive educational setting than Ms. Brionnes's SDC because it is located on a self-contained campus with no access to general education students. Both Apricot Valley and Sierra Vista offered Student about the same level of academic benefit.

#### NON-ACADEMIC BENEFITS

77. At Apricot Valley, Student spent 95 percent of his school day in special education and five percent with regular education students. At Sierra Vista, Student's time in special education was 100 percent. Both Apricot Valley and Sierra Vista took students off campus for socialization and life skills instruction, such as visiting a supermarket and purchasing items. Students in the SDC at Apricot Valley had fewer behavioral problems than students at Sierra Vista, and students at both locations had similar cognitive and verbal abilities. Other than Student's limited interaction with general education students at Apricot Valley, Student obtained about the same non-academic benefit at both schools. Therefore, Student did not establish the non-academic benefit he received by having access to general education students at Apricot Valley because his behavioral deficits prevented his access to general education students.

#### DISRUPTION

78. Student disrupted his Apricot Valley class with his outbursts, as Ms. Brionnes could not work with the other students when she handled Student's behavioral problems. Student's behavioral problems prevented him from accessing his education in this SDC. Student contends that a more appropriate BIP could have permitted Student to remain in a District SDC. The evidence established that the BIP developed by Ms. Simpson was adequate to meet Student's needs, and Ms. Brionnes and her staff had adequate training, but Student's needs exceeded their capabilities. While sensory integration techniques may have assisted in deescalating Student in Ms. Brionnes's class, Student had reached a point where he required an intensive behavioral program, which Sierra Vista offered and the SDC did not. Student's escalating behaviors, probably caused by the change of medications, could not have been resolved through the sensory integration techniques that Mr. Lust used, a different BIP, or other supports.

Therefore, Student could not obtain an educational benefit in an SDC because the intensity of his behavioral problems required intensive intervention that could not be provided in an SDC.

79. Student required a more comprehensive approach to reduce his behavioral problems so that he could later return to a less restrictive environment. Sierra Vista's comprehensive program met Student's needs with the supports and services it provided. Although Student had previously succeeded in the District's SDC at Apricot Valley, his increasing behavior problems required a different approach, which Sierra Vista provided. Therefore, Sierra Vista was the LRE for Student in April 2008.

#### IMPLEMENTATION OF THE APRIL 2008 IEP AT SIERRA VISTA

80. Under state and federal law, one of the factors used in determining whether a school district provided a FAPE to a student is whether the services it provided to the student conformed to his or her IEP. A failure to implement any provision of the IEP violates a student's right to a FAPE where the failure has been determined to be material. A student is not required to demonstrate that he or she suffered educational harm to prevail on a claim that a school district failed to implement his or her IEP.

81. Student asserts that Sierra Vista did not implement his IEP because it failed to implement the BIP, which led to Sierra Vista staff physically restraining Student. Student contends that Sierra Vista failed to provide him with adequate academic instruction and did not integrate Student into his classroom, but rather isolated him. Finally, Student asserts that he was not able to handle the long bus trip as he was repeatedly disciplined for improper conduct. The District admits that due to staffing problems Student did not receive the speech and language and OT services specified in his IEP. However, the District asserts that Sierra Vista implemented Student's BIP through its comprehensive behavior program at the school, and provided adequate

academic instruction and integrated Student into his classroom after his behavior problems stabilized. Student attended Sierra Vista from April 8, 2008, through June 24, 2008. Mother then removed Student from Sierra Vista based on concerns that Sierra Vista did not provide Student with a FAPE.

#### BIP and Behavior on Bus

82. During Mother's visit to observe Sierra Vista in April 2008, Sierra Vista staff informed her about its program and academic levels of the classrooms. Mother requested that Sierra Vista place Student in a classroom with students who were working closer to his grade level, which Sierra Vista did. Mother represented that Student required a more academically challenging program. However, Sierra Vista soon discovered that Student could not perform academically at the same level as his classmates and the added academic demands increased his stress and caused him to act out by hitting at staff and swearing. After a couple of weeks, Sierra Vista moved Student into a class with students at a first- to second-grade ability level.

83. Sierra Vista has a detailed behavior program that it implements for all students, which incorporates ABA methodology and other accepted behavior modification strategies, such as a token-reward system. Sierra Vista staff had proper restraint training, and Sierra Vista kept data to track a student's behavior to determine the cause of problem behavior, the exact conduct, and the consequence of the student's conduct. Although Sierra Vista did not have a copy of Student's IEP for the first two weeks he attended, Sierra Vista did implement its behavior program, which contained many of the same elements included in his BIP. Sierra Vista did have to physically restrain Student twice during his first two weeks at Sierra Vista. Sierra Vista completed a BER, which it sent to the SELPA office. It was not forwarded to Parents.

84. After Sierra Vista received Student's BIP, program staff reviewed it and found that Sierra Vista's comprehensive behavior program incorporated nearly all of the



strategies in the BIP. Sierra Vista would implement Student's BIP if its own behavioral strategies did not work. However, Sierra Vista did not have to implement Student's BIP because its behavioral program was effective in improving Student's behavior.

85. Student asserts that he acted out numerous times on the bus due to the length of the bus trip and his behavior problems. This acting out caused him to be suspended from riding the bus. A review of the bus incident reports contradicts Student's contention. On May 5, 2008, on the ride home, Student hit a bus aide after ignoring repeated instructions not to hit the bus window. Student received a warning. The next incident was on May 7, 2008, on the ride home, when Student hit another student and a bus aide and then got out of his seat and walked towards the bus driver and hit him. The cause of this incident was that a train passed by the bus and the bus did not stop. Student has an extreme preoccupation with trains, and his Mother reinforced this obsession by making sure to take Student to a train crossing at a specified time so Student could see the train. Student was suspended for three days from the bus after the second incident. After the suspension, Student continued to ride the bus to and from Sierra Vista and there were no further incidents.

86. After Sierra Vista moved Student to the appropriate classroom, its staff did not need to restrain Student. Sierra Vista staff talked to Student to calm him down when his behaviors began to escalate, and helped him realize the consequences of his actions. Occasionally, staff escorted Student to a quiet location and then returned him to his classroom. The intensity of Student's maladaptive behaviors decreased during his attendance at Sierra Vista, despite his numerous absences due to illness and his attendance at the social skills program at the MIND Institute. Student began to recognize when he would become upset and want to hit staff, and he would then deescalate himself with minor assistance of Sierra Vista staff. Additionally, Student's ability to stay on-task increased at Sierra Vista as elopement and verbal outbursts

decreased and he responded to staff redirection. Therefore, Sierra Vista properly implemented Student's BIP by using its behavior program.

#### Academics and Class Inclusion

87. After Sierra Vista realized that Student did not belong in the first assigned classroom, because the academics were above his ability, Sierra Vista began academic instruction in another classroom at his academic ability level. Because of the stress of a second transition, the implementation of a behavioral program, and the academic demands, Student was isolated at first from his classmates when doing academic work, and then slowly integrated back into the classroom. At the time of the June 3, 2008 IEP meeting, Student worked on academics with a one-to-one aide separate from other Students, but still in the classroom. Sierra Vista isolated Student because he was easily distractible and got frustrated when he performed non-preferred academic tasks. During other activities, Student was integrated with his classmates. Sierra Vista was working with Student to fully integrate him into the classroom as his behaviors continued to improve, and he was fully included when he left Sierra Vista at the end of June 2008.

88. As of the June 3, 2008 IEP meeting, Student performed second-grade academic work, which was an improvement over the work he performed in Ms. Brionnes's SDC and the kindergarten to first-grade academic levels on the WJ-III administered in March 2008. Therefore, Sierra Vista provided Student with proper academic instruction because he was making progress, and as Student's behavior improved, he was being included into the classroom more frequently. However, Student's expectation that he would be fully included after two months at Sierra Vista was unrealistic based on the severity of behavior problems that Student had in April 2008, and his numerous absences.

## Speech and Language and OT Services

89. The April 2008 IEP provided that Sierra Vista was to provide Student's speech and language services, and the SELPA was to provide OT services. The parties do not dispute that Student did not receive the speech and language and OT services listed in the April 2008 IEP. Student missed approximately 12 speech and language sessions. The OT consultation was not provided twice because the SELPA provider was on maternity leave. The SELPA eventually had Mr. Stevenson go to Sierra Vista for the OT consultation, but he could not provide services because Parents had removed Student from Sierra Vista by that time. Therefore, the District failed to ensure that IEP was implemented because Student did not receive the speech and language and OT services listed in the IEP. The District agreed to provide Student with make-up sessions at the August 26, 2008 IEP meeting, which did not occur because Student did not attend any school after the end of June 2008. Therefore, the District failed to materially implement Student's April 2008 IEP.

## MIND INSTITUTE SUMMER PROGRAM

90. Student began attending the MIND Institute social skills group for autistic children in May 2008, one time a week, through September 2008. The program had six participants, ages 10 through 13. The group required social interaction between the participants and the MIND Institute staff. Dr. Brown worked with the child and oversaw the social skills program and supervised the two psychologists who worked with the children. The goal of the program was to teach the children appropriate social interaction, how to make friends, dispute resolution and coping with emotions. As part of the program intake, Dr. Brown met with Mother, who provided Dr. Brown with Student's history, but did not inform him that Student attended Sierra Vista or had a BIP.

91. The MIND Institute created a two-page intervention summary to improve Student's behavior, which Mother provided the District, along with a psychological report prepared by Andrea Schneider, Ph.D., with the MIND Institute. The MIND Institute sought to reduce Student's loud vocalizations and agitated behavior. The intervention summary identified the cause of these behaviors as Student not engaging in an activity and being required to perform a nonpreferred or difficult task. To improve Student's behavior, the MIND Institute employed techniques similar to those identified in Ms. Simpson's BIP, such as the token-reward system, visual supports and visual schedule, positive reinforcement for proper behavior, redirection and teaching him phrases so he can communicate his wants. The MIND Institute also used 15-minute videos to teach Student social stories on the skill that was to be worked on. In her report, Dr. Schneider recommended that Student have a minimum of two hours a week of cognitive-behavioral therapy.

92. Student asserted that any behavior improvement was from the work of the MIND Institute. Student progressed in the MIND Institute social skills program; however, it is not known how much Student's improvement was also the result of Student's attendance at Sierra Vista, especially since the strategies used were very similar.

#### AUGUST 26, 2008 IEP MEETING

93. The District convened the August 26, 2008 IEP meeting because Student had not attended any school program for two months. Mother informed the District that she would not allow Student to return to Sierra Vista because she believed that Student was not making academic progress, he continued to attempt to hit staff and his classmates and she had concerns about transportation. Right before the IEP meeting, Mother provided the District with the MIND Institute's psychological report, which summarized the DAS-II results, and the MIND Institute's intervention summary that described Student's progress in the social skills program and behavior plan. Mr. Hodge

attended the meeting representing the District. Ms. Hamby attended on behalf of Sierra Vista. Representing SCOE, Deb Lazarri, Director of the Autism Program, attended. Representing the SELPA, Regina Hedin, SELPA Director, and Ms. Kelley attended. Mother and Student's Valley Mountain Regional Center (VMRC) case manager, Lynette Dimond, attended. At the conclusion of the IEP meeting, the District offered Teel as Student's placement, with the same goals and services from the April 2008 IEP.

#### IEP Meeting Participants and Consideration of MIND Institute Reports

94. A procedural violation of the IDEA results in a denial of a FAPE if it impedes the student's right to a FAPE, significantly impedes the parents' opportunity to participate in the decision-making process, or causes a deprivation of educational benefits. A school district need not invite private assessors or private providers of services to an IEP team meeting, but may be invited to IEP meetings at either the district's or parents' discretion, but they are not required members. An educational agency not considering information presented by parents at an IEP meeting and not inviting necessary individuals may result in the denial of a FAPE. Student asserts that the District failed to consider information in the two MIND Institute reports that Mother presented at the meeting, and should have invited personnel from the MIND Institute to participate at the IEP meeting. The District asserts that it considered information from the MIND Institute at the meeting and personnel from the MIND Institute were not necessary to attend the IEP meeting.

95. The IEP participants had a copy of the MIND Institute reports for the meeting. Because Mother provided the reports shortly before the meeting, team members had limited time to review the information in the reports so they could meaningfully discuss them at the meeting, and no time to invite anyone from the MIND Institute to attend. While the MIND Institute reports contained updated information regarding Student's progress in the social skills program and DAS-II results, the

information in the reports did not call for a change in Student's placement or BIP. This was especially true because Mother had not informed Dr. Brown, who supervised the preparation of the reports, of the Sierra Vista placement or the BIP. Additionally, Dr. Schneider's recommendation that Student have a minimum of two hours a week of cognitive-behavioral therapy did not consider whether Student received similar services at Sierra Vista, or whether Student required this therapy to meet his needs or to make meaningful educational progress.

96. The District failed to consider information in Dr. Schneider's report that sensory integration techniques, such as use of hard or soft presses, could refocus Student and deescalate him. No OT provider attended the IEP meeting. The District continued to offer the same level of OT services, without exploring whether Student required additional OT assistance, such as developing a new sensory diet to assist Student with sensory strategies, and activities to help him organize his behavior so he could participate in school activities.

97. Dr. Schneider's report recommended a focus on speech and language therapy to target Student's communication deficits. Ms. Simpson's FAA raised a similar concern that Student's difficulty in communicating caused in part his behavioral problems. Although the District had failed to perform a speech and language assessment as part of the triennial assessment in April 2008, the District did not discuss whether it should conduct a comprehensive speech and language assessment. Rather, the District offered the same speech and language services and goals.

98. The District did not deny Student a FAPE by failing to invite to the IEP meeting individuals from the MIND Institute. However, the District needed to invite to the IEP meeting an OT provider to discuss Student's OT needs because of the sensory integration deficits discussed in the MIND Institute reports that impacted Student's behavior.

## Predetermination of Placement

99. Regarding possible placements, the District considered several placements, including Teel, because of Mother's statement that she would not return Student to Sierra Vista. Mr. Hodge explored possible placement options. Some were rejected because students in those programs were too low-functioning compared to Student. The District, SELPA, and SCOE representatives explained their decision-making process at the IEP meeting, and why they believed that Teel was the appropriate placement for Student. Additionally, although the District still considered that Sierra Vista was the appropriate placement for Student, and continued to offer this as Student's stay put placement, the District researched other possible placements and offered Teel to get Student back into school. Therefore, the District did not predetermine Student's placement at Teel.

## Behavioral Supports and Need for Updated FAA and BIP

100. Student contends that the District needed to update the FAA and BIP based on information from the MIND Institute and Student's lack of behavioral improvement at Sierra Vista. However, the behavioral strategies recommended by the MIND Institute mirrored those in Ms. Simpson's FAA. Additionally, Sierra Vista's behavior program worked as Student's behavior improved, and staff did not have to physically restrain Student after the first two weeks at Sierra Vista. Further, the number of days in which Student did not demonstrate any problem behaviors increased, which demonstrates the appropriateness of the behavioral supports and services. Although Teel was a different program, Student's need for a new FAA and BIP could be quickly determined after he attended Teel to see if behavioral problems increased after the initial transition period.

## Appropriateness of Placement at Teel

101. SCOE runs the Teel SDC, which is designed for children with autism in a self-contained classroom adjacent to a regular education campus, operated by another school district. The SDC is for students in grades sixth through eighth and has fewer than 10 students, with a credentialed teacher and a classroom aide. However, most students in the class, like Student, have their own one-to-one aide. The classroom teacher and staff are trained in behavioral techniques, including ABA and TEACCH,<sup>13</sup> and have received physical restraint training. Similar to Sierra Vista, Teel is a highly structured program with on site BICMs to address students' behavior and provide needed assistance and support to classroom personnel. Discrete trial training (DTT) is available for students who require DTT instruction for academics.<sup>14</sup> Like Sierra Vista, Teel is designed to improve a student's behavior to allow a student to return to a lesser restrictive setting.

102. Student's expert, Shannon Heidermann, visited Teel in December 2009, for 60 to 90 minutes to evaluate the appropriateness of this program for Student. Although Ms. Heidermann visited the Teel SDC more than a year after the District's August 2008 IEP offer, the Teel program had not changed in that time.<sup>15</sup> Ms. Heidermann has a

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<sup>13</sup> Treatment and Education of Autistic and Communication Handicapped Children (TEACCH) uses visual schedules and routines to learn new skills.

<sup>14</sup> DTT involves repetitive, one-to-one drills, in which the instructor attempts to teach the student a particular skill or behavior.

<sup>15</sup> Teel SDC was located between the Teel campus, grades sixth through eighth, and the Empire Elementary School campus, grades kindergarten through fifth. Teel



master's degree in teaching, with a specialty in autism, and is working towards her BCBA. She has worked for an NPA for eight years with autistic children, and has done behavioral assessments as a private assessor. Ms. Heidermann completed a behavioral evaluation of Student in October 2009, and observed Student four times in July through September 2009 at his home and the community.

103. Ms. Heidermann found the Teel SDC program to be an excellent program for children with autism. However, Ms. Heidermann did not believe that Teel was appropriate for Student because he was higher functioning than the other students, who had more significant behavioral problems than he did. Ms. Heidermann did not state that Teel could not meet his behavioral needs or had inadequate behavioral supports and services, just that Student was higher functioning than the other students. Ms. Heidermann's recommendation that Student attend a learning handicapped classroom, supplemented with NPA services and an NPA one-to-one aide does not establish that Teel could not meet Student's behavioral needs. Ms. Heidermann based her recommendation for a learning handicapped classroom on Student's academic needs and behavioral supports he needed to attend the less restrictive learning handicapped classroom, not any inadequacy of the Teel program.

104. The Teel SDC offered Student a highly structured and intensive behavioral program to address his behavioral deficits. Student's position that Teel was too restrictive in August 2008, and that his needs could be met in a less restrictive environment is incongruent. Student asserted that he continued to have behavioral problems at Sierra Vista as he continued to strike out at staff and classmates. Therefore, while Student's aggressive behavior, decreased at Sierra Vista, he still required a highly

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closed at the end of SY 2008-2009, and the Teel SDC is now associated with Empire Elementary School, which now serves children in grades kindergarten through eighth.

structured program, like Teel, to continue to work on his behavioral deficits in a systematic manner so he could return to a less restrictive classroom.

#### Transportation

105. Teel is approximately 17 miles from Student's home. Student asserted that the bus trip would take approximately four to five hours round-trip. However, the bus trip would be the same time as Student's bus trip to Sierra Vista, 75 to 90 minutes one-way at the longest. Based on Student's experience while at Sierra Vista, he had the ability to remain safely on the bus. Therefore, Student did not demonstrate that the bus ride from his home to Teel and back would be too long, that he did not have the ability to ride the bus for that length of time, or did not meet his unique needs.

#### LRE

106. Although not discussed at the August 2008 IEP meeting, Mother subsequently requested, at the October 6, 2008 IEP meeting, that the District place him at its Creekside Middle School (Creekside). Student asserts that the District should have considered placing Student in a learning handicapped classroom at Creekside from the August 2008 IEP meeting through the District's July 29, 2009 offer, because Student was not as cognitively delayed as contended by the District. Mother requested that Student attend Creekside with the support of a one-to-one ABA trained aide, and behavioral support services provided by an NPA. The District opposed placing Student at Creekside because of his behavioral needs and cognitive deficits, which would mean that Student would be isolated in the learning handicapped classroom. The Creekside learning handicapped class is categorized as a mild-moderate classroom, and located within the Creekside campus.

## ACADEMIC BENEFITS

107. The parties do not dispute that the students in the Creekside learning handicapped class are academically more advanced than the students at Teel SDC. Student contends that the District underestimated his learning abilities and that he could perform the academic work at Creekside, with the assistance of a one-to-one aide. The District contends that Student is significantly below the functioning ability of the Creekside students, and that he would be working on a different educational curriculum than his classmates, and be isolated with his one-to-one aide.

108. In August 2008, Student's academic abilities were at the second-grade level based on his work performance at Sierra Vista. Students at Creekside are typically working on academic material between the third- and sixth-grade level. While academic instruction is modified to meet the student's unique needs, instruction at Creekside resembles a typical classroom, and the academics are based on general education state standards, such as pre-algebra, word math problems, world history, life and earth science and writing three-paragraph essays. The WJ-III test results and Dr. Schneider's assessment establish that Student could not perform that level of academic instruction, especially because information at Creekside is presented orally and Dr. Schneider's assessment established Student's need for visual instruction due to his verbal deficits.

109. Mother overestimated Student's academic abilities when she visited Sierra Vista, which caused Sierra Vista to place Student in an inappropriate classroom. Student could not perform the academic tasks in that classroom, which were closer to the level at Creekside than his subsequent Sierra Vista class. The academic demands imposed on Student in the first Sierra Vista class caused Student to attempt to elope to avoid the harder academic tasks and to become increasingly frustrated and aggressive. After Sierra Vista moved Student to a more appropriate classroom, he was better able to stay on-task and his level of frustration and aggression decreased.

110. If Student attended Creekside, the academic expectations would exceed his ability, leading to off-task behaviors, as Student would attempt to avoid these tasks. Student would also become increasingly frustrated with repeated attempts for him to perform the academic tasks, most likely leading to aggressive behaviors. Additionally, Student would likely be frustrated and distracted by the oral class instruction because of his verbal deficits. For Student to understand the class instruction, he would need one-to-one instruction, away from his classmates, negating any positive factors of being in a learning handicapped class.

111. Student would not obtain an educational benefit at Creekside because he could not access the academic curriculum taught to the other students, and would need to be taught, segregated from his classmates, by his one-to-one aide. At Teel, Student would be integrated into the class and have more interaction with his classmates, who are closer to his academic abilities. Therefore, Student would not obtain any significant academic benefit attending Creekside.

#### NON-ACADEMIC BENEFITS

112. The August 2008 IEP stated that Student would spend 100 percent of his school day in special education at Teel. The District asserted that Student would have access to general education students at recess and lunch as the Teel students would go to the regular education play area. However, the IEP did not discuss how the District would facilitate Student's interaction with general education students during this time.

113. If Student attended Creekside, he would be with higher functioning students who do not have behavioral problems, and have more access to general education students because the learning handicapped classroom is more integrated into the regular education campus than Teel. However, because of Student's behavioral and cognitive deficits, Student would spend his class day with his one-to-one aide, and not interacting with his peers. While Student learned social skills at the MIND Institute, his

interaction with the other participants, who had similar social skills deficits as Student, required extensive staff prompting. Student also required staff prompting to participate in group activities.

114. Dr. Storey recommended that Student not be segregated with other autistic students. In this environment, Student could not model appropriate social behavior because he would not have regular education role models. Dr. Storey's opinion was not based on any particular evidence specific to Student that he would obtain substantial non-academic benefit being in the Creekside learning handicapped class. Student did not present sufficient evidence that he could model appropriate behavior from higher functioning students without significant adult intervention.

115. The evidence established that Student would not derive substantial non-academic benefit attending Creekside because he would be isolated from his class to work with his one-to-one aide and he did not have the ability to interact with higher functioning students without significant adult assistance.

#### DISRUPTION AND COST

116. Because the learning handicapped class places higher academic demands on the students than Student's prior placements, it is likely that Student would become increasingly frustrated, especially with the verbal instruction, and based on his history become aggressive to avoid the increased demands, which would be disruptive to the class. Also, because students at Creekside do not have significant behavioral problems, the class does not have a comprehensive behavior management component. Student's improvement at Sierra Vista demonstrated his need for a comprehensive behavioral program, which allowed him to be more integrated into his class.

117. Student's proposal that he receive intensive ABA services to address his behavioral deficits at Creekside, would isolate him with his one-to-one aide, outside of the classroom so not to disturb the other students. Additionally, Student would receive

ABA services at Teel. Based on Student's previous classroom disruptions, he has not demonstrated that he would not be a disruptive influence at Creekside.

118. The District's assertion that its Creekside program was impacted and could not take any more students was not relevant to the LRE analysis because the District has an obligation to educate Student in the LRE. Further, the LRE analysis of the first three factors established that Creekside is not the LRE for Student.

119. Student's request for a learning handicapped class at Creekside, with a one-to-one aide and intensive ABA services is not the LRE because Student would not obtain substantial academic and non-academic benefit, and he would most likely disrupt the class. Teel's comprehensive program met Student's needs with the supports and services it provided. Therefore, Teel was the LRE for Student in August 2008.

#### OCTOBER 6, 2008 IEP

120. At the conclusion of the August 26, 2008 IEP meeting, Mother agreed to visit Teel, and withheld her consent to the IEP. Mother visited Teel and decided that it would not meet her son's needs. Mother asserted that the classroom was too crowded with nine students, a teacher and nine aides and that the students were too low-functioning compared to Student. On September 15, 2008, Mother informed the District in writing that she rejected the August 26, 2008 IEP because the District failed to consider the MIND Institute reports, and the goals, FAA and BIP from the April 2008 IEP did not meet Student's needs. Further, she objected to the length of the bus trip.

121. The District convened the October 6, 2008 IEP meeting to discuss Mother's concerns about Teel. Mother prepared a five-page response that detailed her objections to the District's August 2008 IEP, Ms. Simpson's FAA and BIP, and the April 2008 goals and present levels of performance. Mother also summarized the MIND Institute reports and a report from Student's neurologist. Additionally, Mother and Ms. Dimond discussed the initial findings of the psychological evaluation by Lesley J. Deprey, Ph.D.,

prepared for the VMRC, who had not finished her written report at the time of the meeting. Mother made, for the first time, her request that Student attend Creekside and that the District provide Student with ABA services and an ABA-trained one-to-one aide. At the end of the IEP meeting, Mother requested that the IEP team reconvene later to review Dr. Deprey's report.

#### Continued Offer of Teel and FAA and BIP

122. The District continued to offer Teel as Student's placement to meet Student's unique needs if Parents did not return Student to Sierra Vista as his stay put placement. Student did not present sufficient evidence that the District's continued offer of Teel was not reasonably calculated to provide meaningful educational progress in the LRE for the same reasons that the District's August 2008 IEP offer provided Student with a FAPE. Additionally, Student did not present sufficient evidence that the District needed to conduct another FAA or develop a new BIP. Finally, the fact that the District continued to offer Teel did not mean that the District did not consider information presented by Mother or predetermined its offer. Rather, the District continued the same placement offer because it provide Student with a FAPE.

#### NOVEMBER 24, 2008 IEP MEETING

123. The November 24, 2008 IEP meeting was convened to discuss Dr. Deprey's and the MIND Institute reports, and to review placement options. Mr. Hodge attended the meeting, along with Ms. Hamby, Ms. Hedin, Ms. Kelley, Ms. Lazarri, Mother, Ms. Dimond and Neil Fromm, Area Board representative.<sup>16</sup> Mother presented Dr. Deprey's

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<sup>16</sup> Area boards are a federally funded state program that, among other duties, protect and advocate the rights of persons in the area with developmental disabilities.

report and the information from the MIND Institute, and requested a new FAA. The District continued to offer Teel as the appropriate placement. At the end of the IEP meeting, the District agreed to conduct speech and language and academic screenings.

124. Student asserts that the District did not consider information Mother presented or contained in Dr. Deprey's report and that the District predetermined his placement at Teel. Additionally, Student contends that the District needed to invite a representative from an NPA program to discuss how it could provide services to Student at Creekside at this, and at all future IEP meetings.

#### Dr. Deprey's Evaluation

125. Ms. Dimond referred Student for an assessment to clarify his eligibility category to receive regional center services because a question existed regarding his eligibility under the category of autism.<sup>17</sup> Dr. Deprey reviewed prior psychological testing, including prior school district assessments and information from the MIND Institute. Dr. Deprey observed Student on September 19, 2008, administered the Autism Diagnostic Observation Schedule, Module 2 (ADOS), and interviewed Mother with the Social Communication Questionnaire (SCQ). Dr. Deprey did not administer any cognitive testing.

126. Dr. Deprey concluded that Student met the *Diagnostic and Statistical Manual, Fourth Edition*, diagnosis for autistic disorder. The SCQ revealed no information that the District did not already have from Mother regarding Student's development,

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<sup>17</sup> The Lanterman Act provides that the regional centers of the state may provide specified services to children and adults with "developmental disabilities" as defined, including autism. (Welf. & Inst. Code, § 4512.) The definition for eligibility under the Lanterman Act for autism is not the same for eligibility for special education services.



social and verbal delays and other behaviors typical for autistic children, such as self-stimulatory behavior, echolalic speech, repetitive play, obsession on particular items and pragmatic language deficits. Dr. Deprey corroborated information from Mother during her ADOS observations regarding Student displaying behaviors typical of children with autism. Although Dr. Deprey noted that a question existed regarding a possible mental retardation diagnosis, based on information in the District's 2008 psychoeducational assessment and the MIND Institute's report, she did not give an opinion whether Student might also qualify for regional center services under the category of mental retardation.

127. Dr. Deprey recommended an intensive behavioral program, 25 to 35 hours a week, social skills workgroup, developing functional skills, and speech and language and OT services. Student asserts that Dr. Deprey's report supports his contention that the District needs to provide him with an intensive ABA program. However, Dr. Deprey did not observe the District's proposed placement at Teel, or Student in any educational setting to determine whether his needs could be met in the District's proposed placement, and if the District's proposed placement provided the recommended intensive behavior program. Dr. Deprey's recommendation appears to be merely repeating the recommendations of the 2001 National Resource Council, which recommended 20 to 45 hours of intervention a week, which utilized methodologies for children with autistic-like behaviors, on a full-year basis during the early childhood years, without any analysis of Student's specific needs at home and school.<sup>18</sup>

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<sup>18</sup> *Educating Children with Autism* (Committee on Educational Interventions for Children with Autism, Division of Behavioral and Social Sciences and Education, National Research Council of the National Academy of Sciences, Washington D.C.; National Academy Press, 2001), p. 148.

128. The District reviewed Dr. Deprey's report and found that it did not provide any new information that it did not already have regarding Student's strengths and weaknesses and autistic-like behaviors. Because the report did not present any new information, the District had no reason to contact Dr. Deprey in preparation of the IEP meeting, and ask that she attend. The report does not recommend any changes to the IEP or provide information regarding whether Sierra Vista or Teel could meet Student's unique needs, especially since Dr. Deprey was not aware of Student's IEP or services they provided. Therefore, the District did consider information presented in Dr. Deprey's report, and the report does not support any changes to Student's educational program offered by the District.

#### Attendance of NPA Representative and Need for Inclusion Assessment

129. The MIND Institute and Dr. Deprey recommended that Student receive intensive behavior services. Mother requested, in her October 6, 2008 parent input letter, that the District provide Student with NPA behavioral services as part of his attendance at Creekside. Mother requested that the District invite a representative from an NPA to the IEP meeting to describe how its services could meet Student's unique needs. However, the District did not need to invite an NPA. Ms. Hedin, Ms. Kelley and Ms. Lazarri all have extensive experience working with NPAs who provide ABA services to autistic children in inclusion programs on regular education campuses and classrooms. At subsequent IEP meetings, the District had in attendance SELPA representatives who were familiar with NPAs that provide services in inclusion programs and conduct inclusion assessments. Additionally, Student did not demonstrate what information an NPA representative would present as to Student's ability to attend Creekside with behavioral services and a one-to-one aide provided by the NPA that the SELPA representatives could not present or Student's need for an inclusion assessment. Therefore, the District did not violate Student's procedural rights when it did not invite

an NPA representative to Student's IEP meetings. Additionally, the District did not have to conduct an inclusion assessment for SYs 2008-2009 and 2009-2010.

#### HOME INSTRUCTION

130. On November 10, 2008, the parties agreed that the District would provide Student with home-hospital instruction on a temporary basis through November 24, 2008, which was later extended through January 2009. Mr. Hodge selected Jayme Gray, a District resource teacher, to work with Student at his home. Mr. Gray worked with Student for four hours in November and December 2008, and for two hours in January 2009. The District ceased providing home instruction because it was the District's intent that the instruction was to be a short-term bridge until Student attended school, and not a long-term placement. Further, Student's stay put placement was still Sierra Vista, pursuant to the April 2008 IEP, until the parties agreed upon a new educational program. Student claimed that Ms. Gray's work with Student demonstrated that he could attend the Creekside learning handicapped class because he had the ability to attend to instruction longer than the District contended, and he did not demonstrate any behavior problems.

131. Ms. Gray reviewed Student's April 2008 goals and worked with Student on material that Mother provided and other material she would use if Student were in class. Mother had set up the instruction space in her home, and the only persons present were Student, Mother and Ms. Gray. Ms. Gray could work with Student for 30 to 40 minutes before Student needed a break. Ms. Gray used a token-reward system, using stickers, to reward Student for staying on-task during instruction. However, Ms. Gray needed to constantly redirect Student for him to stay on-task, as he could not work independently, even in a distraction-free environment.

132 Ms. Gray's work with Student did not establish that he was academically and behaviorally ready to attend Creekside. The Creekside class mirrors that of a typical

regular education class regarding the delivery of academic instruction. Even with a properly trained aide, Student would require constant redirection to remain on-task, especially since the learning handicapped class has more distractions and would impose greater academic demands on Student. Additionally, the level of the academic work that Ms. Gray worked on with Student was much less than the academic level at Creekside. Therefore, Ms. Gray's home instruction did not demonstrate the appropriateness of Creekside.

#### Continued Offer of Teel and FAA and BIP

133. The District continued to offer Teel as the placement to meet Student's unique needs. Student did not present sufficient evidence that the District's continued offer of Teel did not meet his needs and was not reasonably calculated to provide meaningful educational progress in the LRE. The reasons why the District's offer in August 2008 was appropriate still existed in November 2008. Information presented in Dr. Deprey's assessment did not support a change of placement to Creekside. Student's work with Ms. Gray did not support his position that he could attend Creekside. Additionally, Student did not present sufficient evidence that the District needed to conduct another FAA or develop a new BIP. Further, because Mother refused to permit Student to attend Teel, and did not return him to his stay put placement at Sierra Vista, the District could not conduct an FAA, which needs to be conducted in an educational setting to get valid data. Data collected from home and in the community was not adequate to replicate the stressors Student would experience at school. Therefore, the District was not required to conduct another FAA or develop another BIP.

#### DECEMBER 11, 2008 IEP

134. The District convened another IEP meeting to discuss the screenings by Ms. Norton and Ms. Rouppet, and revise Student's goals. Mr. Hodge attended the

meeting, along with Ms. Norton, Ms. Rouppet, and Ms. Gray. Paul Stephany and Courtney Powers, SCOE BICMs, Susan Keisser, an APE provider, Ms. Hedin, Ms. Kelley, Ms. Lazarri, Mother, Ms. Dimond and Mr. Fromm also attended the meeting. Student asserts that the District's revised goals failed to address his unique needs in the areas of reading, math, self-help, speech and language, OT, and social skills. Additionally, Student challenges the District's continued placement offer of Teel and failure to perform a new FAA to develop a new BIP.

#### MS. NORTON'S SPEECH AND LANGUAGE SCREENING

135. At the October 2008 IEP meeting, the District agreed for Ms. Norton to conduct a speech and language screening, which she did on December 9, 2008, at Creekside. As part of the screening, she reviewed her file on Student regarding the services she had provided. She did not conduct a full assessment as Mr. Hodge instructed her to conduct a screening to obtain Student's present levels of performance. The screening consisted of informal testing to determine Student's present levels. The only formal test involved picture vocabulary to determine whether Student could identify items in the picture. Ms. Norton's screening revealed that Student's language function to be below that expected of his age. Student demonstrated echolalic utterances and significant delays in his expressive language and lesser delays with his receptive language. Student's pragmatic language was poor, which limited his ability to converse with others as Student had difficulty with appropriate eye contact, maintaining a topic for conversation, turn-taking and organization of ideas. Student had difficulty repeating words, numbers and sentences, following directions and listening attentively to others.

136. Ms. Norton's screening corroborated information presented at the April 2008 IEP meeting regarding Student's present levels of performance. However, despite the fact that Student had speech and language deficits as to his expressive, receptive

and pragmatic language, and no assessment done as part of the triennial assessment, the District did not recommend a comprehensive speech and language assessment, which Student still required.

#### Academic Screening

137. At the October 2008 IEP meeting, the District agreed for Ms. Rouppet to conduct an academic screening to determine Student's present levels of performance based on his math and language arts goals from the April 2007 and April 2008 IEPs. Ms. Rouppet conducted the screening on December 9, 2009, in her office at Creekside. Ms. Rouppet needed to repeatedly redirect Student during the 70-minute testing because he was extremely distracted and he wanted to touch items in her office. Ms. Rouppet's screening revealed that Student's present levels of performance were substantially similar to those in April 2008, although there had been some regression, most likely caused by Student not being at school and being instructed by Mother.

#### Goals

138. Student's expert, Ms. Post, criticized the District's goals for repeating goals Student had already met, not having sufficient baseline information and not being measurable. The District did not repeat goals that Student had already met. The IEP included the prior goals to discuss his progress; due to a computer program error, the date on the older goals reflected the December 11, 2008 IEP meeting date. However, the goals were identifiable as older goals by the short-term objectives' dates and when the annual goal was to be met corresponded to earlier dates. New goals were also included in the IEP.

139. For math, the District increased the difficulty of the goals. The first math goal required Student, using objects, to add and subtract numbers less than 10 with 100 percent accuracy in 10 consecutive trials. The second goal was for Student to use

manipulatives to perform two-digit addition and subtraction with 90 percent accuracy in three out of four consecutive trials. The two math goals were measurable and based on accurate information regarding his performance. Student did not present sufficient evidence that the District's proposed goals were not adequate to meet his unique needs or underestimated his abilities.

140. Regarding the District's proposed behavior and social skills goals, they were the same as those proposed in the April 2008 IEP. For the reasons stated previously, the District's proposed behavior and social skills goals were sufficient to meet Student's unique needs. Although Student had made improvement at Sierra Vista, he had not met the behavior and social skills goals and their continuation was necessary for Student to remain on-task and to comply with academic demands and interact properly with his classmates.

141. For OT goals, the District only had gross motor goals related to Student's APE service. These goals had Student catch a ball and jog or walk laps, twice a month, to total one mile in a month. Student did not present evidence that these two goals did not meet Student's gross motor needs. While the District did not propose fine motor goals, Student did not present evidence that he required this goal.

142. The IEP did not include any goals to address Student's sensory integration deficits, despite information presented in the MIND Institute reports about the success of a simple sensory integration technique. The District's failure to discuss whether Student required sensory integration goals denied Student a FAPE based on information that the District possessed about how these techniques had been successful in deescalating Student. Additionally, as discussed above regarding the April 2008 IEP, the District needed to include sensory integration goals due to the severity of Student's behavior problems and past success of sensory integration techniques in deescalating Student.

143. Regarding reading and language arts, the District proposed continuation of the same goals for Student to blend sounds and master sight words, on which he had been making progress at Sierra Vista. For the reasons stated for the April 2008 IEP, the continuation of these goals was appropriate to meet Student's needs. The District proposed a new goal for Student: after orally reading a story to him, he would answer three to four 'wh' questions about the story, once a day for four out of five days observed. This goal was appropriate to work on Student's comprehension skills and receptive and expressive language deficits. The District proposed a writing goal for Student to write a simple three-to-four-word sentence, using his sight words as a prompt, with 100 percent accuracy in three out of four trials. Student did not present sufficient evidence that the District's proposed reading and language arts goals were not adequate to meet his unique needs, and the goals were measurable.

144. The District modified the sole April 2008 speech and language goal to more specifically address Student's expressive, receptive and pragmatic language deficits, and his social skill deficits. The language arts goal discussed above, that Student orally read a story and answer 'wh' questions, properly addressed receptive and expressive language deficits. Student would work on understanding questions, and then be able to answer questions. The reading goal for Student to read a word and then to say the word by properly blending sounds addressed Student's expressive language deficits.

145. To address Student's pragmatic deficits, the District proposed two goals. The first goal had Student work on learning conversation strategies and topic maintenance during class, or during speech and language therapy, in three out of four opportunities with 90 percent accuracy. The second goal addressed turn-taking and topic elaboration during a conversation in class, or therapy, in three out of four opportunities with 90 percent accuracy. Both of these goals addressed social skills



deficits. Although the District had not conducted a speech and language assessment, the goals addressed the pragmatic language deficits noted in Ms. Norton's screening, the MIND Institute report, and Dr. Deprey's evaluation. Further, Student did not present any evidence that the District's proposed goals were not adequate to address his expressive, receptive and pragmatic language deficits.

#### Continued Offer of Teel and Need for New FAA and BIP

146. The District continued to offer Teel as the appropriate placement to meet Student's unique needs. Sufficient evidence was presented that the District's continued offer of Teel was reasonably calculated to provide Student with meaningful educational progress in the LRE for the same reasons the District's offer in August 2008 was sufficient to meet his unique needs. The District's failure to change its prior offer of Teel did not establish that it predetermined its offer, or did not consider information presented by Parents because the District's offer provided Student with a FAPE. The information in Ms. Norton's and Ms. Rouppet's screenings showed that Student was significantly behind the students at Creekside in his academic skills and ability to participate in the classroom's oral instruction. Because the District's offer provided Student with a FAPE, the District did not have to provide continued home instruction. Additionally, Student did not present sufficient evidence that the District needed to conduct another FAA or develop a new BIP until Student returned to school.

#### MR. STEPHANY'S TRANSITION PLAN

147. The District agreed at the December 2008 IEP meeting to create a transition plan for Student's return to school that would address the behavioral supports, staff training, and strategies for Student to transition from home back to school. For the transition plan, Mr. Stephany reviewed the MIND Institute reports and Ms. Simpson's FAA. Mr. Stephany went to Student's home for 60 to 90 minutes to speak

with Mother and observed Student. Mr. Stephany did not collect data and did not do hands-on work with Student. Ms. Stephany presented his transition plan at the January 21, 2009 IEP meeting. Student asserted that Ms. Stephany needed to conduct a full FAA to meet Student's needs to return to school.

148. Mr. Stephany did not conduct a formal FAA because Student was not attending school and the goal of an FAA is to examine the causes of a target behavior and then to develop strategies to reduce or replace the target behavior in the environment where the problem occurred. Mr. Stephany recommended conducting an FAA after Student began attending school. Although Mr. Stephany could have created situations in which he placed demands on Student to simulate an academic placement, the data collected would not accurately reflect Student's behavior at school because of his increased comfort level at home and not having the distraction of other students. Additionally, Mr. Stephany had sufficient information regarding Student's behavior from the MIND Institute and Ms. Simpson's FAA. Therefore, Mr. Stephany was correct in not conducting an FAA.

149. Mr. Stephany created a detailed transition plan for Student to return to school that addressed issues of Student riding a bus, classroom strategies, and staff training. Dr. Storey complimented Mr. Stephany's transition for including positive strategies, such as staff training and appropriate reinforcers. Dr. Storey's critique centered on that the transition plan should be based on an understanding of where Student would be placed to develop strategies for that learning environment. However, because Mother and the District could not agree on a placement, Mr. Stephany could not specify the learning environment that Student would attend. As a result, Mr. Stephany developed the transition plan to be used in any classroom while a new FAA was conducted.

150. Mr. Stephany properly developed the transition plan based on the relevant information available regarding Student's behavioral and communication deficits and academic needs. The transition plan was sufficient to address Student's unique needs so he could successfully move from his home to a new learning environment while a new FAA was conducted.

#### MARCH 13, 2009 IEP

151. Mother attended the IEP meeting with her advocate and continued to repeat her demand that Student attend Creekside with behavioral supports provided by a NPA. The District presented the revised goals and the IEP team members discussed the goals and, with the exception of the physical education goal, Mother would only agree to particular goal concepts, but not to the actual goals. After discussing placement options, the District again offered Teel with the services and supports offered in the August 2008 IEP meeting.

#### Alleged Failure to Consider Relevant Information

152. Student again asserts that the District came into this meeting predetermined to offer Teel, and ignoring all the information presented by Mother that supported Student's placement at Creekside. At the IEP meeting, District discussed various placement options, including Creekside, and considered all relevant information. Additionally, the District discussed various placement options with representatives of SCOE and the SELPA between IEP meetings to get Student back to school. The fact that the District continued to work with Mother shows that it had an open mind and considered Mother's input.

153. In contrast, Mother refused to consider information presented by the District, SCOE or SELPA that conflicted with her own opinion that Student needed to attend Creekside. The District permitted Mother to visit various placement options,

including Creekside. However, Mother refused to acknowledge that the classroom instruction at Creekside resembled more of a traditional regular education class, with oral instruction, that Student did not have the ability to attend without constant redirection, and that he required instruction to be visually presented to him due to his receptive language deficits. Additionally, Mother ignored the fact that Student would spend nearly the whole school day at Creekside by himself, being taught by the one-to-one aide, and not integrated into class.

154. The evidence established that the District did not predetermine its continued offer of Teel because it considered the information presented by Mother, researched various options and determined that, based on the information it had at the time, that Teel would allow Student to make meaningful educational progress in the LRE. The fact that the District continued to disagree with Mother's request placement at Creekside does not mean that the District predetermined its placement offer.

#### Continued Offer of Teel and Request for FAA and BIP

155. The District continued to offer Teel as Student's placement to meet Student's unique needs. Student did not present sufficient evidence that the District's continued offer of Teel, including transportation, was not reasonably calculated to provide him with meaningful educational progress in the LRE as stated previously, and as further supported by subsequently obtained information, such as Ms. Norton's and Ms. Rouppet's screenings. All relevant evidence demonstrated that Student was significantly behind the students at Creekside as to his ability to participate in the classroom's oral instruction and academic levels. Additionally, Student did not present sufficient evidence that the District needed to conduct another FAA or develop a new BIP until Student returned to school because Mr. Stephany's transition plan, along with Ms. Simpson's BIP, were sufficient to meet Student's behavioral needs until the District could conduct another FAA.

#### APRIL 2009 WOODCOCK JOHNSON

156. At the March 13, 2009 IEP meeting, the District agreed to perform additional academic testing to evaluate Student's present levels of performance. Ms. Rouppet administered the WJ-III on April 24, 2009, in her office at Creekside. Because Student's ability to attend had improved in the year since she last administered the WJ-III, Ms. Rouppet had Student complete more of the subtests. Even with Student's ability to better attend, Student still needed repeated redirection to stay on-task. The results of the WJ-III showed some, but not significant, academic improvement. Student's academic skills were still in the kindergarten to first-grade level, except for letter identification, which was at the second-grade level. The results of the WJ-III did not establish that Student was as close to the academic levels of the students in the learning handicapped classroom at Creekside, and that the placement there would be appropriate for Student.

#### APRIL 29, 2009 IEP MEETING

157. The purpose of the April 29, 2009 IEP meeting was to discuss further the District's proposed goals, the results of the recent academic testing, services and placement. The District's attorney, Mr. Sturges, attended the IEP meeting over the objection of Mother, who attended with her advocate. Student contends that Mr. Sturges's presence violated his Mother's procedural rights, and that the District continued to predetermine its placement offer. Additionally, Student asserts that the District's proposed goals and lack of a new FAA and BIP failed to meet his unique needs, and that the proposed placement at Teel was not reasonably calculated to provide Student with meaningful educational progress in the LRE.

#### Attendance of Mr. Sturges

158. The District informed Mother of Mr. Sturges's attendance before the IEP meeting, and Mother informed the District that she did not want him to attend because

her attorney was not available. Mr. Sturges attended because Student had filed a previous complaint, which was still pending at this time. At the outset of the IEP meeting, Mother raised again her objection to Mr. Sturges's attendance because Mother's attorney was not available. The District offered to reschedule the IEP until Mother's attorney was available. Mother rejected that suggestion because she did not want to delay the IEP because of the difficulty in gathering the IEP participants. Mr. Sturges informed Mother that his role would be to observe the IEP meeting, and a transcript of the IEP confirms that Mr. Sturges had minimal participation in the IEP meeting. The transcript shows that Mother actively participated at the IEP meeting and was not intimidated by Mr. Sturges's presence, as she was a forceful advocate for Student. Therefore, Mr. Sturges's presence at the IEP meeting did not violate Mother's procedural rights, as she was able to actively participate in the IEP meeting.

#### Predetermination

159. The District's continued offer of Teel, despite Mother's repeated insistence that she would not agree to Teel, does not show that the District predetermined its placement offer nor did not consider information presented by Mother and private assessors. The District considered the information presented by Mother why Creekside, not Teel, was Student's appropriate placement. The fact that the District properly rejected Mother's placement request did not mean that the District predetermined Student's placement. Additionally, the District provided Mother with the opportunity to visit other possible placements. However, Mother's requests were not in good faith because she had a predetermined position that only Creekside, with ABA from an NPA, could meet her son's unique needs.

## Goals

160. Student asserted that the District continued not to offer appropriate reading, math, self-help, pragmatic, expressive and receptive language, fine motor, sensory integration, and social skill goals. At the previous request of Mother and her advocate, the District added even more specificity to the proposed goals, and added additional academic goals from the December 2008 IEP. However, the District still did not to offer Student any sensory integration OT goals.

161. The District's behavior goals continued to be measurable and adequate to address Student's unique needs. The District decreased the time that Student needed to remain on-task from seven to four minutes to more accurately reflect his ability, and added that he would remain on-task with verbal and physical redirection. The other behavior goal added using verbal redirection strategies to have Student comply with reasonable academic demands. Student did not show why these behavior goals were not adequate to meet his behavior needs, or that he required additional supports and services.

162. Of the two math goals, the goal for Student to use objects to add and subtract numbers up to 10 remained the same. The District modified the other math goal so Student no longer used manipulatives and would now do 10 addition and subtraction problems up to the number 20, and write his answer with 90 percent accuracy in one out of two trials. Student did not establish that the math goals were not sufficiently measurable, based on inaccurate present levels of performance or not adequate to meet his unique needs.

163. Regarding Student's reading and language arts goals, the District increased the difficulty of the sound blending goal for Student to now sound out correctly 100 percent of the sight words. The goals for Student to answer 'wh' questions and to write three to four word sentences remained the same. The District modified the

sight word goal to specify that Student would work on second-grade words. The District added a goal for Student's reading comprehension for him to read an age-appropriate picture book and then to answer questions about a character's thoughts and feelings. This goal also addressed a behavior concern that Student had difficulty understanding the emotions of others. Student did not establish that the reading and language arts goals were not measurable, based on inaccurate present levels of performance, or inadequate to meet his unique needs.

164. Regarding Student's speech and language goals, the District modified the goals for conversation and pragmatic language skills to include teacher data collection. As stated above regarding the proposed December 2008 speech and language goals, Student did not present any evidence that the District's proposed goals were not adequate to address his expressive, receptive and pragmatic language and social skills deficits.

165. For OT goals, the District only had gross motor goals related to Student's APE services first discussed in December 2008, which were adequate to meet Student's gross motor needs, as discussed above. Further, Student did not demonstrate a need for a fine motor OT goal.

166. At the March 13, 2009 IEP meeting, Gina Ceja, SELPA OT provider, discussed that sensory diets, among other OT services, could be used to assist a student to achieve his or her educational goals. The April 2009 IEP did not contain any goals to address Student's sensory integration deficits, and despite Mother's previous request for OT goals to address Student's sensory processing deficits, the District did not explain why Student's IEP did not contain any such goals. Therefore, the District denied Student a FAPE by failing to discuss further whether Student required sensory integration goals, because of Mother's previous requests and information in the possession of the District that Student might require sensory integration goals.



## Continued Offer of Teel, Transportation, Behavior Supports and FAA and BIP

167. For the reasons stated previously, the District's continued offer at the April 2009 IEP meeting of Teel was reasonably calculated to provide Student with meaningful educational progress in the LRE. Student did not present sufficient evidence of any new information since the prior IEP meetings that would establish that Teel was not an appropriate placement, or that the District needed to provide Student with additional services or supports to meet his unique needs.

168. Also at the April 2009 IEP meeting, the IEP team members discussed transportation options for Student. The District raised the possibility of providing Student dedicated transportation service to Teel with him as the only passenger. However, the District did not include this dedicated transportation in the IEP, which was not required to provide Student with a FAPE.

169. Additionally, regarding Mother's repeated request for an FAA, the District was correct in either not performing its own FAA, or providing for an IEE, until Student was attending school. Student did not establish that a reliable FAA could be conducted by collecting data of Student at his home and in the community.

### JULY 29, 2009 DISTRICT OFFER

170. On July 29, 2009, Mr. Hodge sent Parents a letter that detailed the District's offer of services and placement. The only change from the District's April 2009 IEP offer was transportation; the District offered to provide Student with dedicated transportation to and from his home. Mother asserted that neither she nor her husband received a copy of the letter. However, the evidence established that Parents did receive the letter because Student's complaint includes allegations that the District's July 29, 2009 offer denied Student a FAPE. If Parents never received a copy of the letter, there would not be a contention challenging the July 29, 2009 offer in Student's complaint.

Therefore, the District's July 29, 2009 offer, except for the failure to provide sufficient OT goals to address Student's sensory integration deficits, provided Student with a FAPE.

## LEGAL CONCLUSIONS

1. Student has the burden of proof in this matter as to its complaint, and the District has the burden of proof in this matter as to its complaint. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].)

### ELEMENTS OF A FAPE

2. Under the IDEA and state law, children with disabilities have the right to a FAPE. (20 U.S.C. § 1400(d); Ed. Code, § 56000.) A FAPE means special education and related services that are available to the child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(a)(9).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(a)(29).)

3. In *Board of Educ. v. Rowley* (1982) 458 U.S. 176 [73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that the IDEA does not require school districts to provide special education students the best education available, or to provide instruction or services that maximize a student's abilities. (*Rowley, supra*, at p. 198.) School districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instruction and related services individually designed to provide educational benefit to the student. (*Id.* at p. 201; *J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950-953.) The Ninth Circuit has also referred to the educational benefit standard as "meaningful educational benefit." (*N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2007) 541 F.3d 1202, 1212-1213; *Adams v. State of Oregon* (9th Cir. 1999) 195 F.2d 1141, 1149. (*Adams*).)

4. There are two parts to the legal analysis of a school district's compliance with the IDEA. First, the tribunal must determine whether the district has complied with the procedures set forth in the IDEA. (*Rowley, supra*, at pp. 206-207.) Second, the tribunal must decide whether the IEP developed through those procedures was designed to meet the child's unique needs, and was reasonably calculated to enable the child to receive educational benefit. (*Ibid.*) An IEP is not judged in hindsight; its reasonableness is evaluated in light of the information available at the time it was implemented. (*JG v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801; *Adams, supra*, 195 F.3d 1141, 1149.)

5. In *Rowley*, the Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA. (*Rowley, supra*, at pp. 205-06.) However, a procedural error does not automatically require a finding that a FAPE was denied. Since July 1, 2005, the IDEA has codified the pre-existing rule that a procedural violation results in a denial of a FAPE only if it impedes the child's right to a FAPE, significantly impedes the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the child, or causes a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see, *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

#### BEHAVIOR NEEDS

6. In the case of a child whose behavior impedes his or her learning or that of others, the IEP team must consider, when appropriate, "strategies, including positive behavioral interventions, strategies, and supports to address that behavior." (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324 (2006); Ed. Code, § 56341.1, subd. (b)(1).) As noted by the comments to the 2006 federal implementing regulations, "[D]ecisions [as to the interventions, supports, and strategies to be implemented] should be made on an individual basis by the child's IEP team." (64 Fed.Reg. 12620 (2006).) California law

defines behavioral interventions as the “systematic implementation of procedures that result in lasting positive changes in the individual’s behavior,” including the “design, implementation, and evaluation of individual or group instructional and environmental modifications . . . designed to provide the individual with greater access to a variety of community settings, social contacts and public events; and ensure the individual’s right to placement in the least restrictive environment as outlined in the individual’s IEP.” (Cal. Code Regs., tit. 5, § 3001, subd. (d).) An IEP that does not appropriately address behavior that impedes a child’s learning denies a student a FAPE. (*Neosho R-V School Dist. v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028-1029.)

7. In 1990, California passed Education Code section 56520, et seq., which is commonly known as the Hughes Bill, concerning behavioral interventions for pupils with serious behavior problems. Regulations implementing the Hughes Bill require that an LEA conduct an FAA, resulting in a BIP, when a student develops a “serious behavior problem,” and the IEP team finds that the instructional/behavioral approaches specified in the student’s IEP have been ineffective. (Cal. Code Regs., tit. 5, §§ 3001, subd. (f), 3052, subd. (b).) A serious behavior problem means the individual’s behaviors are self-injurious, assaultive, or the cause of serious property damage and other severe behavior problems that are pervasive and maladaptive for which instructional/behavioral approaches specified in the pupil’s IEP are found to be ineffective. (Cal. Code Regs., tit. 5, § 3001, subd. (aa).)

8. A BIP is “a written document which is developed when the individual exhibits a serious behavior problem that significantly interferes with the implementation of the goals and objectives of the individual’s IEP.” (Cal. Code Regs., tit. 5, §§ 3052, subd. (a)(3), 3001, subd. (h).) A BIP shall be based upon an FAA. (Cal. Code Regs., tit. 5, § 3052, subd. (a)(3).) Before the BIP can be written, an FAA must be conducted. (Cal. Code Regs., tit. 5, § 3052, subd. (b)(1).) An FAA must include a systematic observation of the

occurrence of the targeted behavior for an accurate definition and description of its frequency, duration, and intensity. (Cal. Code Regs., tit. 5, § 3052, subd. (b)(1)(A).) It must also include systematic observation of the immediate antecedent events associated with each instance of the display of the targeted inappropriate behavior. (Cal. Code Regs., tit. 5, § 3052, subd. (b)(1)(B).) An FAA must include systematic observation and analysis of the consequences following the display of the behavior to determine the function the behavior serves for the student. The communicative intent of the behavior is identified in terms of what the student is either requesting or protesting through the display of the behavior. (Cal. Code Regs., tit. 5, § 3052, subd. (b)(1)(C).)

9. An FAA must include ecological analysis of the settings in which the behavior occurs most frequently. Factors to consider should include the physical setting, the social setting, the activities and the nature of instruction, scheduling, the quality of communication between the student and staff and other students, the degree of independence, the degree of participation, the amount and quality of social interaction, the degree of choice, and the variety of activities. (Cal. Code Regs., tit. 5, § 3052, subd. (b)(1)(D).) An FAA must include a review of records for health and medical factors that may influence behaviors. (Cal. Code Regs., tit. 5, § 3052, subd. (b)(1)(E).) An FAA must include a review of the history of the behavior to include the effectiveness of previously used behavioral interventions. (Cal. Code Regs., tit. 5, § 3052, subd. (b)(1)(F).)

10. Following an FAA, a written report of the assessment shall be prepared, and shall include all of the following: (1) a description of the nature and severity of the targeted behavior(s) in objective and measurable terms (Cal. Code Regs., tit. 5, § 3052, subd. (b)(2)(A).); (2) a description of the targeted behavior(s) that include baseline data and an analysis of the antecedents and consequences that maintain the targeted behavior, and a functional analysis of the behavior across all appropriate settings in which it occurs (Cal. Code Regs., tit. 5, § 3052, subd. (b)(2)(B).); (3) a description of the

rate of alternative behaviors, their antecedents and consequences (Cal. Code Regs., tit. 5, § 3052, subd. (b)(2)(C)); and, (4) recommendations for consideration by the IEP team which may include a proposed behavioral intervention plan. (Cal. Code Regs., tit. 5, § 3052, subd. (b)(2)(D).)

11. Under California regulations, the following criteria apply to BIPs: 1) They must be developed by the IEP team, which must include the behavior intervention case manager; 2) They must be implemented by, or under the supervision of, staff with documented training in behavioral analysis and shall only be used to replace maladaptive behaviors with alternative, acceptable behavior; 3) They must be based on an FAA, be in the IEP and used in a systematic manner; 4) Emergency interventions shall not be a substitute for a BIP; 5) Behavioral interventions cannot cause pain or trauma; and 6) To the extent possible, the BIP must be developed and implemented in a consistent manner appropriate to each of the individual's life settings. (Cal. Code Regs., tit. 5, § 3052, subd. (a).)

12. The BIP must contain a statement of the frequency of consultation between the behavior intervention case manager and the parents and staff responsible for implementing the plan. In addition, the BIP must contain: 1) a summary of relevant and determinative information gathered from an FAA; 2) an objective and measurable description of the targeted maladaptive behavior(s) and replacement positive behavior(s); 3) the individual's goals and objectives specific to the behavioral intervention plan; 4) a detailed description of the behavioral interventions to be used and the circumstances for their use; 5) specific schedules for recording the frequency of the use of the interventions and the frequency of the targeted and replacement behaviors, including specific criteria for discontinuing the use of the intervention for lack of effectiveness, or replacing it with an identified and specified alternative; 6) criteria by which the procedure will be faded or phased-out, or less intense/frequent restrictive

behavioral intervention schedules or techniques will be used; 7) those behavioral interventions which will be used in the home, residential facility, work site or other non-educational settings; and 8) specific dates for periodic review by the IEP team of the efficacy of the program. (*Ibid.*) The California Legislature intended that if behavior interventions were used for a special education student, that the behavioral interventions "ensure a pupil's right to placement in the least restrictive environment." (Ed. Code, § 56520, subd. (b)(1); Cal. Code Regs., tit. 5, § 3001, subd. (d).)

13. A "behavioral emergency" is the demonstration of a serious behavior problem, that has not been seen before and for which a BIP has not been developed, or for which a prior BIP is not effective. (Cal. Code Regs., tit. 5, § 3001, subd. (c).) To prevent emergency interventions from being used in lieu of planned, systematic behavioral interventions, the parent shall be notified within one school day whenever an emergency intervention is used or serious property damage occurs. (Cal. Code Regs., tit. 5, § 3052, subd. (i)(5).) After a "behavioral emergency," a "Behavioral Emergency Report" must be completed that includes: 1) the name of the student; 2) the setting and location of the incident; 3) the name of the staff or other persons involved; 4) a description of the incident and the emergency intervention used, and whether the individual is currently engaged in any systematic behavioral intervention plan; and 5) details of any injuries sustained by anyone as a result of the incident. (*Ibid.*)

STUDENT'S ISSUE 1(A): DURING SY 2007-2008, AFTER NOVEMBER 2, 2007, DID THE DISTRICT DENY STUDENT A FAPE BECAUSE THE BSP OF NOVEMBER 16, 2007, DID NOT ADDRESS STUDENT'S BEHAVIORAL DEFICITS?

14. Pursuant to Factual Findings 7 through 17 and Legal Conclusions 6, 7 and 8, the District was not on notice, as of the November 16, 2007 IEP meeting, that it needed to conduct an FAA because Student had not experienced sufficient serious behavior problems. The only severe incident was the incident on August 7, 2007. After

that incident, in which Student hit Ms. Brionnes, Ms. Brionnes was able to easily manage Student's behavior and easily redirect him if he attempted to hit staff or other Students. Ms. Brionnes properly drafted the BSP based on Student's behavioral problems, which were not serious, using the strategies that had been effective in her class. Student's behavior problems began to escalate after school resumed on November 27, 2007, but the District did not need to physically restrain Student until December 17, 2007. Therefore, the District did not deny Student a FAPE because it did not have to conduct an FAA and develop a BIP because Student was not exhibiting serious behavioral problems, and the BSP Ms. Brionnes drafted was adequate to address Student's behavioral problems as of November 16, 2007.

STUDENT'S ISSUE 1(B): DURING SY 2007-2008, AFTER NOVEMBER 2, 2007, DID THE DISTRICT DENY STUDENT A FAPE BECAUSE THE DISTRICT FAILED TO TIMELY CONDUCT AN FAA AND DEVELOP A BIP FROM NOVEMBER 16, 2007, THROUGH APRIL 4, 2008, WHICH WERE REQUIRED TO ADDRESS STUDENT'S INCREASED NON-COMPLIANCE, ELOPEMENT AND AGGRESSION, WHICH IMPEDED HIS LEARNING?

STUDENT'S ISSUE 1(C): DURING SY 2007-2008, AFTER NOVEMBER 2, 2007, DID THE DISTRICT DENY STUDENT A FAPE BECAUSE THE DISTRICT DID NOT COMPLY WITH THE HUGHES BILL REQUIREMENTS BECAUSE IT USED INAPPROPRIATE PHYSICAL RESTRAINTS AND AVERSIVE INTERVENTIONS ON STUDENT, DID NOT PREPARE BERS, DID NOT NOTIFY PARENTS OF EMERGENCY INTERVENTIONS, AND DID NOT CONVENE IEP MEETINGS TO DISCUSS THE EMERGENCY INTERVENTIONS, EVEN THOUGH STUDENT HAD "SERIOUS BEHAVIOR PROBLEMS"?

15. Pursuant to Factual Findings 7 through 12, 17 and 20 through 25 and Legal Conclusions 6 through 13, the District was on notice in January 2008 that it needed to conduct an FAA because of Student's increasing behavior outbursts, which caused the District to physically restrain him nearly every day until his Parents removed him from Ms. Brionnes's SDC. Even though the District physically restrained Student on December 17, 2007, it did not provide Parents with a BER or hold an emergency IEP



meeting to discuss the incident and decide whether the District needed to conduct an FAA. The December 17, 2007 incident did not require the District to conduct an FAA, as this incident appeared to be an aberration. It was the first incident after school resumed on November 27, 2007, in which the District needed to restrain Student. However, the District further failed to provide Parents with a BER or hold an IEP meeting after the January 2008 physical restraints. These incidents, after school resumed from the winter break on January 7, 2008, put the District on notice that it needed to conduct an FAA, which the District offered on January 10, 2008. Therefore, the District timely offered to conduct an FAA to develop a BIP.

16. The District's position that, because Student had a BSP, the District did not have to complete a BER or hold an emergency IEP meeting is in error. The applicable regulation, California Code of Regulations, title 5, section 3052, subd. (i), requires the District to complete the BER and give Parents a copy, regardless of whether Student has either a BSP or a BIP. Additionally, the regulation only excuses the holding of an emergency IEP meeting for a student who has a BIP, as the language of the regulation requires the holding of an IEP meeting for a student who does not have a BIP. Regarding the December 17, 2007, and January 2008 incidents, the District needed to complete the BER regardless of whether Student had either a BSP or a BIP, and needed to hold an emergency IEP meeting because Student did not have a BIP. Therefore, the District denied Parents a meaningful opportunity to participate in Student's educational decision-making process, especially due to Mother's concerns about Student's increased aggressive behaviors and her desire for the District to address this issue.

STUDENT'S ISSUE 3(E): DID THE APRIL 4, 2008 IEP DENY STUDENT A FAPE  
BECAUSE THE DISTRICT FAILED TO OFFER APPROPRIATE BEHAVIOR SUPPORTS AND

## SERVICES, INCLUDING NOT PROVIDING STUDENT WITH AN APPROPRIATE FAA AND BIP?

17. Pursuant to Factual Findings 27 through 37 and Legal Conclusions 8 through 12, Ms. Simpson's FAA complied substantially with the Hughes Bill requirements and adequately identified Student's behavioral problems, and the causes and frequency of the behaviors. The defects in Ms. Simpson's FAA, as pointed out by Dr. Storey, were as to form and not substance because Student did not establish that Ms. Simpson's FAA did not accurately reflect reasons for his behavioral problems, and their frequency. The FAA relied on positive behavioral interventions designed to phase out Student's problem behaviors or to replace them with appropriate conduct. Dr. Storey's criticism of Ms. Simpson's BIP focused on philosophical differences, and not whether the BIP failed to properly address Student's four targeted behaviors. Regarding the use of physical restraints, Dr. Storey did not understand that they were to be used as a last resort and did not offer any alternatives for the District if Student's aggressive behavior escalated and he represented an immediate threat to the health and safety of himself, staff or classmates. Therefore, the District's FAA accurately assessed Student's behavioral deficits and the BIP appropriately addressed Student's targeted behaviors with adequate positive behavior interventions.

18. Additionally, pursuant to Factual Findings 75 and 83 and Legal Conclusions 2 through 6, Sierra Vista had a comprehensive behavior program that could meet Student's unique needs. The Sierra Vista program is designed for autistic students with behavior problems. Sierra Vista had highly trained staff in ABA methodology, with small classes, and behaviorists on duty to provide needed assistance. Sierra Vista also provides social skills training and group therapy. Therefore, Student did not establish that the District's IEP offer of Sierra Vista failed to provide him with appropriate behavior supports and services.

STUDENT'S ISSUE 5(B): DID THE AUGUST 26, 2008 IEP DENY STUDENT A FAPE BECAUSE THE DISTRICT FAILED TO OFFER APPROPRIATE BEHAVIOR SUPPORTS AND SERVICES, INCLUDING NOT PROVIDING STUDENT WITH AN APPROPRIATE FAA AND BIP?

STUDENT'S ISSUE 6(C): DID THE OCTOBER 6, 2008 IEP DENY STUDENT A FAPE BECAUSE THE DISTRICT FAILED TO OFFER APPROPRIATE BEHAVIOR SUPPORTS AND SERVICES, INCLUDING NOT PROVIDING STUDENT WITH AN APPROPRIATE FAA AND BIP?

STUDENT'S ISSUE 7(B): DID THE NOVEMBER 24, 2008 AND DECEMBER 11, 2008 IEPs DENY STUDENT A FAPE BECAUSE THE DISTRICT FAILED TO OFFER APPROPRIATE BEHAVIOR SUPPORTS AND SERVICES, INCLUDING NOT PROVIDING STUDENT WITH AN APPROPRIATE FAA AND BIP?

STUDENT'S ISSUE 10(B): DID THE MARCH 13, 2009 IEP DENY STUDENT A FAPE BECAUSE THE DISTRICT FAILED TO OFFER APPROPRIATE BEHAVIOR SUPPORTS AND SERVICES, INCLUDING NOT PROVIDING STUDENT WITH AN APPROPRIATE FAA AND BIP?

STUDENT'S ISSUE 11(E): DID THE APRIL 29, 2009 IEP, AS MODIFIED ON JULY 29, 2009, DENY STUDENT A FAPE BECAUSE THE DISTRICT FAILED TO OFFER APPROPRIATE BEHAVIOR SUPPORTS AND SERVICES, INCLUDING NOT PROVIDING STUDENT WITH AN APPROPRIATE FAA AND BIP?

19. Student contends that each District IEP offer made after the April 4, 2008 IEP failed to offer Student appropriate behavioral supports and services. Regarding the August 26, 2008 IEP, the District offered Student appropriate behavioral supports and services at Sierra Vista. (Factual Findings 100 through 119 and Legal Conclusions 17 and 18.) The District BIP and Sierra Vista's intensive behavioral management program were successful in reducing Student's aggressive behavior, elopement, vocal outbursts and non-compliance. The District wished to continue this successful program, but Parents refused to consider Sierra Vista based on their mistaken belief that Sierra Vista

constantly needed to physically restrain Student and kept him isolated from his classmates. The District offered Teel because Parents refused to return Student to Sierra Vista, not because Sierra Vista was inappropriate to meet Student's unique needs. The District's offer of Teel provided Student with appropriate behavior supports and services because Teel used ABA and other behavior management strategies designed for autistic students with significant behavior problems, like those of Student. Student did not establish that Teel, along with the District's BIP, could not appropriately address Student's behavioral needs. Therefore, the District's August 26, 2008 IEP provided Student with appropriate behavior supports and services.

20. Regarding the other IEPs, pursuant to Factual Findings 122, 130, 147 through 150, 167 and 168 and Legal Conclusions 17 and 19, the District offered Student appropriate behavioral supports and services as the District's continued offer of Teel and its comprehensive behavior program was adequate to meet Student's unique needs. Student did not establish that Teel could not meet Student's behavioral needs or that he required an NPA to provide behavior services to meet his unique behavioral needs. The SDC had ABA-trained staff, a comprehensive behavior management strategy, a small class size, behavior specialists on staff and a program focused on improving students' behavior so they could leave Teel and return to a less restrictive program. Student did not establish any new facts that existed after the August 26, 2008 IEP that proved that the District did not offer appropriate behavior supports and services to meet Student's unique needs.

21. Student asserted, for each IEP conducted after the April 4, 2008 IEP meeting, that the District needed to conduct a new FAA and develop a new BIP. Pursuant to Factual Findings 122, 130, 147 through 150, 167 and 170 and Legal Conclusion 17, the District's April 4, 2008 FAA and BIP were sufficient to meet Student's unique behavior needs. Student is correct that the District needed to update the FAA

when Student moved to a new placement because the causes of Student's maladaptive behaviors might be different in a different school. However, Parents repeatedly refused the District's request that Student attend Sierra Vista, as Student's stay put placement, or Teel, so the District could conduct an FAA and develop a new BIP. Mr. Stephany was convincing, based on his education, training and experience that it would not be appropriate to conduct an FAA until Student returned to school because any information gathered at Student's home or in the community would not accurately reflect Student's behavior at school because of the additional demands placed on him and the distracting environment with other students. Mr. Stephany's transition plan was sufficient to meet Student's behavior needs at a new school placement until the District had the opportunity to perform a new FAA and develop a BIP. Therefore, the District was not required to perform a new FAA and develop a new BIP until Student returned to school.

#### ASSESS IN ALL AREAS OF SUSPECTED DISABILITY

22. The student must be assessed in all areas related to his or her suspected disability, and no single procedure may be used as the sole criterion for determining whether the student has a disability or determining an appropriate educational program for the student. (Ed. Code, § 56320, subds. (e), (f); 20 U.S.C. § 1414(b)(2); 34 C.F.R. § 300.304(b)(2), (c)(4)(2006).)

23. The threshold for suspecting that a child has a disability is relatively low. (*Dept. of Educ. v. Cari Rae S.* (D. Hawaii 2001) 158 F.Supp.2d. 1190, 1195. (*Cari Rae S.*)) A LEA's appropriate inquiry is whether the child should be referred for an evaluation, not whether the child actually qualifies for services. (*Ibid.*)

STUDENT'S ISSUE 2: DID THE DISTRICT DENY STUDENT A FAPE DURING SY 2007-2008, SY 2008-2009 AND SY 2009-2010 BY FAILING TO CONDUCT TIMELY OT, PRAGMATIC LANGUAGE, AND INCLUSION ASSESSMENTS?

24. Pursuant to Factual Findings 39, 40 and 41 and Legal Conclusions 22 and 23, the District needed to conduct an OT assessment. As of the April 4, 2008 triennial IEP meeting, the District had knowledge of Student's sensory integration deficits, and sensory techniques had been effective in the past in deescalating Student. Additionally, the District had been providing OT services to address, in part, Student's sensory integration issues. However, the District did not adequately explain why it did not conduct an OT assessment despite its previous provision of OT services and offer of services at the April 4, 2008 IEP meeting, especially since Student's OT provider, Mr. Stevenson, did not attend this IEP meeting. Information in the MIND Institute report corroborated the effectiveness of sensory integration techniques to deescalate Student and raised the issue that this was an area of suspected disability. The District did not put forth reasons why it did not conduct an OT assessment to examine Student's sensory integration deficits, even after Mother repeatedly requested goals in this area. Therefore, the District should have conducted an OT assessment as to Student's sensory integration deficits.

25. Pursuant to Factual Findings 42, 43, 44, 136 and 137 and Legal Conclusions 22 and 23, the District needed to conduct a pragmatic language assessment. Regarding Student's speech and language, the District agreed as part of the 2008 triennial assessment to conduct a speech and language assessment, but did not. The District asserted that Student was not available to be assessed. However, Ms. Norton never asked Parents to make Student available, which they had done for other assessments.

26. Following the April 2008 IEP meeting, the District had knowledge of Student's pragmatic language deficits from Ms. Simpson's FAA and the MIND Institute reports that stated that Student's inability to communicate with others caused in part his

maladaptive behaviors. Ms. Norton's December 2008 speech and language screening confirmed that Student had pragmatic language deficits and that the District needed to modify its existing goals to address Student's pragmatic language deficits. However, the District did not offer a viable explanation why it did not follow up with a speech and language assessment. Therefore, Student established that pragmatic language was an area of suspected disability based on his deficits, as noted in Ms. Simpson's FAA, the MIND Institute report and Ms. Norton's screening, and that the District needed to perform a speech and language assessment.

27. Pursuant to Factual Finding 45 and Legal Conclusions 22 and 23, the District did not have to conduct an inclusion assessment. Student did not establish the area of disability that would have required the District to conduct such an assessment, especially because the LRE for Student was Sierra Vista and Teel and not Student's preferred placement of Creekside. Additionally, Student requested the inclusion assessment as part of the request to attend Creekside. Because Creekside was not Student's LRE, no reason existed to conduct an inclusion assessment. Therefore, Student did not establish that the District needed to conduct an inclusion assessment.

## GOALS

STUDENT'S ISSUE 3(A): DID THE APRIL 4, 2008 IEP DENY STUDENT A FAPE BECAUSE IT DID NOT CONTAIN APPROPRIATE READING, MATH, SELF-HELP, PRAGMATIC, EXPRESSIVE AND RECEPTIVE LANGUAGE, FINE MOTOR, SENSORY INTEGRATION, BEHAVIOR AND SOCIAL SKILL GOALS TO MEET STUDENT'S UNIQUE NEEDS?

STUDENT'S ISSUE 8(A): DID THE IEP OF DECEMBER 11, 2008, DENY STUDENT A FAPE BECAUSE IT DID NOT CONTAIN APPROPRIATE READING, MATH, SELF-HELP,

PRAGMATIC, EXPRESSIVE AND RECEPTIVE LANGUAGE, FINE MOTOR, SENSORY INTEGRATION, AND SOCIAL SKILL GOALS TO MEET STUDENT'S UNIQUE NEEDS?

STUDENT'S ISSUE 11(A): DID THE APRIL 29, 2009 IEP, AS MODIFIED ON JULY 29, 2009, DENY STUDENT A FAPE BECAUSE IT DID NOT CONTAIN APPROPRIATE READING, MATH, SELF-HELP, PRAGMATIC, EXPRESSIVE AND RECEPTIVE LANGUAGE, FINE MOTOR, SENSORY INTEGRATION, AND SOCIAL SKILL GOALS TO MEET STUDENT'S UNIQUE NEEDS?

28. Pursuant to Factual Findings 47 through 55 and 64 through 71, and Legal Conclusions 2 through 5, the April 4, 2008 IEP contained appropriate goals in reading, math, and fine motor skills, to meet Student's unique needs based on accurate present levels of information and were measurable. Regarding Student's pragmatic, expressive and receptive language, social skill, and sensory integration deficits, the April 2008 IEP did not contain adequate goals to meet his unique needs because the District had not assessed Student. Additionally, the District's speech and language goal, which contained social skill elements, merely repeated, with small differences, the April 2007 goal, with no explanation why this slightly modified goal was sufficient to meet Student's unique needs. This was especially noteworthy because Ms. Simpson's FAA identified communication deficits as a significant reason behind Student's behavior problems. Regarding sensory integration, Student had deficits that, if addressed, helped him to deescalate, based on the testimony of Mr. Lust and Mr. Stevenson. Because Student's behavior deficits had increased so dramatically and warranted a change of placement, and sensory integration techniques had worked previously, the District should have developed a sensory integration goal to assist Student in using these techniques to deescalate himself. Student also needed a sensory integration goal to learn how to communicate his emotions as a means to deescalate his behaviors, as contained in Ms. Simpson's BIP recommendations.



29. Pursuant to Factual Findings 138 through 145, 156, 160 through 166 and 170 and Legal Conclusions 2 through 5 and 28, the December 11, 2008 IEP and April 29, 2009 IEP, as modified on July 29, 2009, contained appropriate goals in reading, math, and fine motor, to meet Student's unique needs based on accurate present levels of information and were measurable. The District made significant changes to Student's speech and language goal by having specific goals to address Student's expressive, receptive and pragmatic language deficits, and they also addressed his social skills. The goals were sufficient to address his unique needs. Regarding sensory integration goals, for the reasons stated above, and based on information from the MIND Institute report, the District needed to develop a sensory integration goal and failed to do so.

#### SPEECH AND LANGUAGE AND OT SERVICES

##### STUDENT'S ISSUE 3(D): DID THE APRIL 4, 2008 IEP DENY STUDENT A FAPE BECAUSE THE DISTRICT UNILATERALLY REDUCED STUDENT'S SPEECH AND LANGUAGE AND OT SERVICES?

30. Pursuant to Factual Finding 72 and Legal Conclusions 2 through 5, Student did not establish that the District unilaterally reduced speech and language services as the District offered the same level of services in the April 2008 IEP as in the April 2007 IEP.

31. Pursuant to Factual Finding 73 and Legal Conclusions 2 through 5, Student established that the District violated his procedural rights, which denied him an educational benefit, because the District failed to adequately explain at the IEP meeting why it removed the 20 minutes a week of direct OT services because the District had not assessed Student and Mr. Stevenson did not attend the IEP meeting. Therefore, the District denied Student a FAPE because the District failed to explain why it reduced Student's OT services, and this prevented Mother from meaningfully participating at the IEP meeting.

## IEP IMPLEMENTATION

32. A school district violates the IDEA if it materially fails to implement a child's IEP. A material failure occurs when there is more than a minor discrepancy between the services provided to a disabled child and those required by the IEP. (*Van Duyn v. Baker School Dist.* (9th Cir. 2007) 502 F.3d 811, 815.)

STUDENT'S ISSUE 4: FROM APRIL 2008 THROUGH JUNE 2008, WAS STUDENT DENIED A FAPE BECAUSE STAFF AT SIERRA VISTA DID NOT IMPLEMENT STUDENT'S APRIL 4, 2008 IEP OR BIP?

33. Pursuant to Factual Findings 83 through 90 and Legal Conclusions 2 through 5 and 32, Sierra Vista implemented Student's BIP. Sierra Vista's comprehensive behavior program included elements in Student's BIP, and was effective in improving Student's behavior as the number of improper behaviors decreased. Sierra Vista did not have to use all of the elements of Student's BIP that were not included in its behavior program because its behavior program was effective. Therefore, Sierra Vista materially implemented Student's BIP through its use of its behavior program. Regarding OT and speech and language services, these services were not provided to Student at Sierra Vista pursuant to the IEP because of staffing problems, and this denied Student a FAPE.

## LEAST RESTRICTIVE ENVIRONMENT

34. Federal and state law require a school district to provide special education in the LRE. A special education student must be educated with nondisabled peers "to the maximum extent appropriate," and may be removed from the general education environment only when the nature or severity of the student's disabilities is such that education in general education classes with the use of supplementary aids and services "cannot be achieved satisfactorily." (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(ii) (2006).) In light of this preference, and in order to determine whether a child can be

placed in a general education setting, the Ninth Circuit, in *Sacramento City Unified Sch. Dist. v. Rachel H.* (1994) 14 F.3d 1398, 1403, adopted a balancing test that requires the consideration of four factors: (1) the educational benefits of placement full-time in a less restrictive class; (2) the non-academic benefits of such placement; (3) the effect the student would have on the teacher and children in the less restrictive class; and (4) the costs of mainstreaming the student.

STUDENT'S ISSUE 3(B): DID THE APRIL 4, 2008 IEP DENY STUDENT A FAPE BECAUSE THE DISTRICT'S OFFER OF PLACEMENT AT SIERRA VISTA WAS NOT REASONABLY CALCULATED TO MEET STUDENT'S UNIQUE NEEDS IN THE LRE?

35. Pursuant to Factual Findings 47 through 55 and Legal Conclusions 2 through 5 and 34, the District's offer of Sierra Vista was reasonably calculated to provide Student with meaningful educational progress in the LRE. Sierra Vista met Student's need for a functional curriculum because his academic level was at a first- to second-grade level due to his significant cognitive delays. Student's academic performance at Sierra Vista established that his academic levels were not close to his grade level, as claimed by Mother. Additionally, Sierra Vista had an excellent behavior program that Student needed to address his significant behavior deficits, with properly trained and experienced staff.

36. Regarding Student's LRE contention, pursuant to Factual Findings 75 through 79 and Legal Conclusions 2 through 5 and 34, Sierra Vista was the LRE because Student could not obtain academic benefit in a less restrictive class because of his academic deficits and inability to attend. Student would also not obtain a non-academic benefit in a less restrictive placement due to his behavioral deficits. Finally, Student required a more restrictive class because he would otherwise disturb his class if his behavior outbursts could not be controlled, and the structured program at Sierra Vista

was properly designed to reduce Student's disruptive behaviors. Therefore, Student did not establish that Sierra Vista was not Student's LRE.

#### TRANSPORTATION

37. California law defines special education as instruction designed to meet the unique needs of individuals with exceptional needs coupled with related services as needed to enable the student to benefit fully from instruction. (Ed. Code, § 56031.) The term "related services" includes transportation and such developmental, corrective, and other supportive services as may be required to assist a child to benefit from special education. (20 U.S.C. § 1401(26).)

38. The IDEA regulations define transportation as: (i) travel to and from school and between schools; (ii) travel in and around school buildings; and (iii) specialized equipment (such as special or adapted buses, lifts, and ramps), if required to provide transportation for a child with a disability. (34 C.F.R. § 300.34(c)(16).) The IDEA does not explicitly define transportation as door-to-door services. Decisions regarding such services are left to the discretion of the IEP team. (Analysis of Comments and Changes to 2006 IDEA Part B Regulations, 71 Fed.Reg. 46576 (August 14, 2006).)

STUDENT'S ISSUE 5(A): DID THE AUGUST 26, 2008 IEP DENY STUDENT A FAPE BECAUSE THE DISTRICT'S OFFER OF PLACEMENT AT TEEL, INCLUDING TRANSPORTATION, WAS NOT ADEQUATE TO MEET HIS UNIQUE NEEDS IN THE LRE?

STUDENT'S ISSUE 6(A): DID THE OCTOBER 6, 2008 IEP DENY STUDENT A FAPE BECAUSE THE DISTRICT'S OFFER OF PLACEMENT AT TEEL, INCLUDING TRANSPORTATION, WAS NOT ADEQUATE TO MEET HIS UNIQUE NEEDS IN THE LRE?

STUDENT'S ISSUE 10(A): DID THE IEP OF MARCH 13, 2009, DENY STUDENT A FAPE BECAUSE THE DISTRICT'S OFFER OF PLACEMENT AT TEEL, INCLUDING TRANSPORTATION, WAS NOT ADEQUATE TO MEET HIS UNIQUE NEEDS IN THE LRE?

STUDENT'S ISSUE 11(B): DID THE APRIL 29, 2009 IEP, AS MODIFIED ON JULY 29, 2009, DENY STUDENT A FAPE BECAUSE THE DISTRICT'S OFFER OF PLACEMENT AT TEEL, INCLUDING TRANSPORTATION, WAS NOT ADEQUATE TO MEET HIS UNIQUE NEEDS IN THE LRE?

39. Pursuant to Factual Findings 101 through 119, 122, 152 through 155, 167, 168 and 169 and Legal Conclusion 2 through 5, the District's offer of Teel was reasonably calculated to provide Student with meaningful educational progress in the LRE. Student did not establish that the District underestimated his academic ability based on Student's progress at Sierra Vista. Additionally, information from the MIND Institute did not prove that Student could perform at an academic level above the first- to second-grade because the MIND Institute did not test his academic abilities, as did the District with Ms. Rouppet's administration of the WJ-III. Additionally, Ms. Gray's work with Student was only at the first- to second-grade level, and did not prove that he could handle the academic demands at Student's preferred placement at Creekside. Student's expert, Ms. Heidemann, admitted that Teel was an excellent program. Because Ms. Heidemann incorrectly believed that Student was higher functioning than he actually was, her opinion supports the District's contention that Teel was appropriate to meet Student's unique needs.

40. Regarding Student's LRE contention, pursuant to Factual Findings 101 through 119 and Legal Conclusion 2 through 5 and 34, Teel was the LRE. Student would not obtain an educational benefit at Creekside because the class was taught like a traditional class with oral instruction, and Student had significant verbal deficits according to information from the MIND Institute. Additionally, Student would not be included in the classroom instruction because he did not have the ability to attend without significant redirection, for more than five to ten minutes. Because Student was significantly behind academically, he would be isolated in the classroom, receiving his instruction from his one-to-one aide. Non-academically, Student would receive more benefit at Teel where he could interact with his classmates, instead of being isolated with his aide at Creekside. Finally, the increased academic demands at Creekside, along with verbal instruction, would likely increase Student's frustration and cause aggressive behaviors. The staff at Creekside did not have the training and experience to meet Student's behavioral needs, as did the staff at Teel. Therefore, Teel was the LRE for Student.

41. Regarding transportation, pursuant to Factual Findings 105 and 170 and Legal Conclusions 2 through 5 and 37 and 38, the 75-to-90-minute bus ride to Teel, one-way, did not deny Student a FAPE. Student could successfully ride the bus for that period based on his success while attending Sierra Vista. Finally, the District offered on July 29, 2009, to transport Student directly from his home to Teel and back which would have decreased the duration of the trip. Therefore, the District's offer of transportation, even before the offer of direct transportation, did not deny Student a FAPE.

STUDENT'S ISSUE 7(A): DID THE DISTRICT DENY STUDENT A FAPE AT THE IEP MEETINGS OF NOVEMBER 24, 2008, AND DECEMBER 11, 2008, BECAUSE THE

DISTRICT DID NOT PROPOSE AN APPROPRIATE EDUCATIONAL PLACEMENT, WHICH NECESSITATED THAT STUDENT REMAIN IN HOME/HOSPITAL INSTRUCTION?

STUDENT'S ISSUE 8(B): DID THE IEP OF DECEMBER 11, 2008, DENY STUDENT A FAPE BECAUSE THE DISTRICT UNILATERALLY CEASED PROVIDING STUDENT WITH HOME/HOSPITAL INSTRUCTION AFTER THIS IEP MEETING?

42. Placement in the home is one of the most restrictive placement options for a special education student. Special education and related services provided in the home or hospital are limited to eligible students for whom the IEP team recommends such instruction or services. (Cal. Code Regs., tit. 5, § 3051.4, subd. (a).) Before placing a student on home instruction, the IEP team must be assured that a student has a medical or psychological condition that prevents the student from receiving special education and related services in a less restrictive environment. When recommending placement for home instruction, the IEP team shall have in the assessment information a medical report from the attending physician and surgeon or the report of the psychologist, as appropriate, stating the diagnosed condition and certifying that the severity of the condition prevents the student from attending a less restrictive placement. The report shall include a projected calendar date for the student's return to school. The IEP team shall meet to reconsider the IEP prior to the projected calendar date for the student's return to school. (Cal. Code Regs., tit. 5, § 3051.4, subd. (d).)

43. Pursuant to Factual Findings 130 through 133, 134 and 145 and Legal Conclusions 2 through 5, the District was not required to provide Student with home/hospital instruction because Student did not have a medical reason that he could not attend school, and the District offered an appropriate placement at Teel. Further, Student had a stay put placement available to him at Sierra Vista. The District provided home instruction as a courtesy in late 2008 and January 2009, and was under no

obligation to continue after Parents rejected the District's offer that met Student's unique needs.

#### PARENTS' RIGHT TO PARTICIPATE IN THE EDUCATIONAL DECISION-MAKING PROCESS

44. Federal and state law require that parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. (20 U.S.C. § 1414(d)(1)(B)(i); Ed. Code, §§ 56304, 56342.5.) A district must ensure that the parent of a student who is eligible for special education and related services is a member of any group that makes decisions on the educational placement of the student. (Ed. Code, § 56342.5.) Among the most important procedural safeguards are those that protect the parents' right to be involved in the development of their child's educational plan.

(*Amanda J. v. Clark County Sch. Dist.* (9th Cir. 2001) 267 F.3d 877, 882.)

45. A school district has the right to select a program for a special education student, as long as the program is able to meet the student's needs; the IDEA does not empower parents to make unilateral decisions about programs funded by the public. (See, *N.R. v. San Ramon Valley Unified Sch. Dist.* (N.D.Cal. 2007) 2007 U.S. Dist. Lexis 9135; *Slama ex rel. Slama v. Indep. Sch. Dist. No. 2580* (D. Minn. 2003) 259 F.Supp.2d 880, 885; *O'Dell v. Special Sch. Dist.* (E.D. Mo. 2007) 47 IDELR 216.) Nor must an IEP conform to a Parents' wishes in order to be sufficient or appropriate. (*Shaw v. Dist. of Colombia* (D.D.C. 2002) 238 F.Supp.2d 127, 139 [The IDEA does not provide for an "education . . . designed according to the Parents' desires."], citing *Rowley, supra*, 458 U.S. at p. 207.)

46. A school district is required to consider the results of a privately procured assessment when developing an IEP. (Ed. Code, § 56341.1.) However, the school district is not required to adopt its recommendations. (Ed. Code, § 56329, subd. (c).)



47. Predetermination occurs when an educational agency has decided on its offer prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives. (*Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2004) 392 F.3d 840, 858.) A district may not arrive at an IEP meeting with a “take it or leave it” offer. (*JG v. Douglas County School Dist.*, *supra*, 552 F.3d 786, 801, fn. 10.) However, school officials do not predetermine an IEP simply by meeting to discuss a child's programming in advance of an IEP meeting. (*N.L. v. Knox County Schs.*, *supra*, 315 F.3d at p. 693, fn. 3.)

48. There is no requirement in the law that a district must invite private assessors or private providers of services to an IEP team meeting. Under United States Code, title 20, section 1414, and California Education Code section 56341, private assessors and providers can be part of an IEP team meeting at either the district's or parents' discretion, but they are not required members.

49. An IEP team is composed of the parents of the child with a disability; at least one of the child's regular education teachers if the student is or may be participating in the regular education environment; at least one of the child's special education teachers or, if appropriate, at least one of the child's special education providers; a representative of the school district who is qualified to provide or supervise the provision of specially designed instruction to meet the student's needs, and is knowledgeable about the general education curriculum and the availability of resources; a person who can interpret the instructional implications of evaluation results; other persons who have knowledge or special expertise regarding the student, at the discretion of the parent or school district; and the child, whenever appropriate. (20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. § 300.321(a)(2006); Ed. Code, § 56341, subd. (b).)

STUDENT'S ISSUE 3(C): DID THE APRIL 4, 2008 IEP DENY STUDENT A FAPE  
BECAUSE THE DISTRICT PREDETERMINED STUDENT'S PLACEMENT, WHICH DENIED HIS

PARENTS THE OPPORTUNITY TO MEANINGFULLY PARTICIPATE IN THE EDUCATIONAL DECISION-MAKING PROCESS?

STUDENT'S ISSUE 5(C): DID THE AUGUST 26, 2008 IEP DENY STUDENT A FAPE BECAUSE THE DISTRICT PREDETERMINED STUDENT'S PLACEMENT AND FAILED TO CONSIDER INFORMATION PRESENTED BY MOTHER AT THE IEP MEETING?

STUDENT'S ISSUE 6(B): DID THE IEP OF OCTOBER 6, 2008, DENY STUDENT A FAPE BECAUSE THE DISTRICT PREDETERMINED STUDENT'S PLACEMENT AND LIMITED HIS PARENTS' ABILITY TO OBSERVE OTHER POSSIBLE PLACEMENTS, WHICH DENIED HIS PARENTS THE OPPORTUNITY TO MEANINGFULLY PARTICIPATE IN THE EDUCATIONAL DECISION-MAKING PROCESS?

STUDENT'S ISSUE 9: DURING SY 2008-2009, DID THE DISTRICT DENY STUDENT A FAPE BY FAILING TO CONSIDER INFORMATION FROM STUDENT'S PRIVATE ASSESSORS AND NOT INVITING PRIVATE ASSESSORS TO THE IEP MEETINGS?

STUDENT'S ISSUE 11(D): DID THE APRIL 29, 2009 IEP, AS MODIFIED ON JULY 29, 2009, DENY STUDENT A FAPE BECAUSE THE DISTRICT PREDETERMINED STUDENT'S PLACEMENT AND LIMITED HIS PARENTS' ABILITY TO OBSERVE OTHER POSSIBLE PLACEMENTS, WHICH DENIED HIS PARENTS THE OPPORTUNITY TO MEANINGFULLY PARTICIPATE IN THE EDUCATIONAL DECISION-MAKING PROCESS?

50. Pursuant to Factual Findings 60, 61, 62, 95 through 99, 128 and 159 and Legal Conclusions 2 through 5 and 43 through 48, the District did not predetermine its placement offers, and it considered information presented by Mother and the private assessors. At the April 4, 2008 IEP meeting; although the District explored Sierra Vista as a possible placement before the meeting, the District did not come to the meeting planning to offer Sierra Vista. The District discussed other placements at the IEP meeting, before offering Sierra Vista. Regarding the August 2008 IEP meeting, the District explored other possibilities before the IEP meeting besides Teel and discussed those with Mother at the IEP meeting before it made its offer because Mother rejected Sierra Vista. The District's continuing offer of Teel did not establish that the District did

not consider information presented by Mother at each IEP meeting. The information from the MIND Institute and Dr. Deprey did not establish that Creekside was Student's appropriate placement. Additionally, those reports did not consider whether Student's need for an intensive behavior program could be met at either Sierra Vista or Teel, as the reports did not assess the ability of Sierra Vista or Teel to meet Student's unique needs. The District allowed Mother to visit several proposed placements. The evidence established that the District did not prevent Parents from meaningfully participating in Student's educational decision-making process because the District did not predetermine its placement offers and considered information and reports presented by Mother.

STUDENT'S ISSUE 11(C): DID THE APRIL 29, 2009 IEP, AS MODIFIED ON JULY 29, 2009, DENY STUDENT A FAPE BECAUSE THE DISTRICT BROUGHT AN ATTORNEY TO ATTEND THE IEP MEETING OF APRIL 29, 2009, DESPITE PARENTS' OBJECTION TO HIS PRESENCE, WHICH DENIED PARENTS THE OPPORTUNITY TO MEANINGFULLY PARTICIPATE IN THE EDUCATIONAL DECISION-MAKING PROCESS?

51. Pursuant to Factual Finding 158 and Legal Conclusions 2 through 5 and 49, the presence of Mr. Sturges did not violate Parents' procedural rights because Mr. Sturges's presence did not prevent Mother from actively participating in the IEP meeting. The District informed Parents of Mr. Sturges's presence before the IEP meeting, and offered to continue the IEP meeting if Parents needed their attorney to attend the IEP meeting. Mr. Sturges was not an active participant in the meeting. Therefore, Ms. Sturges's attendance at the IEP meeting did not deny Parents' ability to meaningfully participate in the IEP process.

DISTRICT'S ISSUE 1: DURING SY 2007-2008 THROUGH APRIL 4, 2008, DID THE DISTRICT PROVIDE STUDENT WITH A FAPE BECAUSE THE DISTRICT MET STUDENT'S UNIQUE NEEDS AT APRICOT VALLEY, AND TOOK REASONABLE ACTIONS TO RETURN

## STUDENT TO A CLASSROOM AFTER HIS PARENTS REMOVED HIM FROM APRICOT VALLEY?

52. Pursuant to Factual Findings 7 through 12, 17 and 20 through 23 and Legal Conclusions 6 through 13, 15 and 16, the District failed to provide Student with a FAPE while he attended Apricot Valley because of the District's failure to hold an emergency IEP meeting in January 2008 after the numerous physical restraints. While, the change in Student's medication, and not any District failure, increased Student's aggressive behaviors, which led to numerous physical restraints, the District still needed to provide Parents a BER after physically restraining Student in December 2007 and January 2008. Further, the District needed to hold the requisite IEP meeting to discuss possible changes in Ms. Brionnes's class, and an interim BIP. The District started the FAA process before Parents removed Student from Apricot Valley, and took reasonable steps to expedite the FAA and triennial assessment so Student could resume school attendance. The District's failure to provide Parents with timely BERs and to hold a timely IEP meeting prevented Parents from meaningfully participating in Student's educational decision-making process, which would include discussing with the District reasonable measures to take to permit Student to remain in Ms. Brionnes's class.

## DISTRICT'S ISSUE 2: WAS THE IEP OF APRIL 4, 2008, REASONABLY CALCULATED TO PROVIDE STUDENT WITH MEANINGFUL EDUCATIONAL PROGRESS IN THE LRE?

53. Pursuant to Factual Findings 39, 40, 41, 42, 43, 44, 73, 136, 137 and Legal Conclusions 22, 23, 24, 25, 26 and 31, the District's April 4, 2008 IEP offer did not provide Student with a FAPE due to the District's failure to conduct speech and language and OT assessments as part of the triennial IEP process. Additionally, the District did not offer Student with adequate speech and language and OT goals to meet his unique needs, and changed his OT services without providing Parents with an explanation for the change in services. However, pursuant to Factual Findings 27 through 37, 47 through 56,

65 through 72, 73, 74, 84 and Legal Conclusions 2 through 5, 8 through 12, 17, 18, 28, 30, 34, 35, the District's offer of Sierra Vista provided Student with a FAPE in the LRE as Sierra Vista provided functional academics, which Student required based on his academic abilities. Additionally, Student needed the comprehensive behavior program that Sierra Vista offered. Finally, Student could not attend a less restrictive class because of his significant behavior deficits, which prevented him from obtaining any significant academic or non-academic benefit in a less restrictive class.

DISTRICT'S ISSUE 3: DURING SY 2008-2009, DID THE DISTRICT PROVIDE STUDENT WITH A FAPE BECAUSE THE DISTRICT COULD MEET STUDENT'S UNIQUE NEEDS AT SIERRA VISTA, AND TOOK REASONABLE ACTIONS TO RETURN STUDENT TO A CLASSROOM AFTER HIS PARENTS REMOVED HIM FROM SIERRA VISTA?

54. Pursuant to Factual Findings 83 through 91 and Legal Conclusions 32 and 33, Sierra Vista provided Student with a FAPE in the LRE as Sierra Vista met Student's academic and behavioral needs. While Student did not receive all the OT and speech and language services pursuant to the April 2008 IEP, the District agreed to provide make-up sessions at the August 2008 IEP meeting. Parents' refusal to return Student to Sierra Vista was based on an incorrect belief that Sierra Vista was not implementing Student's BIP, that Student's aggressive behaviors were regularly occurring, and that Sierra Vista isolated Student from his classmates. The District took reasonable steps for Student to return to Sierra Vista, which Parents refused to consider. Therefore, the District provided Student with a FAPE as it took reasonable steps for his return by having Sierra Vista available as his stay put placement, which could meet his unique needs.

DISTRICT'S ISSUE 4: WAS THE IEP OF OCTOBER 6, 2008, REASONABLY CALCULATED TO PROVIDE STUDENT WITH MEANINGFUL EDUCATIONAL PROGRESS IN THE LRE?

55. Pursuant to Factual Findings 101 through 119, 122, 130, 147 through 150, 152 through 155, 167, 168, 169, 170 and Legal Conclusions 2 through 5, 17, 19, the District October 6, 2008 IEP provided Student with a FAPE because it was reasonably calculated to provide Student with meaningful educational progress in the LRE, except for the speech and language goals and OT services and goals, as stated above regarding the April 4, 2008 IEP. Additionally, the District considered information presented by Mother and from the private assessors in making its IEP offer. Parents' preferred placement in a learning handicapped class at Creekside was not the LRE for Student because he would not obtain significant academic and non-academic benefits because his cognitive and behavioral deficits required that he be educated by himself, away from his classmates who would be working on more advanced academics with traditional classroom instruction. The stress of the added academic demands at Creekside, along with the manner of classroom instruction, would likely have caused Student to act out and disrupt the class. In contrast, the District's proposed placement of Teel met Student's needs for functional academics and a comprehensive behavior management program with trained staff. Therefore, the District's October 6, 2008 IEP was reasonably calculated to provide Student with a meaningful educational program in the LRE, except for the District's speech and language goals and OT services and goals.

DISTRICT'S ISSUE 5: DURING SY 2009-2010, DID THE DISTRICT OFFER TO PROVIDE STUDENT WITH A FAPE BECAUSE THE DISTRICT COULD MEET STUDENT'S UNIQUE NEEDS AT TEEL?

56. Pursuant to Factual Findings 101 through 119, 120, 130, 138 through 145, 147 through 150, 152 through 156, 160 through 170 and Legal Conclusions 2 through 5, 17, 19, 29, 34, 39, 40, the District's April 29, 2009 IEP, as modified on July 29, 2009, was

reasonably calculated to provide Student with a meaningful educational program in the LRE, except for the District's OT services and goals. The District considered information from Mother and the private assessors as part of the IEP process, and properly determined that Parents' request that Student attend Creekside with behavioral services from a NPA would not meet Student's unique needs. The District modified the goals based on Student's present levels of performance and requests from Mother. Student's behavior deficits and academic abilities had not changed significantly from the October 6, 2008 IEP offer of Teel, and Parents did not present any new information that required the District to change its offer of Teel. Therefore, the April 29, 2009 IEP, as modified on July 29, 2009, was reasonably calculated to provide Student for SY 2009-2010, with a meaningful educational program in the LRE, except for the District's OT services and goals.

#### RELIEF

57. ALJs have broad latitude to fashion equitable remedies appropriate for the denial of a FAPE. (*School Comm. of Burlington v. Department of Educ.* (1985) 471 U.S. 359, 370 [85 L.Ed.2d 385]; *Parents of Student W. v. Puyallup School Dist., No. 3* (9th Cir. 1994) 31 F.3d 1489, 1496.)

#### COMPENSATORY EDUCATION

58. Appropriate equitable relief, including compensatory education, can be awarded in a due process hearing. (*School Comm. of Burlington v. Department of Education* (1985) 471 U.S. 359, 374; *Student W. v. Puyallup Sch. Dist.* (9th Cir. 1994) 31 F.3d 1489, 1496.) The right to compensatory education does not create an obligation to automatically provide day-for-day or session-for-session replacement for the opportunities missed. (*Park, supra*, 464 F.3d at p. 1033 (citing *Student W. v. Puyallup Sch. Dist.*, 31 F.3d at 1496).)

59. Pursuant to Factual Findings 17 through 25 and Legal Conclusions 6 through 13, and 15, the District's failure to provide Parents with BERs and to hold an emergency IEP meeting after the use of physical restraints denied Student a FAPE because the District could have offered additional supports Student may have needed to remain in Ms. Brionnes's SDC at the IEP meeting. Student established a substantive loss of educational benefit for the missed speech and language and OT sessions and academic instruction caused by the District's failure to hold a timely IEP meeting after use of the physical restraints in December 2007 and January 2008. Further, the District needs to take steps to ensure that it appropriately and timely provides Parents with BERs and holds timely IEP meeting for students who are physically restrained.

60. Pursuant to Factual Findings 17 through 25 and 91 and Legal Conclusions 6 and 25, Student is entitled to an award of compensatory education in the form of 30 speech and language sessions for the missed sessions at Sierra Vista, and when Student did not attend Ms. Brionnes's SDC because the District failed to hold the required emergency IEP meeting after physically restraining Student.

61. Pursuant to Factual Findings 17 through 25 and Legal Conclusions 6 through 13, and 15, Student did not receive OT services because of the District's failure to hold an emergency IEP meeting in January 2008, which prevented Parents from meaningfully participating in Student's educational decision-making process through the April 2008 IEP meeting. Also, the District failed to provide consultative services when Student attended Sierra Vista. (Factual Finding 91 and Legal Conclusion 33.) Additionally, because the District eliminated Student's OT sessions without providing Parents with adequate information to allow them to meaningfully participate in the educational decision-making process, the District needs to provide Student with additional compensatory education for these eliminated OT sessions. (Factual Finding 73 and Legal Conclusion 31.) However, Student did not establish that the District needed to



provide him session-for-session replacement as compensatory education. Additionally, because Parents refused to return Student to his stay put placement at Sierra Vista or to enroll Student at Teel, they have not made Student available to receive OT services. Therefore, Student is entitled to 20 individual OT sessions, 20 minutes a session, as compensatory education. These OT sessions can address Student's sensory integration deficits that the District failed to properly address by not offering an adequate goal or services.

62. Pursuant to Factual Findings 17 through 25 and Legal Conclusion 6, Student is entitled to compensatory education for the lost academic instruction Student did not receive because of the District's failure to hold an emergency IEP meeting in January 2008, which prevented Parents from meaningfully participating in Student's educational decision-making process through the April 2008 IEP meeting. Student did not establish that the District needs to provide Student hour-for-hour replacement as compensatory education. Therefore, Student is entitled to 25 hours of one-to-one tutoring to work on Student's academic goals.

## IEE

63. Although Student requires speech and language, and OT assessments, Student did not establish why the District should not conduct these assessments. Student did not establish that the District's assessors are not qualified nor that Parents requested an IEE in these areas in the due process complaint. Therefore, District may conduct the speech and language and OT assessments.

## ORDER

1. During SY 2007-2008 through April 4, 2008, the District denied Student a FAPE because the District failed to hold the required IEP meetings after staff physically restrained Student in December 2007 and January 2008.

2. The District's April 4, 2008 IEP offer of Sierra Vista was reasonably calculated to provide Student with meaningful educational progress in the LRE. However, the District's IEP did not provide Student with adequate speech and language and OT goals to meet his unique needs, and the District changed his OT services without providing Parents with an explanation for the change in service, which denied Student a FAPE.

3. During SY 2008-2009, the District provided Student with a FAPE because the District could meet Student's unique needs at Sierra Vista as Student's stay put placement, except for speech and goals and OT goals and services in the District's April 4, 2008 IEP.

4. The District's October 6, 2008 IEP was reasonably calculated to provide Student with a meaningful educational program in the LRE, except for the IEP's speech and language goals, and OT services and goals.

5. The District's April 29, 2009 IEP, as modified on July 29, 2009, was reasonably calculated to provide Student with a meaningful educational program in the LRE, except for the District's OT services and goals.

6. Within 90 days of this Decision, the District shall conduct a speech and language assessment that assesses Student's expressive, receptive and pragmatic language deficits, and hold an IEP meeting to discuss the findings of the assessment. Parents shall make Student reasonably available for the assessment.

7. Within 90 days of this Decision, the District shall conduct an OT assessment that assesses Student's sensory integration deficits, and hold an IEP meeting to discuss the findings of the assessment. Parents shall make Student reasonably available for the assessment.

8. As compensatory education, the District shall provide Student, by December 31, 2010, with 30, 20-minute speech and language sessions, either

individually or in a small group, to work on Student's pragmatic language deficits. Parents shall make Student reasonably available for the speech and language services.

9. As compensatory education, the District shall provide Student, by December 31, 2010, with 20 individual OT sessions, 20 minutes a session, to work on Student's sensory integration deficits. Parents shall make Student reasonably available for the OT services.

10. As compensatory education, the District shall provide Student, by December 31, 2010, with 25 hours of one-to-one tutoring, by a qualified special education instructor, to work on Student's academic goals. Parents shall make Student reasonably available for the academic tutoring.

11. Within 60 days of this Decision, the District shall develop a written protocol to ensure that it provides parents with a BER, as required by the Hughes Bill, when a student, who has either a BSP or BIP, is physically restrained due to a behavioral emergency. Additionally, for students who have a BSP, the District shall develop a written protocol to hold a timely IEP meeting, as required by the Hughes Bill, when a student is physically restrained due to a behavioral emergency.

## PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that the hearing decision indicate the extent to which each party has prevailed on each issue heard and decided. Student fully prevailed on Student Issue 2(c) and District Issue 1. Student partially prevailed on Student Issues 2, 3(a), 3(d), 4, 8(a), and 11(a) and District Issues 2, 4, and 5. The District prevailed fully on Student Issues 1(a), 2(b), 3(b), 3(c), 3(e), 5(a), 5(b), 5(c), 6(a), 6(b), 6(c), 7(a), 7(b), 8(b), 9, 10(a), 10(b), 11(b), 11(c), 11(d), and 11(e) and District Issue 3. The District partially prevailed on Student Issues 2, 3(a), 3(d), 4, 8(a), and 11(a) and District Issues 2, 4 and 5.

## RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by this Decision. The parties to this case have the right to appeal this decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this Decision. A party may also bring a civil action in United States District Court. (Ed. Code, § 56505, subd. (k).)

Dated: April 27, 2010

\_\_\_\_\_/s/\_\_\_\_

PETER PAUL CASTILLO

Administrative Law Judge

Office of Administrative Hearings