

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS on behalf of STUDENT,

v.

MURRIETA VALLEY UNIFIED SCHOOL
DISTRICT.

OAH CASE NO. 2009101528

DECISION

Administrative Law Judge Robert F. Helfand, Office of Administrative Hearings (OAH), State of California, heard this matter in Murrieta, California, on February 2, 3, 4, 22-25, 2010; March 16 and 18, 2010; and April 15, 2010.

Mark Woodsmall, Esq., represented Student and his parents (Student). Student's mother (Mother) was present during the hearing. Student's father (Father) was present for part of the hearing.

Jack B. Clarke, Jr., Esq., represented the Murrieta Valley Unified School District (District). Megan M. Moore, Esq. was present for part of the hearing. Zhanna Preston, Special Education Director for the District, was present during the hearing.

Student filed his due process request on October 29, 2009. On December 3, 2009, the District requested a continuance of the hearing. This request was granted on December 8, 2010. At the first day of hearing, the District once again moved for a continuance. The District's motion was denied.

At the hearing, the ALJ received oral and documentary evidence. The following witnesses testified: Zhanna Preston, Mother, David Kovich, Rosa Parra, Natalie August, Jeannine Arnaldo, Jennifer Martinez, Michela Gamelin, Jennifer Pyle, Jarilyn Parra, Dr.

Richard D. Abbey, Janet Leuthold, Lori Coleman, Jennee Villalobos, Estela Dominguez, Kathy Dixon, Annette Macher, and Megan McCann.

At the request of the parties, the record remained open for the submission of written closing and rebuttal arguments. The parties filed their closing briefs on May 3, 2010 and their rebuttal briefs on May 10, 2010. The parties stipulated that the decision would be due 30 days after the case was submitted. The matter was deemed submitted upon receipt of the written rebuttal briefs on May 10, 2010.

ISSUES¹

A. Did the District fail to offer Student a free and appropriate public education (FAPE) because it failed to adequately assess him in all areas of known or suspected need as follows:

- i Failing to conduct a transitional review and assessment;
- ii. Failing to use a variety of assessment tools and strategies; and
- iii. Failing to assess Student's behavioral needs fall 2008?

B. Did the deny Student a FAPE because his individualized education program (IEP) of November 26, 2007 and January 15, 2009 do not state accurate levels of performance and does not provide measurable goals?

C. Did the District deny Student a FAPE because the District's placement and supportive services:

- i Failed to educate Student in school year 2007-2008 in the least restrictive environment;
- ii Failed to offer Student a research-based program in the November 26, 2007 IEP; and because

¹ The issues have been re-framed for the purposes of this decision.

- iii The District failed to implement Student's speech services according to Student's last agreed-upon IEP in school year 2008-2009?

D. Did errors in the IEP process deprive Student of educational benefit and/or impede parental involvement, thus denying Student a FAPE, because the District:

- i Predetermined Student's educational placement and services prior to the IEP team meeting;
- ii Failed to consider the independent assessment reports privately secured by Parents, during the IEP team meeting; and
- iii Failed to provide Parents with prior written notice?

PROPOSED RESOLUTION

Student proposed resolution is as follows:

- (a) The District shall reimburse Parents for the cost of Student attending the Kinder Readiness program for the 2007-2008 and 2008-2009 school years;
- (b) Student shall be placed in a general education kindergarten program at Cole Canyon Elementary School for the 2009-2010 school year;
- (c) The District shall provide a one-to-one aide for Student during the school day for the 2009-2010 school year;
- (d) The District shall fund an independent speech and language assessment and behavior assessment;
- (e) The District shall reimburse Parents the cost of assessments by Dr. Richard Abbey and Lucid Speech and Language;
- (f) The District shall provide 40 hours of speech and language services by an independent speech therapist as compensatory education; and
- (g) The District shall conduct a new IEP team meeting and reimburse Parents for the cost of having their counsel attend.

FACTUAL FINDINGS

1. Student is a six and a half year old boy who resides with his family within the geographical boundaries of the District. On November 26, 2007, Student was found eligible for special education under the primary eligibility category of autistic-like behaviors and secondarily as speech and language impaired.

2. From August through December 2006, Student attended with Mother a "Mommy and Me" program. In August 2007, Student commenced attending a Kinder-Readiness class, a general education class, at the E. Hale Curran Elementary School (Curran). After about one month, the Curran class ended, and Student then entered Natalie August's Kinder Readiness class at the Antelope Hills Elementary School. August has an associates degree in early childhood education and has worked with young children in the District for 17 years. After observing Student for "a couple of weeks," August noticed that Student lacked making eye contact; often used gestures and pointing in lieu of words when communicating; walked over and through things; would often hide under furniture; covered his ears when the noise level rose in the classroom; would repeat what was said to him; had difficulty in participating in non-preferred activities; engaged in perseverating behaviors; was rigid in regards to the classroom schedule; failed to appropriately interact with peers unless prompted; and was defiant and aggressive which would often lead to shut down behaviors. August was also concerned that Student had difficulty in the area of expressive language as his speech was often scripted, and he would only state his name and feelings in one specific spot in the classroom. She also noted that Student was an enthusiastic learner whose strengths were in fine and gross motor skills and memorization. August approached Parents about services available in special education. Parents then requested a special education assessment.

3. In her November 8, 2007 conference report, August informed Parents that Student was able to recognize his own name, rote count to 15, and use numbers to represent quantities and objects. Mother testified that Student knew many colors, could count past 10 in English and five in Spanish, and knew some letters and shapes. He used number names to represent quantities of objects. He also loved music and dancing. Student was working on writing his name and developing phonological awareness. Student was also working on expressing himself through language. Mother felt that Student was making good progress while August felt that Student was progressing slowly as compared to his class.

INITIAL ASSESSMENT

4. In October 2007, Student was assessed by a District multidisciplinary team. The team consisted of a school psychologist, Rosa Parra; a preschool special education teacher, Jeneé Villalobos; and a speech language pathologist (SLP), Janine Arnaldo. Additionally, a health screening was done by a preschool nurse. At the time of the assessment, Student was four years, four months old.

Educational Profile

5. Villalobos conducted the educational profile assessment. Villalobos has been a preschool teacher with the District for four years, and she also taught a birth to three class for two years. She has her B.A. from Chapman University and possesses an early childhood special education credential. In conducting her assessment, Villalobos observed Student in his classroom, interviewed parents, and administered the Brigance Inventory of Early Development. During the observation, Student explored the classroom and played appropriately with toys. At first he was reluctant to engage the assessor and made only limited eye contact, but he gave full effort when engaging in adult directed activities. While near the classroom, Student became preoccupied with a

door being opened and closed. He was easily redirected to move to another area of the room.

6. Student exhibited appropriate fine and gross motor skills. In the area of general knowledge and comprehension, Student was able to match uppercase letters and named them. He was also starting to match uppercase letters with lowercase ones. He could count to 10 and match and label the numerals in random order. He recognized colors and shapes and was able to match pictures and objects. Student could identify body parts. He did have difficulty labeling pictures but he could describe the actions or functions of the items pictured. Student identified directional/positional concepts. He failed to respond to questions of what a person does (i.e., "What do you do when you are tired?"). When shown pictures of animals, Student named them but would not reply to questions as to what sounds the animals make. Student would perform tasks for an adult if the activity was functional and motivated him. He displayed "moderate difficulty" focusing on adult directed tasks for more than five minutes. Based on a parental interview, Villalobos concluded that Student "does appear to have difficulties in peer interactions" and in group settings.

Speech and language Assessment

7. Arnaldo conducted a speech and language assessment and submitted a written report on November 26, 2007. Arnaldo has been a SLP with the District for 13 years. She received a B.A. in communicative disorders in 1993 from San Diego State University and an M.A. in communicative disorders from California State University, Fullerton in 1997. Arnaldo administered the Preschool Language Scale, 4th Edition (PLS-4) as it was a comprehensive test which measures expressive and receptive language skills as well as articulation, pragmatics, and social language. Following the completion of the PLS-4, Arnaldo observed Student at his kindergarten readiness class at Curran.

She relied on information gathered by other members of the team in her assessment including the parental questionnaires. Additionally, she interviewed August.

8. PLS-4 scores are reported in standard scores with scores in the 85 to 115 range being "average." In the expressive language portion, the PLS-4 addresses vocal development and social communication by having the preschool aged child label common objects, describe objects, express quantities, as well as use specific prepositions, grammatical markers, and sentence structure. Student was able to name pictured objects, use more words than gestures to communicate, and ask questions. He had difficulty in explaining how objects are used and was unable to appropriately respond to questions. Student scored a 60 in this portion which is significantly below the average range. Student had an age equivalent score of two years, five months. Student was also screened using the PLS-4 articulation screener and his performance was typical compared to same aged peers.

9. In the receptive language portion of the PLS-4, Student had a standard score of 50 which is significantly below the average range and yielded an age equivalent score of one year, nine months. Student appropriately used more than one object in play, was able to follow directions with cues relating to familiar objects (e.g., throw the ball), and appropriately used objects such as a ball and blocks. He could also identify familiar objects from a group of objects and identify photographs of familiar objects and body parts. He was unable to demonstrate an understanding of spatial concepts (e.g., in, off and out of). He had difficulty with descriptive concepts (e.g., wet, big, little); and he did not understand concepts of quantity. Student was unable to respond to questions regarding the functions of objects. He was also unable to follow two-step direction related commands (i.e., "open the box and give me the bear").

10. Prior to being given the PLS-4, Arnaldo observed Student. Student had played by himself and had no interaction with another child who was present. During

testing, Student did not spontaneously interact with adults. When asked to do specific tasks by an adult, he only performed those tasks that were of interest to him. Student required a lot of prompts to complete activities or tasks. In the classroom, Student had difficulty sitting still during circle time and would often lie down. He shouted inappropriately while his teacher spoke. Student did not participate at times. At one point, he repeatedly shouted out his teacher's name while she was engaged in reading a book to the class. Student's teacher, August, reported to Arnaldo that Student did not communicate much or play with his peers; had difficulty following instructions; and needed to follow a familiar routine.

11. Arnaldo recommended that the IEP team find Student eligible for special education under the category of speech and language impaired (SLI) as he presented with delays in receptive and expressive language which has a negative impact on his social interaction and conversational skills.

Psycho-educational assessment

12. Parra conducted a psycho-educational assessment. Parra has been a school psychologist with the District for three years specializing in pre-schoolers. In 2002, she received a B.A. in psychology and a B.A. in communicative disorders from California State University, Fullerton. In 2007, Parra received a master's degree in educational psychology and a pupil and personnel services credential from California State University, Long Beach. Prior to her assessment, Student had been diagnosed with Asperger's Disorder by his physician.² In conducting her assessment, Parra conducted a records review, parent interview, teacher interview, and observed Student in his

².Parents produced a prescription form from the physician with the words "Asperger Disorder" on it. Student's physician did not generate a written report nor did she testify regarding the basis for her diagnosis.

kindergarten readiness class. She also administered four standardized tests; Differential Ability Scales (DAS), the Scales of Independent Behaviors-Revised (SIB-R), Gilliam Asperger's Disorder Scale (GADS), and the Gilliam Autism Rating Scale-Second Edition (GARS-2).

13. Parra interviewed August, Student's teacher on November 15, 2007. August reported that Student had well developed gross motor skills, could identify his name in written form, and had a wonderful memory for shapes and colors. Student was able to cut with scissors, trace his name, and string beads. He was very rigid with the classroom schedule. His speech was often scripted, and he would only state his name or emotions while standing in one particular place in the classroom. Student often required teacher prompts to verbally interact with peers. Student perseverated on opening and closing of doors. Often, Student was defiant and passive-aggressive resulting in shutting down behaviors although this had improved over time.

14. During the classroom observation on November 15, 2007, Student repeatedly called out to his teacher during various activities. While transitioning to books and puzzles, Student perseverated on the characters in his book and repeatedly stated the character's name as he pointed out pictures to August. While August read a story to the class, Student pushed his way through the children to lean against August and show her his book. After being redirected to share with a peer, Student sat for several seconds and then returned to August again interrupting her. He repeated the words "follow the troll" six to eight times and repeated this 23 times in an eight minute time span. Next, the class sat in a square and sang songs which Student found difficult despite prompting. He continually ran up to August to hold her hand and request songs while the class sang. The then class did a freeze dance. Student appeared to not to attend to this task. Overall, Parra found Student interacted with his teacher rather than his peers.

15. The DAS measures intellectual functioning. Student's composite scores were 66 on the verbal cluster which placed him in the first percentile and in the "very low" range, and an 84 in the nonverbal cluster which placed him in the 14th percentile and the "below average" range. Student's general conceptual ability score was a 75 which placed him in the fifth percentile and the "low" range. His test scores for the verbal cluster were in the "very low" range for verbal comprehension and "low" in naming vocabulary. In the nonverbal cluster, he was "average" in copying and picture similarities and "low" for pattern construction. He was also in the "low" range in the early number concepts subtest. Parra did note that the DAS most likely understated Student's cognitive ability which she estimated to be in the "low" range.

16. The SIB-R is a behavior rating scale designed to demonstrate a child's day-to-day functioning in several areas of adaptive behavior and problem behaviors. The scale was completed by Mother. In adaptive behavior, Student received a standard score of 97 which was in the 42nd percentile with an age equivalent of four years two months (4-2). In problem behaviors, Student's withdrawal or inattentive behavior and his cooperative behavior were "slightly serious" as it occurred one to six times weekly. His disruptive behavior was "slightly serious" as it occurred one to six times per week. Parra concluded that Student's functional independence was age appropriate, and that he demonstrated normal behaviors requiring "limited support, about the same as his age."

17. The GADS is a behavioral scale that assists in identifying persons with Asperger's Disorder. If a subject receives a standard score of 80 or above, the person probably has Asperger's. Mother completed the rating scale. Student received an Asperger's Disorder Quotient of 67 which indicates an "unlikely probability" of Asperger's. The GARS-2 is a behavioral rating scale which assists in identifying persons with autism. Student's teacher and Parents completed the rating scale. The GARS-2 consists of three subscales and an autism quotient. Student scored in the third

percentile in stereotypical behaviors, 63rd in communication and the 50th in social interaction. His autism quotient score was 91, which placed him in the 27th percentile. This indicated a "very likely" probability of autism.

18. Parra concluded that Student displayed an autistic-like characteristic which impacts his communication, social interactions, and learning potential. She also found that Student was eligible for special education under the eligibility category of autistic-like behaviors.

NOVEMBER 26, 2007 IEP MEETING

19. On November 26, 2007, the IEP team convened its initial meeting. Attending were Mother; Father; David Koltovich, Principal at Curran and the administrative designee; August; and the assessment team of Parra, Arnaldo and Villalobos, who also acted as the special education specialist. At the meeting, Parents were given a copy of the assessment reports to review. Sometime after the meeting commenced, Koltovich left the meeting to attend another meeting. Parents signed an IEP team member excusal form. Parra was knowledgeable about the availability of resources and programs as was Koltovich. Each member of the assessment team reviewed and presented their assessment results which were discussed. August reported that Student had been making slow improvement in his ability to be redirected since starting in her class, and that he was continuing to have problems picking up social and classroom cues. Parents reported that they felt that Student had made improvements in picking up social cues. Parents stated that the observations of team members were accurate. The IEP team concluded that Student was primarily eligible for special education under the categories of autistic-like behaviors and secondarily under speech and language impairment. The team agreed that Student's present level of performance academically was that he could match uppercase letters and name them, emerging in matching upper and lower case letters, able to count to 10 and match and label

numbers up to 10 when placed in random order. Student's adaptive behavior was comparable to a four year, two month child, and his functional independence was age appropriate. Student was found to be in need of limited support. Student exhibited expressive and receptive language delayed skills as well social/pragmatic delays.

20. The team adopted four goals. Baselines could be inferred from the first short term objective in that these were actions that he could not perform when the goals and objectives were established. The goals were to be met by November 26, 2008 were as follows:

- a. Goal One was in Attending. Student was to attend to an adult directed activity without interrupting the adult for 10 minutes with two prompts in a group setting. The short term objective was by March 26, 2008, Student would attend to the adult-directed activity for five minutes with two prompts and by September 26, 2008 for eight minutes. Although the IEP omitted mentioning a baseline for this goal, it is readily apparent that Student's baseline was that he was unable to attend to an adult directed activity for five minutes without interrupting with two prompts.
- b. Goal Two was in the area of receptive language. By November 26, 2008, Student was to demonstrate comprehension of basic concepts following two step directions with 80 percent accuracy in at least three consecutive sessions. The short term objectives were to complete one step directions by March 26, 2008 and to complete two-step directions with 60 percent accuracy by September 26, 2008. Student's baseline was that he had "difficulty with spatial, descriptive and qualitative concepts."
- c. Goal Three was in the area of expressive language. By November 26, 2008, Student would answer questions appropriately when presented with oral questions regarding topics/events while speaking with 80 percent accuracy in

at least three consecutive sessions. The short term objectives were that by March 26, 2008, he would be able to answer appropriately questions when presented with pictures with 80 percent accuracy; and on September 26, 2008, he would be able to answer simple yes/no questions with 80 percent accuracy in three consecutive sessions. Student's baseline was that he "does not answer questions appropriately."

- d. Goal Four was also in the area of expressive language. The annual goal called for Student to describe the use of items when given a verbal prompt; "tell me what you do with ____" - with 80 percent accuracy in at least three consecutive sessions. By March 26, 2008, Student's first short term objective was that he would be able to describe the use of items when shown a picture of an object with 80 percent accuracy over three sessions. The second short term objective was that by September 26, 2008, he would be able to describe the use of items when given a verbal prompt with 60 percent accuracy over three sessions.

21. The IEP team then discussed their proposal for FAPE. The District members offered Student placement in a special day class (SDC) at Curran until January 2008, when Student would be placed in a newly formed inclusion SDC, which would put Student in the general education environment 50 percent of his day. The assessment team felt that Student was not succeeding in the regular education preschool class and required specialized instruction to learn the skills which a child requires to benefit from a regular education environment. The team members believed that the inclusion SDC would provide Student with specialized instruction designed to teach him these skills and give him an opportunity to generalize these newly learned skills in the regular education portion of the day. The inclusion SDC is taught by a special education teacher, Estela Dominguez, who collaborates with a SLP to design the program to incorporate

the teaching of social skills within the program. The SDC would meet four times per week for two hours 45 minutes per day. Student would also receive speech and language therapy in a group setting twice per week for 30 minutes per session.

22. Parents desired that Student remain within his current placement. Parents felt that Student's academic level required him to remain in general education to obtain educational benefit. During the IEP team meeting, the team failed to discuss the various placement options which were available. Mother testified that the team failed to discuss alternative placements as well as the qualifications of the inclusion SDC teacher, Dominguez. This was corroborated by August, who also served as the note taker during the meeting. Arnaldo testified that she had no recall of any discussion at the meeting involving whether it would be appropriate for Student to remain in his then regular education preschool class with further support. Parents refused to consent to the IEP until they had time to observe the SDC. Parents requested that another IEP meeting take place in the spring to discuss Student's transition to Kindergarten which was scheduled to take place the next school year.

THE SDC INCLUSION CLASS AND PARENTAL OBSERVATION OF THE CLASS

23. The Curran SDC class was taught by Estela Dominguez, who has been teaching an SDC and working with autistic children for 10 years. Dominguez has a B.S. in physical education from Sonoma State University and an early childhood teaching credential from California State University, Fullerton. She has received training in applied behavior analysis (ABA), discrete trial instruction and TEACCH (Treatment and Education of Children and related Communication disorders). She used components of each of these in her class. Dominguez's class consisted of between 10 and 12 students who had special needs. About five of the children demonstrated social skills and pragmatic development challenges. None of the students had severe behavior problems. The class had a range of cognitive abilities. Based on Dominguez's review of Student's November

26, 2007 IEP and the initial assessment reports, Dominguez opined that Student would have been in the high middle range of her class in cognitive abilities as well as in language ability and academics. The class is very structured and social skills and language enrichment are included in the curriculum. The skills worked on in class are then generalized during inclusion with typically developing peers.

24. Following the November 26, 2007 IEP team meeting, Lori Coleman, a special education coordinator with the District,³ contacted Mother to arrange a visit to Dominguez's SDC at Curran. Although Mother requested that the visit occur at 8:15 a.m., the visit was scheduled for 10:15 a.m. The visit took approximately 30 minutes during which the class watched a clown show. Mother met with Dominguez who explained that the class offered a structured environment and was organized around centers where there were small groups and circle time which involved the entire class. A SLP and occupational therapist regularly came into the classroom. Speech therapy and OT were incorporated into the class activities. Mother did not inquire as to Dominguez's qualifications. Because Dominguez had never seen Student's IEP or assessments, she was unable to comment as to whether her class was appropriate for Student.

PARENTS' REFUSAL TO ACCEPT THE DISTRICT'S FAPE OFFER

25. On December 10, 2007, Mother sent a letter to Coleman informing her that Parents would not be "signing the IEP" in its current form. Mother stated that she was unable to observe the students in the SDC to determine whether "it would be a

³ Coleman is a credentialed special education teacher with 15 years experience. She served as a program specialist for five years, and a special education coordinator for two years with the District. She currently is in her second year as an assistant principal of Moreno Valley High School.

suitable environment for my son.” Mother opined that the academic level of the SDC was below that of her son, which is contrary to the Asperger diagnosis made by Student’s pediatrician and the assessment team findings that Student was “functioning at an age-appropriate level in several cognitive areas.” Mother then stated that Student’s placement in a SDC was not in keeping with the requirement that Student must be placed in the least restrictive environment (LRE), which would be his current class. Mother did consent to the District’s offer of speech and language therapy for two 30 minute group sessions per week if the service was provided at either Student’s home school or the Antelope Hills School where Student was attending the Kinder-Readiness class.⁴

PARENTS’ ACCEPTANCE OF THE PROFFERED SPEECH SERVICES

26. On February 11, 2008, Coleman prepared a handwritten IEP amendment which provided that speech services would be provided to Student at Antelope Hills, where Student was attending a kinder readiness class. Parents consented to the change by signing the form on February 26, 2008.

SPRING AND SUMMER 2008

27. Student continued in August’s class through the spring and summer of 2008. Student required prompting to stay on task, but he did exhibit much growth and improvement in his level of functioning in areas of language skills; ability to handle changes in class routines; and being comfortable with strangers. Student had good

⁴ Coleman forwarded to Parents on December 7, 2007, a Prior Written Notice form Although the form erred as to the amount of time Student would spend in the SDC, the form did state that the Parents could agree to the proffered speech services which would be provided at their home school, Cole Canyon Elementary.

recognition of letters, numbers and colors, and he enjoyed being a class helper. Student did demonstrate that he needed to improve in the areas of 1:1 correspondence; sorting and counting; and communication and fine motor skills. In May 2008, Parents informed the District, through Annette Macher who was then Student's SLP, that they had decided to have Student continue in the preschool program for another year. Macher passed the information to Coleman.

28. Macher was the District SLP who was assigned to work with Student from early February 2008 through June 2008. Macher received a B.A. and M.A. in communication disorders from California State University, Fullerton. From January 1991 through June 1993, she was a SLP at Rancho Santiago College, where she also taught courses on accent reduction and communication for non-native speakers. From 1993 through August 2006, she worked as an SLP treating adults at nursing facilities. Since August 2006, she has been employed by the District as a SLP. Macher worked on the goals established by the November 26, 2007 IEP. Macher found these goals "sufficiently written" for her to understand and work on. Macher did state that had she written the second goal (receptive language), she would have specified the concepts to be worked on in more detail. Although there was not a specific pragmatic speech goal, Macher incorporated pragmatics into her therapy by utilizing typical children as models for Student. Although Student made steady progress, Macher felt that he would have met his goals had he been placed in a SDC which incorporates speech and language into its program. In the SDC, Student would receive increased reinforcement, including repetition, until he was able to master a speech and language goal.

29. Student received an MRI of the head and an MRI spectroscopy at Loma Linda University Medical Center on August 19, 2008. Dr. Sheri Harder, the reviewing radiologist, found that Student had a normal MRI of the head. Dr. Harder concluded that the MRI spectroscopy findings indicated "abnormal MR Spectroscopy showing

decreased NAA [N-acetylaspartate] and creatine in frontal white matters," which "are consistent with autism proton MRS reports in the literature."

FALL 2008

30. In August 2008, Student entered the pre-school class of Jennifer Martinez, who is a child development teacher, at Tovashal Elementary School. Parents had elected to have Student continue in the Pre-Kindergarten class for another year.⁵ On September 18, 2008, Mother sent a letter to Zhanna Preston, the District special education director to that effect. Mother stated that Parents' decision was based on the great progress Student made during the previous school year as shown by Student asking friends to play on the playground; sitting quietly during story time; and participating in the year-end show. Mother did request that the District reimburse the amounts the family paid to the District for tuition to the state pre-school program. Additionally, Mother pointed out that Student had been deprived of between one third to one half of his speech therapy time due to sessions missed during District-wide testing, Student being transported late to the speech therapy sessions, and because some sessions were located in a teacher's lounge where Student was distracted.

31. In October 2008, the District forwarded to Parents an assessment plan to assess Student in the areas of academic achievement, social/adaptive behavior/emotional, processing, perceptual/motor development, communication development, health/developmental and cognitive development. Mother signed her consent on October 10, 2008.

⁵ The class had relocated to Tovashal.

SECOND ASSESSMENT BY THE DISTRICT

32. The District's multidisciplinary assessment team consisted of Janet Leuthold, school psychologist; Tiffany Knudson, occupational therapist; Michaela Gamelin, a SLP; Rebecca Diephouse, a special education specialist and SDC classroom teacher; plus Natalie August and Jennifer Martinez, Student's past and then current preschool teachers. The assessment consisted of a developmental history, which included a medical history, records review, vision screening and hearing screening; classroom and playground observations; an occupational therapy assessment battery; a speech and language assessment battery; academic testing; and psycho-educational assessment. The assessment testing commenced in mid-October 2008 and continued through the beginning of November 2008.

Academic assessment

33. Diephouse conducted the academic portion of the assessment. On November 5 and 10, 2008, Student was administered the Wechsler Individual Achievement Test (WIAT) and the Kindergarten Readiness Skills Profile (KRSP). The WIAT consists of four major components which include reading, mathematics, written language, and oral language skills. Because of his young age, Student was unable to participate in several aspects of the test. WIAT scoring is reported utilizing standard scores with scores in the 90 to 109 range indicating average intellectual ability, 80-89 as low average, 70-79 classified as well below average, and scores below 69 as intellectually deficient.⁶ Student earned a score of 98 in word reading, although comprehension and word decoding were not calculated due to his age. Student scored an 86 in overall mathematics, although he scored a 93 in numerical operations and an 83 in

⁶ Groth-Marnat, Handbook of Psychological Assessment, 4th ed. (2003) p. 143.

mathematical reasoning. In written language, Student was unable to complete all of the subtests and had trouble writing his name. He did receive an 83 in spelling. Student received an 83 in oral language composite with scores of 86 in listening comprehension and 87 in oral expression. In the KRSP, Diephouse concluded that Student was ready for the Kindergarten curriculum. Diephouse concluded that Student's areas of difficulty were in fine motor skills based on his poor writing skills. Student seemed unsure while attempting pencil paper tasks such as writing his name or tracing a line pattern. He also had difficulty identifying letters which were placed out order.

Occupational therapy assessment

34. Knudsen, a District occupational therapist, conducted the occupational therapy (OT) assessment. She administered the Beery-Buktenica Developmental Test of Visual-Motor Integration, Fifth Edition (VMI); the Developmental Test of Perception, Second Edition (DTVP-2); and the Bruininks-Oseretsky Test of Motor Proficiency-2 (BOT-2). Additionally, she made clinical and classroom observations. On the VMI, Student scored in the below average range with a standard score of 83 for visual motor integration; average with a 97 for motor coordination; and high with a 123 for visual perception. The BOT-2 measures a child's motor proficiency and fine motor skills to identify motor dysfunction and developmental coordination disorder. Student scored in the average range for fine manual control and below average in manual coordination. Knudsen noted that Student's manual coordination may have been influenced by his poor attention level and his failure to follow directions. In the DTVP-2, which measures visual perception and vision-motor integration, Student's subtest scores ranged from average to superior. Based on the test results and observations, Knudsen recommended that Student receive OT as to pre-writing skills.

Psycho-educational assessment

35. Leuthold conducted the psycho-educational portion of the assessment. Leuthold has a B.A. in sociology from the University of California, Santa Barbara and a Masters in social work from the University of Southern California. In April 1997, she received her school psychologist credential from Chapman University. She also is a licensed clinical social worker since 1982 and a licensed educational psychologist since 2004. From 1997 to 1999, Leuthold was a designated instructional services counselor with the District. Since 1999, Leuthold has been a school psychologist with the District. Leuthold conducted classroom and playground observations, and administered the Kaufman Assessment Battery for Children II (KABC II); Asperger Syndrome Diagnostic Scales (ASDS); the Gilliam Autism Rating Scales (GARS); and the SIB-R. Leuthold also reviewed the District's initial assessment; Student's developmental and medical history including the Loma Linda University Medical Center MRI and MRI spectroscopy report; educational history and conducted observations of Student at his pre-school.

36. Student was observed on several occasions in his pre-school classroom and on the playground. Generally, Student followed classroom and playground routines with minimal redirection during both structured and unstructured activities. He did seek out peer interaction during free time and snack time. During class, he would often seek the teacher's attention by pointing out what his peers did not do. He appeared talkative and flexible during changes in routine. Student would repeat to other students the teacher's directions and perseverated on telling the other students what they should be doing. Student responded to redirection but then would resume telling the others what they should be doing again. Leuthold noted that at times Student's conversations were preservative in nature such as talking about something that had happened outside of school repeatedly and out of context. During testing, Student was cooperative and was more engaged in tasks involving visual stimulus than those presented orally. At times

Student would squint and roll his head back and appeared distant and detached from his environment. During these times, the assessor had difficulty reengaging Student using verbal prompts. Student was also easily distracted by outside noises, and he did demonstrate perservative thoughts and self stimulatory behaviors.

37. On October 23, 2008, Leuthold administered the KABC II to gather a picture of Student's processing and cognitive abilities. The KABC II divides cognitive functioning into two types: sequential processing, which requires a person to process information in a step-by-step way and measures verbal and visual short-time memory; and simultaneous processing which is measured by visual patterns and arriving at a instantaneous answer. Simultaneous processing also measures nonverbal reasoning abilities. Student's overall cognitive abilities fell in the below average range compared with peers his own age. In activities requiring minimal use of language, Student also was in the below average range. Student had a mental processing composite score of 80 which placed him in the ninth percentile and below average. Student's scores in the specific areas were as follows: nonverbal index 81, 10th percentile, below average; short-term memory 88, 21st percentile, average; visual processing 90, 25th percentile, average; and crystallized knowledge (breadth and knowledge acquired in one's culture) 82, 12th percentile, below average.

38. The SIB-R measures adaptive behavior through a rating scale which was completed by Parents. Student's overall full composite score, Broad Independent Living, was 100 which placed Student in the average range for his age and an age equivalency of five years, three months (5-3).⁷ Student received age equivalent scores on the composite areas of 4-8 for motor skills, 6-6 for personal living skills, 5-7 for community living skills, and 4-4 for social interaction and communication skills. Overall, Student

⁷ Student's actual age at the time of the assessment was five years, four months.

demonstrated normal problem behaviors; but he also demonstrated uncooperative and socially offensive behaviors which were "slightly serious and occurs one to ten times per day." Based on his levels of functional independence and problem behaviors, Student will "need limited support, about the same as others his age."

39. The ASDS comprises rating scales which were given to Mother and Martinez, Student's teacher. The ASDS is utilized to identify persons who manifest characteristics of Asperger Syndrome. The individual is rated in five areas: language, social, maladaptive, cognitive and sensorimotor abilities. The scores are then compared to a national sample of persons who have been identified as having Asperger Syndrome. Martinez's ratings indicated an "unlikely probability" that Student has Asperger Syndrome; while Mother rated Student in the "possibly" range. Martinez and Mother also rated Student on the GARS, which resulted in a "very low probability of autism" when compared to the norm group of persons who were diagnosed with autism. Martinez observed behaviors which included: avoids eye contact; stares at hand, objects or items for at least five seconds; flaps hands or fingers; repeats words verbally; repeats words out of context; repeats phrases over and over; avoids looking at speaker when his name is called; inappropriately answers questions; looks away when someone looks at him; is unaffectionate; uses toys or objects inappropriately; and responds negatively when given commands and requests. Mother observed that Student repeats or echoes words; repeats words out of context; repeats phrases over and over; uses pronouns inappropriately; inappropriately answers questions about a story; avoids eye contact; does certain things repetitively; becomes upset when routines are changed; responds negatively to commands; had developmental delays before 36 months; did not cry when approached by unfamiliar persons during first year; and appeared deaf to some sounds but heard others.

40. Leuthold concluded by recommending that Student presents with "'autistic like' behaviors as defined by the California Education Code," and that "[t]he disorder is adversely affecting [Student's] educational performance resulting in significant delays or irregular patterns in learning, or both."

Speech and Language assessment

41. Gamelin has a clinical and rehabilitation services credential and has been a SLP since 2000 in public schools. She received her B.A. and M.A. in communicative disorders from California State University, Fullerton. She was assigned to and did provide speech and language services to Student during the 2008-2009 school year. Student was assessed over several sessions. Gamelin administered the Expressive One Word Picture Vocabulary Test Revised (EOWPVT-R), Receptive One Word Picture Vocabulary Test Revised (ROWPVT-R), Preschool Language Scale-Fourth edition (PLS-4), the Comprehensive Assessment of Spoken Language (CASL), the Articulation Screener of the Preschool Language Scale-4, and the Clinical Evaluation of Language Fundamentals-4 (CELF-4). During testing, Student was cooperative and his attention span appeared good for his age level, although he did demonstrate at times low levels of impulse control by pointing to pictures and naming items before he was asked a question. He frequently demonstrated high levels of perservative thought and was unable to focus on the task or question asked but compulsively talked about something which occurred a few minutes earlier or something completely unrelated but which he found more interesting. Gamelin would allow Student extra time, redirect him, or do multiple repetitions if needed for Student to stay on task and focus on the activity or question. Language skills below the seventh percentile level indicate an area of significant deficit. Student did not have any articulation problems nor did he demonstrate any speech disorder or phonological disorder.

42. The EOWPVT-R assesses the ability to name pictures of items, people, actions and concepts. The ROWPVT-R assesses the ability to identify a picture named aloud. Student received standard scores of 72 on the EOWPVT-R which was in the third percentile and had an age equivalency of 3-1; while on the ROWPVT-R, he received an 85 which was in the 16th percentile with an age equivalency of 4-0. Student's test results demonstrated that his understanding and use of vocabulary skills was below age expectations. Student struggled with naming target vocabulary concepts that were on target. He also was confused and could not retrieve accurate labels for some common items and actions. Student was unable to identify or name many common items. The PLS-4 was administered to assess receptive and expressive language skills. Student had a standard score of 76 in total language which was in the fifth percentile and had an age equivalency of 4-2. In expressive language, he received a 73 which was in the 14th percentile with an age equivalency of 4-4; and he scored a 73 in auditory comprehension which was in the fourth percentile with an age equivalency of 4-1. Student had a particular deficit in understanding exactly what was being asked of him and to answer questions or make comments on target. The CASL is another measure to determine a child's level in expressive and receptive language. In the receptive sub-tests, Student was in the fifth percentile in basic concepts (score of 75) and the first percentile (67) in paragraph comprehension. In expressive sub-tests, he was in the sixth percentile (77) in antonyms, 10th percentile (81) in sentence completion, 19th percentile (87) in syntax construction, and the third percentile (71) in pragmatic judgment.

43. Student's teachers completed the pragmatics profile of the CELF-4 which gave information regarding Student's communication skills in natural contexts. Student received a score of 114 with a score of 99 or greater as the criterion. Student's teachers felt that he has adequate communication abilities when examining skills in context and when compared to his peers. Areas of difficulty were maintaining topic, avoiding the use

of repetitive and redundant information, asking appropriate questions, responding or giving appropriate advice or suggestions, and apologizing or accepting apologies appropriately. The teachers felt that Student was doing very well regarding non-verbal communication such as reading facial cues, body language and voice tone.

44. Gamelin concluded that Student was “presenting as a child with a severe receptive and expressive language disorder.” She recommended a number of strategies that would benefit him such as shortening and repeating directions, enhancing verbal information with visuals, and giving him additional time to respond to questions or react to directions.

ABBEY’S NEUROPSYCHOLOGICAL EVALUATION

45. Kathleen Hurwitz, M.D., Student’s physician, recommended that Student be evaluated by a pediatric psychologist. Parents saw a segment on the television show “Good Morning America” which featured Dr. Fernando Miranda and the Bright Minds Institute, a treatment center for children with learning problems. Dr. Miranda saw Student in September 2008 and then referred Student to Richard D. Abbey, a neuropsychologist, to conduct the evaluation. Abbey received a B.A. in psychology from California State University, San Marcos, and a M.A. in psychology and Ph.D. in clinical psychology from Texas Tech University. He was a post-doctoral neuropsychology fellow at Cincinnati Children’s Hospital Medical Center from September 2005 through August 2007. Since September 2007, Abbey has maintained a private pediatric neuropsychology practice and been on staff at the Lucile Packard Children’s Hospital at Stanford University.

46. Abbey conducted his evaluation on November 1 and 2, 2008 at the Loma Linda University Medical Center.⁸ Abbey obtained background information from a parental interview, a review of medical records, and a review of school records which included the District's initial assessment and a draft of an IEP. Abbey administered the Wechsler Preschool and Primary Scale of Intelligence-Third Edition (WPPSI-III); VMI; GARS-2; Behavior Rating Inventory of Executive Function- preschool version (BRIEF); and the Vineland-2nd Edition (Vineland-II). During testing sessions, Student perseverated on a clock in the testing room, which had to eventually be removed. Although Student was focused when testing began, he needed frequent redirection thereafter. Student would only tolerate five minutes of testing before he started flapping his hands to indicate he needed a break. In order to receive verbal responses, the examiner needed to make eye contact with Student.

47. On the WPPSI-III, Student obtained a verbal IQ score of 83 which is in the 13th percentile and in the low average range. Student's performance IQ was 105 and placed him in the 63rd percentile and in the average range. The 22 point discrepancy indicated to Abbey that Student had a weakness in verbal intellectual reasoning skills. Student demonstrated strengths in visuospatial skills although he did have problems copying an "x," a triangle and a lining up figures. Student's general language skills varied. In the picture naming section, Student was mildly impaired. He was average in his ability to articulate vocabulary, although he struggled to provide clear definitions for most words and needed extended time to formulate his responses. Student was average in the one-word receptive vocabulary portion.

⁸ In his written report, Abbey states that the evaluation occurred at Loma Linda, but during testimony, Abbey stated that it took place at the Brentwood location of the Bright Minds Institute.

48. In the area of executive functioning, Student scored between the 55th and 88th percentile on the various scales of the BRIEF, which was completed by Parents. There was "mild concerns" as to Student's ability to control impulses and behavior, emotional control, and to utilize working memory. As to adaptive behavior, the parent ratings on the Vineland-II yielded a score within normal limits. Student was in the age-appropriate range in the areas of communication, daily living skills, socialization and motor skills. Problem behaviors identified were in the area of externalizing problem behavior including intentionally disobeying authority, temper tantrums, impulsivity, and stubbornness. Abbey noted that the parent ratings indicated that Student's adaptive functioning was within normal limits "appeared to be an overestimation of [Student's] abilities in the areas of communication and socialization."

49. Student's social functioning was measured by the GARS-2 which was completed by Parents. The parental rating yielded an overall Autism Index Standard Score of 76 which was in the fifth percentile. Parents noted that Student repeats words or phrases he hears; avoids making eye contact when spoken to; uses pronouns inappropriately; uses gestures in lieu of words; and inappropriately answers questions. Parents also indicated that Student engages in stereotyped behaviors including staring at hands and objects; whirling and turning in circles; and walking on tip toes. Additionally, Parents indicated that Student had difficulties with social interactions, becomes upset in when routines change, and withdraws from social interactions.

50. Abbey diagnosed Student with Autism Disorder and ruled out Asperger's Disorder. Abbey concluded that Student's autistic symptoms "are interfering with [Student's] social and academic functioning." Abbey testified that Student can perform at the level of his peers when he focuses, as he does well when re-directed.

ABBEY'S RECOMMENDATIONS

51. In light of his evaluation and diagnosis, Abbey made the following recommendations for Student's IEP:

- a. Student should receive "intensive speech therapy" due to his impairments in language pragmatics and expressive and receptive language. Student required individual speech therapy because of his high levels of distractibility and self-stimulation associated with his autism. He would also benefit from group speech sessions which emphasize social skills. Additionally, Abbey recommended that Student should receive "social instruction" throughout the day such as cooperative activities with peers.
- b. Student should be placed in a full-inclusion classroom with a full-time classroom aide. The aide would closely monitor Student and redirect him to ensure that he is able to stay on task. Lessons should be highly structured and be able to be completed in short-time intervals. Additionally, accommodations need to be made, such as preferred seating, to keep any distractions to a minimum.
- c. Student's teacher should allow Student to be active in class without being disruptive by permitting him to do classroom duties such as board erasing and handing out papers. This will improve his social skills and increase his motivation to participate.
- d. Information given to Student should be presented in "novel ways" and in multiple modalities because of his weaknesses in language.
- e. Interventions should be implemented to increase Student's engagement and flexibility in developing appropriate tasks and play which focus on replacing problem behaviors with more conventional behaviors. This should also

emphasize independent organizational skills and behavior needed to succeed in a classroom.

- f. Collaboration between teachers and Parents is needed to increase target behavior and reduce inappropriate behaviors. Abbey suggested that one approach is to utilize a daily report card which is linked to home based rewards.
- g. Student should be given OT because of mild impairments in psychomotor functioning which emphasizes handwriting and general visual motor integration.

NOVEMBER 20, 2008 IEP MEETING

52. On November 20, 2008, the IEP team reconvened for the annual meeting and to develop a new IEP, and review the results of the recent District assessment. Parents did not inform the IEP team that Student had recently been evaluated by Abbey although the evaluation had already taken place. Attending the meeting was Mother; Father; Andy Banks, administrative designee; August; Martinez; Gamelin; Knudsen; Diephouse; and Leuthold. Each member of the assessment team presented a report on their assessments. Parents asked questions as to the reports and the team discussed the reports. Because of time constraints, the team agreed to continue the meeting to December 4, 2008. The team agreed that during the next session present levels of performance and progress on prior goals would be discussed. Parents were given a draft copy of the IEP so as to allow Parents to review a draft of the proposed goals for the next year.

DECEMBER 4, 2008 IEP MEETING

53. On December 4, 2008, the IEP team reconvened for the continued annual meeting. Also in attendance was Zhanna Preston, the District special education director.

On the prior day, Parents had submitted to the District a proposed agenda for the meeting which included proposed services and goals in the areas of OT, small group speech, individual speech, and kinder-readiness teacher. Parents also sought to have Student remain in the Kinder-Readiness program for the remainder of the school year and then enter Kindergarten at his home school with a one-to-one aide for the 2009-2010 school year. Student's present teacher, Martinez, reported that Student knew his colors, shapes, numbers and all upper case letters except "x" and 23 lower case letters (missing d, l, and q). Student continued to have problems in retelling stories, answering questions appropriately, and perseverating. Student knew the class rules and continually reminded his classmates of them. Parents and the team agreed as to Student's present levels of performance. Gamelin led a discussion as to Student's levels in communication which reviewed the progress made on each goal. The team then discussed the proposed draft goals from the District and the proposed goals presented by Parents. Parents disagreed as to the proposed baselines for each of the goals. The team agreed that more information should be gathered to collect a more accurate baseline for some of the goals discussed. It was agreed that Leuthold would conduct a classroom observation because of parental concerns that Student's perservative behaviors would hinder his academic progress in Kindergarten where the academic demands are higher. The team agreed to reconvene in January 2009.

LEUTHOLD'S DECEMBER 8, 2008 OBSERVATION

54. Leuthold arranged with Martinez to conduct a classroom observation of Student while the class engaged in nonpreferred activities so as to gauge his perservative behaviors. Leuthold arrived at 10:00 a.m. while the class was in circle time and the teacher was reading a story. Student sat on the floor and did not appear to be interested in the story and he kept looking at his watch. When the teacher asked the class a question, Student paid attention and did not need redirection. Then the class

transitioned to center time. Student was with three peers when he was directed to trace his name using three different crayons. He transitioned to this activity without the need for additional prompting. At the table, Student called to the teacher that he was tracing his name using only a single crayon. The teacher reminded Student of the task. Student then helped another child pick out crayons for his drawing. The teacher instructed Student to let the child pick out his own crayons and Student complied. Student then finished his project using three crayons and shouted out that he was finished. The teacher then instructed him to trace the numbers 1, 2, and 3 which she wrote under his name. Student did so without further direction. Student was then directed to write his name, and he replied that he could not. The teacher told him he could do it, and that task was accomplished. Leuthold noted that she saw no perservative behavior interfering with the task which required teacher redirection.

JANUARY 15, 2009 IEP MEETING

55. On January 15, 2009, the IEP team reconvened to complete Student's IEP. In addition to Parents, attending were Brent Weaver, a District special education program specialist; Danielle Rainey, occupational therapist; Gamelin; Diephouse; and Martinez. The team again reviewed Student's present levels of performance. Martinez reported that Student required two to three prompts during activities which took 10 minutes. When the activities were 15 minutes in length, Student required five to six prompts. Student, at times, became disengaged and interrupted which required a prompt to redirect him on task. Martinez noted that Student knew his shapes but did not know the shape names. Martinez estimated that Student initiated conversations with peers approximately 50 percent of the time. Leuthold then reviewed her December 8, 2008, classroom observations. Parents joined the District team members in agreeing to the present levels of performance.

56. The team then discussed the Abbey report.⁹ Leuthold noted that the two reports reached similar conclusions including as to Student's strengths and weaknesses and his having autism and not Asperger's Disorder. The main difference between the two evaluations was that Student received higher IQ and performance scores from Abbey's testing than Leuthold's although the scores were in the same range. Gamelin felt that Abbey was not qualified to make recommendations as to speech and language as he had not conducted any standardized tests nor was he qualified as was not a SLP. Gamelin also disagreed that Student required individual speech therapy sessions as he was more distracted during individual sessions than in group ones.

57. The team then reviewed Student's progress on the goals from the past year's IEP. Parents opined that Student had not met three of his four goals. As to Goal One (attending), Parents felt the goal was not tracked and not met although Student had made progress as to attending. The team agreed that Student had not met Goals Two (receptive language) and Three (expressive language-answering questions) although they were partially met. The team felt that Goal Four (expressive language-describing the use of items) had been met. The team adopted six new goals for Student. The goals, which were to be met by January 15, 2010, were as follows:

- a. Goal One (communication development) was that Student would be able to use two descriptive words describing objects in 30 different pictures with 90 percent accuracy. Student's baseline was zero as he was unable to provide such information during testing situations.

⁹ The IEP itself omits mention of the discussion on the Abbey report. Leuthold and Gamelin testified that the report was discussed. Mother testified that the report was mentioned at the meeting and that Gamelin had commented that Abbey's testing may have "voided out" testing conducted by the District.

- b. Goal Two (communication development) required Student to be able to answer 20 who, what and where questions regarding pictures and single sentences read aloud with 90 percent accuracy. During testing and in the classroom, Student demonstrated poor accuracy for answering questions involving spatial, time and qualitative concepts, plus he had difficulty understanding what was being asked.
- c. Goal Three (communication development) required Student to independently name eight presently known pictures of items in the categories of fruits, transportation, farm animals, zoo animals, kitchen items, bedroom items, playground items, foods, clothing, furniture, and school items. Student's baseline was a list of his current ability to name such items in the listed categories.
- d. Goal Four (gross/fine motor development) required Student to copy an "x" and a triangle with no more than one verbal prompt per shape. Student's baseline was that he was able to copy a vertical and horizontal line, a circle, cross, and an oblique line.
- e. Goal Five (communication development) was for Student to follow a two-step direction involving spatial concepts, time concepts, and qualitative concepts with 90 percent accuracy independently. The baseline was that Student could follow two-step directions with 80 to 90 percent accuracy as to top/bottom, on/off, whole/part, under, in, and in front. He had an accuracy rate of 30 percent for knowledge of first and last, and he overgeneralized "on" when answering "where" questions.
- f. Goal Six (social/emotional/behavioral) required Student to independently answer 20 questions as what to do in certain situations with 90 percent accuracy. The baseline was that Student could only answer two of nine such

questions pursuant to the pragmatic subtest of the CASL, which had been administered by Gamelin.

58. Father spoke of his concerns regarding Student's weakness in receptive language which he believed warranted one-to-one intervention. Parents requested that Student receive one-to-one speech therapy based on their view that Student had not progressed on his speech goals. Parents also pointed to Abbey's recommendation that Student needs individual speech because of his inattention, impulsivity and perservative behaviors.¹⁰ Gamelin responded that Student did much better in a small group. Gamelin stated that there were ways that she could provide Student with more directed therapy within the group sessions. She also questioned what the basis for Abbey's speech recommendations were based since Abbey did not cite to any standardized testing in support.

59. The District's offer of FAPE was presented to Parents. The offer was to continue Student's placement in his current preschool program, provide OT once per week for 30 minutes in a small group, pull-out small group speech and language therapy two 30 minute sessions weekly, and one individual speech and language therapy session weekly for 15 minutes. The District also agreed to fund the preschool program for the remainder of the 2008-2009 school year. Another IEP team meeting was scheduled to be held by the end of April 2009, as to Student's transition to Kindergarten for the next year. The team proposed to conduct a special circumstances instructional aide assessment to determine Student's need for a one-to-one aide for Kindergarten

¹⁰ Abbey also noted that Student "would also benefit from group speech therapy sessions which social skills are emphasized to provide opportunities to generalize what he has learned in individual therapy."

(hereafter referred to as the aide assessment). Parents were presented with an assessment plan, which they took home to review.

60. Parents consented to the IEP on February 4, 2009, with two exceptions: (a) Parents contended that the goals adopted were “based in (sic) limited and inaccurate information” although they consented to the implementation of the goals,¹¹ and (b) that Student required “individualized aide support.” On February 26, 2009, Mother signed and consented to the proposed assessment plan which was returned to the District on March 2, 2009.

THE AIDE ASSESSMENT

61. The aide assessment was done by a team consisting of Leuthold, Gamelin, and Kathy Dixon, then a program specialist. Student’s current teachers, Martinez and August,¹² reported that Student was able to follow established classroom procedures and routines, but he required prompting. Student was able to follow the class behavior management system that all the other students follow. He was able to work on the preschool curriculum without the need for modification or accommodations. Student played with his peers though it was often one-sided with Student doing all the talking. He directed his peers and was very bossy. Student possessed limited turn taking skills and often hummed, poked, repeated phrases over and over which tended to annoy classmates and required redirection. Gamelin reported similarly to the teachers and concluded that Student required “lots of adult time, peer/staff patience and attention.” She also noted that Student demonstrated many autistic traits such as perseveration,

¹¹ Parents did not offer any specificity.

¹² August assisted Martinez in teaching the preschool class.

intrusive thoughts, and self-stimulatory talk and actions that “sometimes make him unavailable for learning.”

62. Leuthold observed Student on class on March 19, 2009 for 50 minutes, and Dixon observed him for one hour 20 minutes on March 25, 2009. On March 19, 2009, Student failed to complete assigned tasks and did not follow repeated instructions, although he interacted with classmates. During the March 25, 2009 observation, Student was mostly on task and easily redirected. He stayed on task even with loud noises and other distracting activities ongoing. He did interact with peers and they become distracted by making tornados in a bottle.

63. The assessors concluded that Student was able to follow directions with prompting and handled change when his questions were answered and with redirection. He interacted with peers although he did become bossy. At times, Student might disrupt class which required prompting, and he was able to follow class rules and procedures.

APRIL 23, 2009 IEP MEETING

64. On April 23, 2009, the IEP team met for the Kindergarten transition meeting. The team agreed that Student’s annual IEP date would be February 4, 2010. Rainey presented an occupational therapy assessment she had performed. Martinez then reported that Student was experiencing difficulty with rhyming. Martinez also reported that Student could rote count to 50, identified all shapes, recognized all shapes, knew all 26 upper and lower case letters, and knew 17 sounds. Gamelin reported that Student had continued to make progress conversationally with his peers. The IEP team adopted eight goals for Student in the areas of communication development (four goals), social/emotional/behavioral (one) and gross/fine motor development (three). The adopted goals followed closely those proposed by Parents for the December 4, 2008 IEP meeting. The team then discussed Student’s placement for the next school year. Gamelin reviewed Student’s strong academic abilities. Dixon reviewed the placement

options available including general education Kindergarten, SDC, and the resource specialist program. Parents desired that Student be placed in a general education Kindergarten class because of his strong academic skills and the progress he made in all other areas. Mother suggested that Student be placed in a morning session as Student performs better then. Based on Student's abilities and level of functioning, Dixon recommended that the appropriate placement for Student would be in a general education Kindergarten class. The team determined that the appropriate placement would be in a morning general education Kindergarten at Student's home school.

65. The team then reviewed the aide assessment report. Dixon reported that Student was observed responding to teacher direction and that he does not require exceptional levels of redirection. Gamelin stated that Student does require verbal and physical prompts to correct his perservative behaviors. Leuthold noted that Student performed better in structural settings and required increased redirection during unstructured activities. The team noted that the Kindergarten teacher only receives assistance during the one hour daily learning center time. Mother added that Kindergarten would increase the academic demands and pressure on Student which might cause an increase in preservative behaviors. The team discussed the restrictive nature of an aide including issues of dependence and attachment which may develop. Mother suggested that the aide monitor Student and intervene only when he requires redirection. Karen Michaud, school principal acting as the administrative designee, opined that it is crucial that aide support be provided at the start of the school year since Student was entering a new school and would be with new classmates and a new teacher. The team agreed that Student should be provided a one-to-one aide who would monitor Student as well as keep a record of the frequency and level of prompts given to Student.

66. The District's FAPE offer was to provide an intensive academic instructional one-to-one aide five days per week for three and a half hours; group speech and language therapy twice per week for 30 minutes each session; individual speech and language therapy once per week for 15 minutes; and small group OT once per week for 30 minutes. Parents accepted the District offer and signed their consent on April 27, 2009.

MCCANN'S SPEECH AND LANGUAGE EVALUATION

67. On May 19, 2009, Student was given a speech and language evaluation by the Lucid Speech & Language Center in Murrieta at the request of Parents. The evaluation was conducted by the Lucid clinical director. Megan McCann has a B.A. and M.A. in communication disorders from California State University, Fullerton. She is a licensed SLP. From 1993 to 1995, McCann worked as a speech language and hearing specialist at the Orange (1993-1994) and Corona-Norco (1994-1995) school districts. From 1995 through 1997, McCann was a SLP at the Lake Elsinore Unified School District. Since 1997, she has been in private practice with Lucid, which she founded.

68. Before conducting her evaluation, McCann requested that parents provide her with background documents including past speech and language assessments. Parents provided a copy of the April 23, 2009 IEP, the aide assessment, a prescription by Student's physician which simply said he was diagnosed with Asperger Disorder,¹³ and the Abbey neuropsychological evaluation report only. Parents informed McCann that they were concerned that Student's pragmatic, receptive language and expressive language skills were not being adequately addressed by the District SLP. Parents gave permission for McCann to speak to Student's current SLP, although McCann did not feel

¹³ See footnote 2 on page 6.

the need to do so because of the recent the IEP. At the time of testing, Student was five years, 10 months old.

69. McCann administered the EOWPVT, ROWPVT, the expressive communication subtest of the PLS-4, and the Test of Language Development-Primary: Fourth Edition (TLD-P). McCann observed that Student as "an attentive and happy child who remained on task appropriately." On the EOWPVT and ROWPVT, Student received identical standard scores of 84 which were in the 14th percentile with an age equivalent score of 4-5. McCann noted that these scores demonstrated that Student's expressive and receptive language skills were "commensurate," and that "[w]hile scores fall in the below average range, they are not low enough to be considered of clinical concern." On the PLS-4 expressive communication subtest, Student received a standard score of 86 which fell in the 18th percentile with an age equivalency of 4-9. McCann observed that while Student scored in the below average range, the score was "not currently low enough to be considered of clinical concern."

70. On the TLD-P4, Student's percentile scores were Listening-27, Organizing-9, Speaking-12, Grammar-39, Semantics-3, and Spoken Language-12. In the Picture Vocabulary subtest where Student had to pick the correct picture out of four pictures verbally presented, he scored in the 16th percentile with an age equivalency of 4-0. In Word Articulation (63rd percentile, Age equivalent of 6-3), Morphological Understanding which is a completion of partial utterances (50th, 5-6), Syntactic Understanding (50th, 5-6), Sentence Imitation (25th, 4-6), and Picture Vocabulary (16th, 4-0), McCann noted no clinical concerns in these subtests. On the Relational Vocabulary subtest, Student was required to state the relationship between two presented items. He scored in the fifth percentile with an age equivalency of below 4-0. McCann concluded as to this subtest "[a]t this time, this task is considered of concern." The Oral Vocabulary subtest required Student to orally define single words. Student was able to define the

item's function, but he never presented additional physical descriptors such as color, shape and size. Student fell in the second percentile with a below 4-0 age equivalency. McCann also labeled this subtest as an area of concern.

71. McCann assessed Student's pragmatic skills by observations and parental reports throughout the testing and while he was in the Lucid lobby in the presence of other children.¹⁴ Student exhibited difficulty responding to questions based on topics selected by his conversational partner. He often imitated back what his partner said when Student did not know the answer. Student required contextual cues when he told stories. He also had difficulty switching topics during conversations as he perseverated on topics he found interesting. He did maintain eye contact. McCann noted that pragmatics was an area of concern.

72. McCann concluded that Student "presents with a moderate pragmatic disorder and mild expressive language disorder secondary to a diagnosis of Asperger Syndrome."¹⁵ McCann recommended that Student should receive two 30 minute individual speech and language therapy sessions weekly by a private provider for six months when a reassessment would occur. These sessions would focus on Student's deficits in pragmatic and expressive language. She also recommended that Student continue to receive school based speech and language therapy. She also recommended six month goals for pragmatics and expressive language. The pragmatics goals were for Student to produce five conversational turns with a partner in two out of three attempts; accurately respond to questions in eight out of 10 attempts; and accurately retell stories

¹⁴ McCann testified that she utilized observations to measure pragmatics as her concerns are "clinical," while school districts utilize standardized testing instead.

¹⁵ McCann testified she mistakenly assumed that Abbey had made a diagnosis of Asperger Disorder in lieu of Autistic Disorder. (See Factual Finding 50.)

in nine out of 10 attempts. The expressive language short term goals were for Student to describe the relationships between orally presented items with 80 percent accuracy, and to accurately describe and define items with three to four attributes in eight of 10 trials. McCann did not include a receptive language goal as this was not an area of concern.

73. McCann also admitted that she would not have administered the PLS-4 subtest had she been aware that Gamelin had administered the PLS-4 within a one year period. McCann also testified that the second and fifth goals of the April 23, 2009 IEP dealt with pragmatics. As to Abbey's report, McCann had concerns as to his speech and language recommendations since he is not a SLP. She testified that she sought to confirm his findings rather than question the findings.

74. Shortly thereafter, Student commenced receiving speech therapy by a Lucid SLP.

AUGUST 19, 2009 IEP MEETING

75. On August 19, 2009, the IEP team reconvened at the request of Parents to review Student's progress on his speech goals and whether speech and language therapy should be increased. In attendance were Parents; Michaud; Amy Brennan, occupational therapist; Rainey; Jarilyn Parra (hereafter JParra), Student's Kindergarten teacher; Jennifer Pyle, Student's then current SLP;¹⁶ and James Schneider, program specialist. Parents provided to the IEP team a copy of the Lucid evaluation to the IEP team at the meeting. Pyle felt that the Lucid evaluation was similar to the District's past

¹⁶ Pyle received a B.A. in communication disorder in 1997 and an M.A. in speech pathology in 1998 from the University of the Pacific. She has worked as a SLP in hospital settings before joining the District in 2003.

assessment results. Based on the report, she noted that Student had met all of the benchmarks to the goals set in the last IEP. The team discussed Student's progress on his IEP goals. Father voiced concerns that Student was below the seventh percentile in vocabulary. Father did indicate that he was pleased to recently observe Student engage his teacher in a four-turn-taking conversation (a five-turn-taking conversation was one of the goals proposed by McCann). Parents stated that they felt that Student had made good progress over the summer in individual speech therapy at Lucid and requested that his individual speech services be increased. Pyle reviewed Student's goals and objectives and noted that he had met all his benchmarks while working with Gamelin. The District team members agreed that Student had met his benchmarks. Pyle, who had been providing Student with speech services for two weeks, noted that Student was more easily distracted during one-to-one sessions than in small group sessions. The District members did not believe additional services were required because Student had met his benchmarks. Pyle suggested that she could work in collaboration with Student's aide to incorporate speech in games and activities in the classroom which could be done with other children. Mother had concerns that this would lead to the other children making fun of Student. The IEP team agreed to add a weekly collaboration between Student's aide and the SLP once weekly for 15 minutes as suggested by Pyle. Parents agreed to allow the District to implement this service but did not agree to the level of speech services.

2009-2010 SCHOOL YEAR

76. Student was assigned to JParra's Kindergarten class for school year 2009-2010. JParra has a B.A. in psychology from San Diego State University and a M.S. in Education with an emphasis in Elementary Reading and Literacy from Walden University. She has taught Kindergarten in the District since 1993. She was the school's Teacher of the Year award winner in school year 2008-2009, and she has been for 13 years the

District literacy leader. When Student started Kindergarten in early August 2009, Student was assigned an aide, Heidi Edwards. JParra placed Student in the middle level of the class academically. He continually interrupted during class and had trouble transitioning from one activity to the next. On September 24, 2009, JParra stated in a written progress report that Student was making satisfactory progress in the areas of mathematics, writing, large muscle control and small muscle control; but he needed improvement in reading. She also noted that Student needed work on recognizing and producing rhymes. As to social skills/work habits, Student made satisfactory progress in attendance and following classroom and school rules although he needed to work "on following directions even when we don't want to." Starting in October/November 2009, Student showed improvement and stopped interrupting during class. On the November 4, 2009 Trimester Report,¹⁷ Student received academic grades of 4 in all areas except producing rhymes which was a 1. In effort, Student received either S or E in all areas except "demonstrates self-control." On the second Trimester Report, Student received a 4 in all academic areas and no effort grade below an S. Currently, Student is performing at grade level in all academic areas save mathematics where addition and subtraction has recently been introduced. Student's self-control and behaviors have markedly improved. Although immediately following Winter Break he needed increased prompting, Student currently does not require prompting and is able to function independently. Student is able to recall events accurately and participates in conversations with his peers. JParra

¹⁷ In the Trimester reports, students are graded in academic areas and effort areas. In academics areas, the grades are 1 (far below basic), 2 (below basic), 3 (basic), 4 (proficient), and 5 (advanced). Effort grades are N (needs improvement), S (satisfactory), and E (excellent).

opined that Student no longer requires the service of a one-to-one aide to access his education.

77. Pyle began providing speech services to Student in August 2009. Following the August 19, 2009 IEP, Pyle began corroborating with Edwards on ways to generalize the skills which Student was learning during speech sessions. Student's language skills have continued to improve and he has met all his benchmarks on his annual goals based on her observations in sessions and in class, reports from teacher and aide, and data she collects. During classroom observations, Pyle has observed Student interacting with teachers and his aide, engaging his peers in conversations with turn taking, and even telling jokes to adult classroom volunteers. Student's level of behavior and engagement is on par with those of the others in the class. Pyle opines that Student is presently functioning at a higher level than shown on the latest assessments.

78. Parents contend that Student has not received all of the speech sessions required by his IEP. Pyle admitted that Student has missed some sessions because of District testing as well as during school activities such as the Thanksgiving show rehearsals. Pyle received a request from Mother that Student be included in all school activities even if the activities are during the time for speech therapy. Pyle testified that these sessions were rescheduled and have been made up or were scheduled to be made up.

EVIDENCE OF COSTS INCURRED

Preschool

79. Based on Mother's testimony and invoices produced, Parents paid the District the amount of \$4,762.00 to enroll Student in the Kinder Readiness program.

Abbey evaluation

80. Mother testified that Parents were billed a total of \$4,600.00 by Bright Minds Institute for the Abbey evaluation which took place on November 1-2, 2008 (see Factual Finding 46). Student also introduced into evidence a copy of the Bright Minds invoice dated December 7, 2008 (Exhibit S-23). The invoice lists dates of services as November 1, 2, 25 and 26, 2008 and December 1, 2008. Three hours were billed on November 1st and 3 on November 2, 2008. The invoice also lists five hours on November 25th, six on November 26th, and five on December 1, 2008. The hourly rate charged was \$200.00. The invoice entries all list the charges are for neuropsychological testing and interpreting and report writing. Abbey testified that he charged \$2,300.00 to conduct the evaluation. Parents have not produced evidence proving amounts paid for the evaluation. Accordingly, the ALJ finds that the total cost incurred for the Abbey evaluation was \$2,300.00. This is based on Abbey's testimony and the invoiced amounts for the actual testing days, which equal \$1,400.00, and for the additional amounts to prepare the report and reasonable costs incurred by Abbey.

Lucid evaluation and Speech Therapy Services

81. The cost of the McCann evaluation was \$157.50, which Parents have paid.

82. Individual speech therapy sessions were given to Student by Lucid SLP pursuant to McCann's recommendation in her evaluation report. In 2008, Student attended individual sessions six times in June, eight in July, seven in August, eight in September, 10 in October, 10 in November, and seven in December. Student also received two sessions in January. The cost of each session was \$100.00, except the June 26, 2008 session where the charge was \$400.00. The Lucid invoice indicates that insurance paid for a portion of the therapy sessions. The total amount charged Parents and paid by them, was \$2,487.50, which included the McCann evaluation.

LEGAL CONCLUSIONS

APPLICABLE LAW

BURDEN OF PERSUASION

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

ELEMENTS OF A FREE APPROPRIATE EDUCATION (FAPE)

2. Under both the federal Individuals with Disabilities Education Act (IDEA) and state law, students with disabilities have the right to a free appropriate public education (FAPE). (20 U.S.C. § 1400; Ed. Code, § 56000.)¹⁸ A FAPE means special education and related services that are available to the student at no charge to the parent or guardian, which meet the state educational standards, and conform to the student's IEP. (20 U.S.C. § 1401(9).) A child with a disability has the right to a FAPE under the IDEA and California law. (20 U.S.C. § 1412(a)(1)(A); Ed. Code, § 56000.) In California, related services are called designated instructional services (DIS). (Ed. Code, § 56363.) DIS includes speech-language services and other services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26)(A); Ed. Code, § 56363, subd. (a); *Irving Independent School Dist. v. Tatro* (1984) 468 U.S. 883, 891 [104 S.Ct. 3371; 82 L.Ed.2d. 664]; *Union School District v. Smith*, (9th Cir. 1994) 15 F.3d 1519, 1527.) DIS services shall be provided "when the instruction and services are necessary for the pupil to benefit educationally from his or her instructional program." (Ed. Code, § 56363, subd. (a).)

¹⁸ All statutory citations to the Education Code are to California law, unless otherwise noted.

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034] (hereafter *Rowley*), the United States Supreme Court addressed the level of instruction and services that must be provided to a student with a disability to satisfy the requirements of the IDEA. The Court determined that a student's IEP must be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not require school districts to provide the student with the best education available or to provide instruction or services that maximize a student's abilities. (*Id.* at pp. 198-200.) The Court stated that school districts are required to provide a "basic floor of opportunity" that consists of access to specialized instructional and related services that are individually designed to provide educational benefit to the student. (*Id.* at p. 201.) The Ninth Circuit has referred to the "some educational benefit" standard of *Rowley* simply as "educational benefit." (See, e.g., *M.L. v. Fed. Way School Dist.* (2004) 394 F.3d 634.) It has also referred to the educational benefit standard as "meaningful educational benefit." (*N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2008) 541 F.3d 1202, 1212-1213; *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (hereafter *Adams*).) Other circuits have interpreted the standard to mean more than trivial or "de minimis" benefit, or "at least meaningful" benefit. (See, e.g., *Houston Indep. Sch. Dist. v. Bobby R.* (5th Cir. 2000) 200 F.3d 341; *L.E. v. Ramsey Bd. of Educ.* (3d Cir. 2006) 435 F.3d 384.) A child's academic progress must be viewed in light of the limitations imposed by his or her disability and must be gauged in relation to the child's potential. (*Mrs. B. v. Milford Board of Education* (2d Cir. 1997) 103 F.3d 1114, 1121.)

4. The Ninth Circuit recently reaffirmed the validity of the *Rowley* standard in analyzing FAPE in the context of the 1997 version of the IDEA. In *J.L. v. Mercer Island School District* (9th Cir. 2010) 592 F.3d 938 (hereafter *Mercer Island*), the Ninth Circuit overturned the district court's finding that *Rowley's* educational benefit standard had

been superseded by Congress when it revised the IDEA in 1997. The court found that for all intents and purposes, Congress had retained the same definition of a free appropriate public education when it reenacted the IDEA in 1997 and that it had not indicated any disapproval of *Rowley*. The court further found that Congress did not express any clear intent to change the *Rowley* FAPE standard. The court thus found that the proper standard to determine whether a disabled child has received a FAPE is the "educational benefit" standard set forth by the Supreme Court in *Rowley*. (*Id.* at pp. 949 - 951) A review of the 2004 reauthorization of the IDEA does not indicate any substantive changes in the definition of FAPE or anything in the legislative history that would support a finding that Congress intended to change or modify the educational benefit standard enunciated in *Rowley* when it reauthorized the IDEA in 2004. The Ninth Circuit's discussion regarding the lack of congressional intent to modify the *Rowley* standard is therefore equally applicable to IDEA 2004.

5 In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (See *Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer of educational services and/or placement must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. (*Ibid.*; 20 U. S.C. § 1401(9).) The IEP need not conform to a parent's wishes in order to be sufficient or appropriate. (*Shaw v. Dist. of Columbia* (D.D.C. 2002) 238 F.Supp.2d 127, 139 [IDEA does not provide for an "education . . . designed according to the parent's desires"], citing *Rowley, supra*, 458 U.S. at p. 207. See also *Miller v. Bd. of*

Education of the Albuquerque Public Schools (D.N.M. 2006), 455 F.Supp.2d 1286, 1307-1309; *aff'd on other grounds, Miller v. Bd. of Education of the Albuquerque Public Schools* (10th Cir. 2009) 565 F.3d 1232.)

THE IEP

6. An IEP is an educational package that must target all of a student's unique educational needs, whether academic or non-academic. (*Lenn v. Portland School Committee* (1st Cir. 1993) 998 F.2d 1083, 1089.) The term "unique educational needs" is to be broadly construed and includes the student's academic, social, emotional, communicative, physical, and vocational needs. (*Seattle Sch. Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500 [citing J.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106].)

7. When a child's behavior impedes his learning or that of other children, the IEP team should consider the use of positive behavioral interventions and supports, and other strategies to address that behavior. (20 U.S.C. § 1414(d)(3)(B)(i); Ed. Code, § 56341.1, subd. (b)(1).)

8. Federal and state special education law require generally that the IEP developed for a child with special needs contain the present levels of the child's educational performance and measurable annual goals, including benchmarks or short-term objectives, related to the child's needs. (20 U.S.C. § 1414 (d)(1)(A)(ii); Ed. Code § 56345, subd. (a).) The purpose of goals and measurable objectives is to permit the IEP team to determine whether the pupil is making progress in an area of need. (Ed. Code, § 56345.) For each area in which a special education student has an identified need, the IEP team must develop measurable annual goals that are based upon the child's present levels of academic achievement and functional performance, and which the child has a reasonable chance of attaining within a year. (Ed. Code, § 56344.) The IEP must contain "a description of how the child's progress toward meeting the annual goals...will be measured and when periodic reports on the progress the child is making toward

meeting the annual goals...will be provided.” (20 U.S.C. § 1414(d)(1)(A)(III).) An IEP must show a direct relationship between the present levels of performance, goals and objectives, and the specific educational services to be provided. (Cal. Code Regs., tit. 5, § 3040, subd. (c).) As indicated in these code sections, the purpose of the goals is to enable the IEP team to determine if the child is making progress.

9. The laws do not specify any particular language that must be used for goals. The comments to the federal regulations are instructive on the issue of the specificity required of IEP goals. When discussing Title 34 Code of Federal Regulations part 300.320 (2006), which mirrors the IDEA requirement for measurable annual goals, the comment stated the following:

Comment: One commenter requested clarification as to whether IEP goals must be specific to a particular discipline (e.g., physical therapy goals, occupational therapy goals). One commenter recommended that goals be explicitly defined and objectively measured. Another commenter recommended requiring IEP goals to have specific outcomes and measures on an identified assessment tool. One commenter recommended clarifying that an IEP team is permitted, under certain circumstances, to write goals that are intended to be achieved in less than one year.

Discussion: Section 300.320(a)(2)(i), consistent with section 614(d)(1)(A)(i)(II) of the Act, requires the IEP to include measurable annual goals. Further, § 300.320(a)(3)(i), consistent with section 614(d)(1)(A)(i)(III) of the Act, requires the IEP to include a statement of how the child’s progress

toward meeting the annual goals will be measured. The Act does not require goals to be written for each specific discipline or to have outcomes and measurements on a specific assessment tool. Furthermore, to the extent that the commenters are requesting that we mandate that IEPs include specific content not in section 614(d)(1)(A)(i) of the Act, under section 614(d)(1)(A)(ii)(I), we cannot interpret section 614 to require that additional content. IEPs may include more than the minimum content, if the IEP team determines that additional content is appropriate.

(71 Fed. Reg. 46662 (Aug. 14, 2006).)

10. An IEP is evaluated in light of the information available at the time it was developed; it is not judged in hindsight. (*Adam, supra*, 195 F.3d at p. 1149.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*)

11. The law requires an IEP team to meet at least annually “to determine whether the annual goals for the pupil are being achieved, and revise the individualized education program, as appropriate, to address among other matters the following: (1) Any lack of expected progress toward the annual goals and in the general education curriculum, where appropriate....” (Ed. Code, § 56341.1, subd. (d).) An IEP meeting must be called when the “pupil demonstrates a lack of anticipated progress.” (Ed. Code, § 56343, subd. (b).)

IMPLEMENTATION OF IEP SERVICES

13. A material failure to implement an IEP violates the IDEA. (*Van Duyn v. Baker School District* (9th Cir. 2007) 502 F.3d 811, 822.) But, minor failures by a school

district in implementing an IEP should not automatically be treated as violations of the IDEA. (*Id.*, at p. 821.) "A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP." (*Id.*, at p. 822.) This standard does not require that the child suffer demonstrable educational harm for there to be a finding of a material failure. (*Ibid.*)

LEAST RESTRICTIVE ENVIRONMENT

14 A child with a disability must be educated with children who are not disabled to the maximum extent appropriate. (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2);¹⁹ Ed. Code, § 56342.) A child with a disability should be removed from the regular educational environment only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. A child with a disability shall not be removed from an age-appropriate regular classroom solely because the general curriculum requires modification. (34 C.F.R. § 300.116(e).) In determining the program placement of the student, a school district shall ensure that the placement decisions and the placement are made in accordance with federal requirements regarding placing the child in the LRE. (Ed. Code, § 56342, subd. (b).)

15. When determining whether a placement is the least restrictive environment for a child with a disability, four factors must be evaluated and balanced: the educational benefits of full-time placement in a regular classroom; the non-academic benefits of full-time placement in a regular classroom; the effect the presence of the child with a disability has on the teacher and children in a regular classroom; and

¹⁹ All references to the Code of Federal Regulations are to the 2006 version.

the cost of placing the child with a disability full-time in a regular classroom. (*Ms. S. v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1136-1137; *Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404.)

PROCEDURAL ASPECTS OF FAPE

16. An IEP must be both procedurally and substantively valid. A procedural violation constitutes a denial of FAPE only if it impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a FAPE to their child, or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E); Ed. Code, § 56505, subd. (f); see also, *W.G. v. Board of Trustees of Target Range School Dist.* (9th Cir. 1992) 960 F.2d 1479, 1483-1484 (hereafter *Target Range*)). Recent Ninth Circuit Court of Appeals cases have confirmed that not all procedural violations deny the child a FAPE. (*Park v. Anaheim Union High Sch. Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033, fn. 3; *Ford v. Long Beach Unified Sch. Dist.* (9th Cir. 2002) 291 F.3d 1086, 1089.)

PREDETERMINATION OF IEP OFFERS

17. Predetermination of a student's placement is a procedural violation that deprives a student of a FAPE in those instances where placement is determined without parental involvement in developing the IEP. (*Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2004) 392 F.3d 840 (hereafter *Deal*); *Bd. of Educ. of Township High School Dist. No. 211 v. Lindsey Ross* (7th Cir. 2007) 486 F.3d 267.) Predetermination occurs when a school district 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. (*H.B. v. Las Virgenes Unified Sch. Dist.* (9th Cir. 2007) 239 Fed.Appx. 342, 244-245 [nonpub. Opn.].) A district may not arrive at an IEP meeting with a "take it or leave it" offer. (*JG v. Douglas County School Dist.* (9th Cir. 2008) 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.* (6th Cir. 2003) 315 F.3d 688, 693, fn. 3.) Although school district personnel may bring a draft of the IEP to the meeting, the parents are entitled to a full discussion of their questions, concerns, and recommendations before the IEP is finalized. (Assistance to States for the Education of Children with Disabilities and the Early Intervention Program for Infants and Toddlers with Disabilities, 64 Fed.Reg. 12406, 12478 (Mar. 12, 1999).) However, a school district has the right to select a program and/or service provider for a special education student, as long as the program and/or provider is able to meet the student's needs; 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.)

DETERMINING WHETHER AN ASSESSMENT IS APPROPRIATE AND THE REQUIREMENTS FOR OBTAINING AN INDEPENDENT EDUCATIONAL EVALUATION

18. For purposes of evaluating a child for special education eligibility, the district must ensure that the "the child is assessed in all areas of suspected disability." (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) After a child has been deemed eligible for special education, reassessments may be performed if warranted by the child's educational needs or related services needs. (34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).) The determination of what tests are required is made based on information known at the time. (See, *Vasheresse v. Laguna Salada Union Sch. Dist.* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158 [assessment adequate despite not including speech/language testing where concern prompting assessment was deficit in reading skills].)

19. In order for an assessment to be considered appropriate, the assessment materials and procedures must be selected and administered so as not to be racially, culturally or sexually discriminatory, and must be given in the student's native language or mode of communication unless it is not feasible to do so. (Ed. Code, § 56320, subd. (a).) Assessments must also meet the following requirements: 1) are provided and administered in the language and form most likely to yield accurate information on what the pupil knows and can do academically, developmentally, and functionally, unless it is not feasible; 2) are used for purposes for which the assessments or measures are valid and reliable; and 3) are administered by trained and knowledgeable personnel in accordance with any instructions provided by the producer of the assessments. (Ed. Code, § 56320, subd. (b).) Assessments must also be selected and administered to best ensure that the test results accurately reflect the pupil's aptitude, achievement level, or any other factors the test purports to measure and not the pupil's impaired sensory, manual, or speaking skills unless those skills are the factors the test purports to measure. (Ed. Code, § 56320, subd. (d).) No single measure, such as a single intelligence quotient, shall be used to determine eligibility or services. (Ed. Code, § 56320, subds. (c) & (e).)

20. The personnel who assess the student shall prepare a written report that shall include, without limitation, the following: 1) whether the student may need special education and related services; 2) the basis for making that determination; 3) the relevant behavior noted during observation of the student in an appropriate setting; 4) the relationship of that behavior to the student's academic and social functioning; 5) the educationally relevant health, development and medical findings, if any; 6) if appropriate, a determination of the effects of environmental, cultural, or economic disadvantage; and 7) consistent with superintendent guidelines for low incidence disabilities (those effecting less than one percent of the total statewide enrollment in

grades K through 12), the need for specialized services, materials, and equipment. (Ed. Code, § 56327.) The report must be provided to the parent at the IEP team meeting regarding the assessment. (Ed. Code, § 56329, subd. (a)(3).)

21. The procedural safeguards of the IDEA provide that under certain conditions a student is entitled to obtain an IEE at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502 (a)(1); Ed. Code, § 56329, subd. (b) [incorporating 34 C.F.R. § 300.502 by reference]; Ed. Code, § 56506, subd. (c) [parent has the right to an IEE as set forth in Ed. Code, § 56329; see also 20 U.S.C. § 1415(d)(2) [requiring procedural safeguards notice to parents to include information about obtaining an IEE].) “Independent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question.” (34 C.F.R. § 300.502(a)(3)(i).) To obtain an IEE, the student must disagree with an evaluation obtained by the public agency and request an IEE at public expense. (34 C.F.R. § 300.502(b)(1) & (b)(2).)

22. The provision of an IEE is not automatic. Code of Federal Regulations, title 34, part 300.502(b)(2), provides, in relevant part, that following the student’s request for an IEE, the public agency must, without unnecessary delay, either:

- (i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or
- (ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§ 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria.

(See also Ed. Code, § 56329, subd. (c) [providing that a public agency may initiate a due process hearing to show that its assessment was appropriate].)

PRIOR WRITTEN NOTICE

23. A district is required to provide prior written notice to the parents of a child whenever it proposes to initiate or change, or refuse to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(3); Ed. Code, § 56500.4.) The notice given to the parents or guardian must meet the requirements specified in United States Code, title 20, section 1415(c)(1). However, a district may use the IEP as the prior written notice as long as it meets all of the requirements of the IDEA. (34 C.F.R. § 300.503(a); 71 Fed.Reg. 46691 (August 14, 2006).) For example, in the case of *A.B. v. San Francisco Unified School District* (N.D. Cal. 2008) 2008 WL 4773417, the court held that the District's IEP offer itself constituted prior written notice to a student's parent of the District's refusal to fund a summer camp program desired by the parent in lieu of the District's offer. The court ruled that the District's offer in the IEP put the parent on notice that the district had denied her request.

TRANSITION MEETING

24. Education Code, section 56445, subdivision (a), requires that "[p]rior to transitioning an individual with exceptional needs from a preschool program to kindergarten, or first grade as the case may be, an appropriate reassessment of the individual shall be conducted...to determine if the individual is still in need of special education and services."

REIMBURSEMENT

25. Parents may be entitled to reimbursement for the costs of services they have procured for their child when: (1) the school district has failed to provide a FAPE and (2) the private placement or services are determined to be proper under the IDEA. (*School Committee of Burlington v. Department of Education* (1985) 471 U.S. 359, 374

[105 S.Ct. 1996]; *Student W. v. Puyallup School District* (9th Cir. 1994) 31 F.3d 1489, 1496.) Parents are not required to have procured an exact proper placement under the IDEA in order to be entitled to reimbursement. (*Alamo Heights Independent School District v. State Board of Education* (5th Cir. 1986) 79 F.2d 1153, 1161.)

DETERMINATION OF ISSUES

ISSUE A (I): DID THE DISTRICT FAIL TO OFFER STUDENT A FAPE BECAUSE IT FAILED TO CONDUCT A TRANSITIONAL REVIEW AND ASSESSMENT IN SPRING OF 2008?

26. Student contends that the District is obligated to hold a transition meeting pursuant to Education Code 56445, subdivision (a), to determine whether a child is ready to transition from a preschool program to kindergarten.

27. Education Code 56445, subdivision (a) only requires a school district to hold a transition meeting and conduct a reassessment when a child is going from preschool to kindergarten for the purpose of determining whether the child continues to be in need of special education and related services. Pursuant to Factual Finding 27, Student was unable to meet his burden in that Mother informed Macher of Parents' desire to have Student remain in the Kinder Readiness preschool program for the 2008-2009 school year.

ISSUE A (II): DID THE DISTRICT FAIL TO OFFER STUDENT A FAPE BECAUSE IT FAILED TO USE A VARIETY OF ASSESSMENT TOOLS AND STRATEGIES DURING THE DISTRICT'S FIRST AND SECOND ASSESSMENTS?

School Year 2007-2008 Assessments

28. Student contends that the District's 2007 assessment was inappropriate because (a) the SLP failed to utilize "a variety of assessment tools" in that (i) she did not include teacher or parent interviews (ii), utilized a single testing instrument, the PLS-4, in evaluating Student's speech and language deficits, and (iii) failed to administer a

standardized test to measure Student's pragmatic language skill levels; (b) the District failed to evaluate all Student's areas of suspected disability in that the District assessors failed to evaluate Student's behaviors and their effect on his ability to access his education as his preschool teacher, August, had reported that Student had difficulty sustaining attention, inability to attend to group activities and follow directions, perservative behaviors, rigid adherence to schedule, and defiant and aggressive behaviors; and (c) the District failed to conduct a transition reassessment in the spring of 2008.

29. Pursuant to factual Findings 7 through 18, the SLP, Arnaldo, did include parental and teacher interviews in conducting her speech and language assessment. Arnaldo was part of a multi-disciplinary assessment team which shared information so that she considered the information received by Parents.²⁰ Additionally, Arnaldo relied on the PLS-4 and information from Parents and teacher as well as her observations in class and during her testing sessions with Student. Moreover, Arnaldo did observe Student in August's class and interviewed her at that time. Arnaldo did assess the Student in articulation and pragmatics with the PLS-4 and during her observations. Student offered no expert testimony that the assessment by Arnaldo was not appropriate.²¹ Thus, Student failed to meet his burden as to the inappropriateness of Arnaldo's speech and language assessment.

²⁰ In Student's closing brief, he alleges that because both Parra and Arnaldo testified that they had made their assessment conclusions independently, that means that there was no sharing of information. This allegation is without merit.

²¹ Student's speech and language expert, McCann testified that she had never been given Arnaldo's assessment report.

30. Although August had identified a number of characteristics which led her to refer Student for a special education assessment including problem behaviors, she also reported that he was making academic progress although maybe at a slower pace than his classmates. (Factual Findings 2 and 3.) The District assessors relied on parental rating scales in the SIB-R, GADS and GARS; the teacher ratings on the GARS and GADS; teacher interview; classroom observation; and observations during the administration of the testing in determining whether Student's behavior was so disruptive so as to require further assessments regarding Student's behaviors. (Factual Findings 4 through 18.) Student offered no testimony as to the inappropriateness of the District assessment as to Student's problem behaviors and their effect on his ability to access the educational curriculum. Thus, Student has failed to meet his burden that the District's 2007 assessment was inappropriate.

31. Student's contention that he was denied a FAPE because the District failed to conduct a transition reassessment in spring 2008 is without merit. (See Legal Conclusion 25.)

2008-2009 ASSESSMENTS

32. Student contends that (a) the second psycho-educational assessment was inappropriate because it relied solely on the parental SIB-R rating scales to evaluate Student's behavior, and (b) the assessors who conducted the aide assessment in the spring of 2008 based their findings only on their subjective observations.

33. Pursuant to factual Findings 35 through 40, Leuthold relied on more than one measure as to Student's level of social skills and behavior.²² Leuthold conducted

²² It should be noted that Student's neuropsychological expert, Abbey, relied on the GARS-2 to measure Student's level of social function, which includes behavior.

several days of observations in Student's classroom and on the playground, interviewed his teacher, and had teacher ratings in the GADS and ASDS in addition to the parental rating on the SIB-R. Following the completion of the assessment during the continued IEP meetings, Leuthold reviewed the Abbey report and conducted further classroom observations on December 8, 2008. (Factual Findings 54 and 56.) There was no indication that Student's behavior was so disruptive as to interfere with his and other pupils' ability to learn in class. Thus, Student has failed to meet his burden that the District's second psycho-educational assessor conducted an inappropriate assessment because of reliance on only the SIB-R to measure Student's behavior levels.

ISSUE A (III:) DID THE DISTRICT FAIL TO OFFER STUDENT A FAPE BECAUSE IT FAILED TO ASSESS STUDENT'S BEHAVIOR NEEDS IN FALL 2008?

34. As stated in Legal Conclusion 30, there was no indication that Student's behavior was interfering with his or others ability to learn. Student's behavior had markedly improved as reported by his teachers to the extent that he followed classroom protocol, was a helper, and socialized with his classmates. (Factual Findings 2, 27, 30, 36, 38, and 54.) Thus, Student has failed to meet his burden that the District violated the IDEA by its failure to assess Student's behavior needs.

ISSUE B: DID THE DISTRICT DENY STUDENT A FAPE BECAUSE THE IEPs OF NOVEMBER 26, 2007 AND JANUARY 15, 2009 DO NOT STATE ACCURATE LEVELS OF PERFORMANCE AND DOES NOT CONTAIN MEASURABLE GOALS?

35. Student contends that goals and objectives contained in the November 26, 2007 and January 15, 2009 IEPs were imprecise in terms of baselines and specifically what Student must demonstrate in order to meet the goals. The District counters that the annual goals themselves set out clear direction to a person implementing the IEP as to what is required of Student and how to measure his progress.

36. Student, in his closing brief, contends that the goals should pass the “stranger test,” which states that a goal is appropriate if a person unfamiliar with the IEP would be able to implement the goal and assess a student’s progress. Student cites as authority an Iowa administrative ruling. In *Mason City Community Sch. Dist.* (2006 SEA Ia.) 46 IDELR 148, 106 LRP 51522, which is cited by Student, the ALJ stated: “It is often sometimes said that a well written IEP goal must pass the ‘stranger’ test. Could a stranger to the IEP goal be able to implement the goal, and be able to determine whether the student’s progress was satisfactory.” Student offers no legal authority that this test has been adopted by California and the ALJ declines to adopt this as the appropriate standard in determining the appropriateness of IEP annual goals and objectives.²³

37. Pursuant to Factual Findings 20 and 28, the goals contained in the November 26, 2007 IEP were appropriate. Although Goal One of the November 26, 2007 IEP fails to state a baseline; it is obvious from the Present Levels of Performance section of the IEP and the goal itself that Student’s baseline was that he was unable to “attend to an adult-directed activity without interrupting the adult for 5 minutes.” District witnesses testified that the goals were appropriate and measurable. Macher, the SLP who implemented the goals, testified the goals were sufficiently written for her to understand and to work on. Although she testified that she might have written the second goal with more specificity as to the concepts being referenced, she understood what she was to implement and how to measure Student’s progress. In further evidence that the goals were appropriate, Parents consented to the goals at the time of the IEP and they did not criticize the language of the goals at or following the November 26,

²³ Student failed to offer any evidence that any of the goals would fail to pass muster under this test.

2007 IEP meeting, including Mother's December 10, 2007 letter in which Mother takes issue with the District's placement offer. Thus, Parents understood the goals and objectives.

38. As to the January 15, 2009 IEP goals, Parents objected to the goals on the basis that they believed that the goals, as drafted, were based on inaccurate assessment data and not that the goals were unclear and imprecise. (Factual Findings 57 and 62.) Student offered no evidence in support of Parents' position that the goals were based on inaccurate data. Thus, Student has failed to meet his burden.

ISSUE C (I): DID THE DISTRICT DENY STUDENT A FAPE FOR THE 2007-2008 SCHOOL YEAR BECAUSE THE DISTRICT'S OFFER OF FAPE FAILED TO EDUCATE STUDENT IN THE LEAST RESTRICTIVE ENVIRONMENT?

39. Student contends that the November 26, 2007 IEP failed to offer Student a FAPE during the fall of school year 2008-2009 because the FAPE offer would have placed Student in an inclusion SDC. Student contends that he was making academic progress, benefiting from the non-academic aspects of the classroom, and that his behavioral interruptions did not prevent him from participating when he had adult support. The District contends that the November 26, 2007 offer of FAPE was appropriate based on the information known at the time of the development of the IEP.

40. Based upon the report of August and the initial assessment, the District's offer to place Student in an inclusion SDC where he would spend half of his time in the general education setting and half in the SDC did provide a FAPE. Student's performance in August's preschool class indicated that he was having struggles in both expressive and receptive language, exhibited defiant and aggressive behavior during non-preferred tasks, lacked social skills necessary to succeed in a general education setting, and engaged in behaviors which interfered with his accessing his education but also interfered with others by constantly interrupting. Student's academic strengths

were in areas of rote learning, but that he was making slower progress academically than his peers. (Factual Finding 2, 3, and 19.) In the educational profile conducted by Villalobos, although Student demonstrated knowledge of letters, colors, shapes, numbers, and was able to match pictures and objects, he was unable to respond to questions of what a person does and what sounds are made by pictured animals. He had difficulty in focusing for more than five minutes on adult directed tasks. (Factual Finding 6.) Classroom observations made by the District assessors also indicated that Student's behaviors at the time interfered with his and others' learning by his constantly interrupting, and repeating phrases over and over. Additionally, Student was inattentive for which redirection resulted with little success. (Factual Findings 10 and 14.) Student's difficulties communicating and socializing with peers also limited his ability to access the curriculum. (Factual Findings 7 through 18.) District IEP team members believed that the best placement would be in a structured setting, an SDC with inclusion, where Student could learn the skills he would need to succeed in a general education environment. In the inclusion SDC, Student would be able to learn new skills and then generalize these skills in the general education setting. Additionally, Dominguez's SDC would be at Student's academic level as he would have been in the high middle range of the class as to cognitive abilities, language ability and academics. (Factual Findings 19 through 24.) Thus, the evidence clearly demonstrates that, based on the information known by the IEP team at the time of the November 26, 2007 IEP meeting, the District offered an appropriate placement based on Student's unique needs.

ISSUE C (II): DID THE DISTRICT DENY STUDENT A FAPE IN THE NOVEMBER 26, 2007 IEP BECAUSE THE DISTRICT'S OFFER OF FAPE FAILED TO OFFER STUDENT A RESEARCH-BASED PROGRAM?

41. Student failed to present any evidence to demonstrate that the District failed to implement a program based on research-based, peer-reviewed methodologies. In his closing brief, Student fails to cite any evidence in support of his contention.

42. Alternatively, Dominguez is an experienced teacher who is trained in various methodologies in educating Autistic children which she incorporates into her classroom. (Factual Finding 23.) In *Rocklin Unified School District v. Student* (2007) Calif.Ofc.Admin.Hrngs, Case No. 2006110278, *affd.*, *Joshua A. v. Rocklin Unified Sch. Dist.* (E.D. Cal. 2009) 2009 WL 725157, the ALJ held that a "[d]istrict did not act inappropriately by choosing to implement Student's IEP using the eclectic approach, despite the conclusions reached in the three studies relied on by Student's experts." Even assuming that Dominguez utilizes an eclectic approach in teaching, Student presented no evidence that her methods would fail to confer meaningful educational benefit on him.

ISSUE C (III): DID THE DISTRICT DENY STUDENT A FAPE FOR THE 2008-2009 SCHOOL YEAR AND FALL 2009 BECAUSE THE DISTRICT'S OFFER OF FAPE FAILED TO IMPLEMENT STUDENT'S SPEECH SERVICES ACCORDING TO STUDENT'S LAST AGREED IEP?

43. Student has failed to meet his burden to demonstrate that the District failed to implement the speech and language portions of the IEP in school year 2008-2009 and fall 2009. Pursuant to Factual Findings 77 and 78, Student has been receiving both individual and group speech and language services pursuant to the IEP, except that Mother has instructed that Student should not attend those sessions which conflict with

school or class activities. Student's SLP, Pyle, has provided or scheduled make-up sessions for those missed sessions.

ISSUE D (I): DID ERRORS IN THE IEP PROCESS DEPRIVE STUDENT OF EDUCATIONAL BENEFIT AND/OR IMPEDE PARENTAL INVOLVEMENT, THUS DENYING STUDENT A FAPE BECAUSE THE DISTRICT PREDETERMINED STUDENT'S EDUCATIONAL PROGRAM AND SERVICES PRIOR TO THE IEP TEAM MEETINGS?

44. Student contends that the District predetermined its placement and services offer at the November 26, 2007 IEP and the District failed to inform Parents of the continuum of placement options available.

45. The District came to the November 26, 2007 IEP with a predetermined offer of placement in an inclusion SDC, which was being formed to commence in January 2008. At the IEP meeting, Parents expressed their opinion that the proper placement would be for Student to continue in the general education preschool program. District team members did not discuss any alternative placement options which were available, including general education preschool with increased supports. (Factual Finding 22.) The evidence therefore supports Student's contention that the District did not come to the IEP meeting with an open mind. Rather, the evidence supports Student's contention that the District had predetermined that its inclusive SDC classroom was the only appropriate placement for Student without discussion and consideration of any viable alternatives. This constitutes a procedural violation of the IDEA. Student's right to a FAPE is violated because Parents' right to meaningfully participate in the IEP process was impeded in that they were not apprised of alternatives which may have been available to the District's proposed placement.

ISSUE D (II): DID ERRORS IN THE IEP PROCESS DEPRIVE STUDENT OF EDUCATIONAL BENEFIT AND/OR IMPEDE PARENTAL INVOLVEMENT, THUS DENYING STUDENT A FAPE BECAUSE THE DISTRICT FAILED TO CONSIDER THE INDEPENDENT ASSESSMENT REPORTS PRIVATELY SECURED BY PARENTS DURING THE IEP TEAM MEETINGS?

46. Student contends that the District IEP team members failed to consider the evaluations conducted by Abbey, at the December 4, 2008 and January 15, 2009 IEP meetings, and McCann, at the August 19, 2009 IEP meeting.

47. Pursuant to Factual Findings 55 through 60, the Abbey report was discussed and considered by the IEP team even though the IEP notes omit this. The team discussed Abbey's recommendations and, in fact, adopted his recommendation of individual speech and language therapy sessions. During testimony, Mother acknowledged that the report was referred to during the IEP meeting. Pursuant to Factual Finding 75, McCann's report was presented to the IEP team at the August 19, 2009 meeting and the IEP team discussed it. A district is required to consider the recommendations of outside experts but there is no requirement that a district must adopt such expert recommendations because of parental preference. See *Gregory K. v. Longview View School District*, *supra*, 811 F.2d at p. 1314.) Thus, Student has not met his burden as to the Abbey and McCann reports.

ISSUE D (III): DID ERRORS IN THE IEP PROCESS DEPRIVE STUDENT OF EDUCATIONAL BENEFIT AND/OR IMPEDE PARENTAL INVOLVEMENT, THUS DENYING STUDENT A FAPE BECAUSE THE DISTRICT FAILED TO PROVIDE PARENTS WITH PRIOR WRITTEN NOTICE?

48. Student has failed to meet his burden that the District failed to give prior written notice of its refusal to implement Abbey's and McCann's recommendations and to provide speech services at Student's home school following the November 26, 2007 IEP. As to the Abbey and McCann reports, the IEP itself constitutes written notice. (Legal Conclusion 22.) As to the Parents' desire to have speech services be at Student's

neighborhood school in lieu of the placement location, the District accommodated Mother's December 10, 2007 written request by the February 11, 2008 IEP amendment. (Factual Findings 25 and 26.)

DETERMINATION OF RELIEF

49. As stated in Legal Conclusion 25, the courts have recognized that equitable factors may be considered when fashioning relief for violations of the IDEA. Any relief ordered must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied.

50. As determined in Legal Conclusions 44 and 45, this Decision finds that the District denied Student a FAPE in his November 26, 2007 IEP by predetermining its placement offer and failing to discuss and consider viable alternative placements.

51. After weighing all the evidence and considering the equities, this Decision finds that Parents are entitled to reimbursement in the amount of \$4,762.00 (four thousand seven hundred and sixty-two dollars) for the cost of the Kinder-Readiness preschool which Parents paid.

ORDER

Within 45 days of receipt of this Decision, the District shall reimburse Parents the cost of attending the District Kinder-Readiness preschool program in the amount of \$4,762.00.00. All of Student's remaining requests for relief are denied.

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 prevailed substantially on Issue D (i). The District prevailed fully on all remaining issues.

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this Decision in accordance with Education Code section 56505, subdivision (k).

Dated: June 9, 2010

_____/s/_____

ROBERT F. HELFAND

Administrative Law Judge

Office of Administrative Hearings