BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matters of: PARENT ON BEHALF OF STUDENT, v. GARDEN GROVE UNIFIED SCHOOL DISTRICT,	OAH CASE NO. 2012060342
GARDEN GROVE UNIFIED SCHOOL DISTRICT, v. PARENT ON BEHALF OF STUDENT.	OAH CASE NO. 2012040530

DECISION

Susan Ruff, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), heard this matter on September 11, 12, 13, and 17, 2012, in Garden Grove, California.

Jennifer Guze Campbell, Esq., and James Gregory Campbell, educational advocate, represented Student and Student's mother. Student's mother was present during the hearing. Student was not present.[1]

[1] Although Jennifer Guze Campbell was the attorney of record on the case, during the hearing Student's case was prosecuted by James Campbell, with the assistance of Jennifer Guze Campbell.

Alefia Mithaiwala, Esq., represented the Garden Grove Unified School District (District). Clark Osborne, Coordinator of Special Education, also appeared on behalf of the District.

The District's request for due process hearing was filed on April 12, 2012, in case number 2012040530. Student's request for due process hearing was filed on June 6, 2012, in case number 2012060342. On June 22, 2012, OAH granted Student's motion to consolidate the two cases and named Student's case (case number 2012060342) as the primary case for determining the 45-day timeline for issuance of a decision. On July 16, 2012, the District filed an amended due process hearing request. At the end of the hearing in September 2012, the parties requested and received permission to file written closing argument. The case was taken under submission upon receipt of the parties' written closing argument on October 1, 2012.

On October 2, 2012, OAH requested that Student's counsel provide copies of two non-published federal court orders cited in Student's closing brief. Student provided that information on October 3, 2012. On October 5, 2012, the District requested an opportunity to file a supplemental briefing regarding the federal court orders. That request was granted and the decision due date was tolled for a week to enable both parties to file supplemental briefing.[2]

[2] To maintain a clear record, Student's written closing argument has been marked as Exhibit S-82. The District's written closing argument has been marked as Exhibit D-49. Student's October 3 and October 15 supplemental briefs have been marked as Exhibits S-83 and S-84, respectively. The District's supplemental brief was marked as D-50.

ISSUES

STUDENT'S ISSUES:

1) Did the District deny Student a free appropriate public education (FAPE) during the 2010 – 2011 school year by failing to provide an occupational therapy (OT) assessment for Student and failing to provide prior written notice in the Vietnamese language?
2) Did the District deny Student a FAPE from May 2011 to December 2011 and January 2012 to June 6, 2012, by failing to provide OT goals in the areas of adaptive/daily living skills related to Student's eating and adaptive/daily living skills related to Student's toileting?
3) Did the District deny Student a FAPE at the December 7, 2011 individualized education program (IEP) meeting by: 1) failing to procure written permission for the general education teacher to leave the meeting; and 2) holding discussions regarding the offer of FAPE without Student's parent in attendance and making the offer of FAPE prior to discussions about placement?
4) Did the District deny Student a FAPE by failing to provide prior written notice for the central auditory processing assessment which was requested at the March 13, 2012 IEP meeting?
5) Did the District deny Student a FAPE at the March 13, 2012 IEP meeting by making the offer of FAPE prior to the time the team discussed placement?
6) Did the District deny Student a FAPE between January 6, 2012, and June 6, 2012, by failing to provide a central auditory processing assessment, functional behavior assessment, audiological assessment, eyesight assessment, and assistive technology assessment, which were requested by

Student's mother on January 6, 2012, and March 30, 2012, and by failing to provide appropriate prior written notice?

7) Did the District deny Student a FAPE between March 2012 and June 6, 2012, by failing to provide parent training?

8) Did the District deny Student a FAPE by failing to provide independent educational evaluations (IEE's) for the District's 2012 multidisciplinary assessment?

DISTRICT'S ISSUES:

9) Was the District's 2012 multidisciplinary assessment appropriate?

10) Did the consent provided to Student's IEP's, assessment plan, and emergency healthcare plan constitute meaningful informed consent under the Individuals with Disabilities Education Act (IDEA)?

CONTENTIONS

This is a consolidated case. Student contends that the District failed to perform certain assessments, failed to provide parent training, and committed various procedural violations of IDEA. The District contends that it properly assessed Student in all areas of suspected disability, complied with all procedural requirements of the law, and provided Student with all necessary supports, accommodations, and services.

The District filed its due process case to defend its 2012 multidisciplinary assessment. The District also seeks a ruling on whether the letters sent by Student's attorney on behalf of Student's mother constitute meaningful, informed consent to Student's IEP's, assessment plan, and emergency healthcare plan. Student contends the District's assessment was not appropriate. Student also contends that Student's mother's attorney may properly consent to educational documents such as IEP's under

California agency law. Student believes it was not necessary for Student's parents to sign any of the documents.

This decision finds that the District properly assessed Student in all areas of suspected disability and provided all necessary educational supports and services to Student. To the extent that the District might have committed minor procedural violations of special educational law, none of those violations gave rise to a substantive denial of FAPE. The District's multidisciplinary assessment was appropriate and met all the requirements of law. All of Student's requests for relief are denied.

The issue of whether documents such as IEP's, assessment plans, and emergency healthcare plans require a parent's signature for consent is currently being litigated in the federal courts. The District presents compelling public policy arguments for why the lack of a parent's signature may cause confusion in a child's educational program (and did, in fact, cause confusion in the instant case). However, recent federal court orders, cited by Student, hold that California agency principles apply to documents such as assessment plans and IEP's. This administrative tribunal will not second-guess the wisdom of the federal courts.

FACTUAL FINDINGS

1. Student is an eight-year-old boy who is currently eligible for special education and related services under the eligibility category of autism. The parties do not dispute that Student's family resides within the jurisdiction of the District.

2. In addition to Student's autism, Student has severe food allergies and asthma. Since at least 2009, Student has had an emergency healthcare plan at school (sometimes called "allergy action plan") which instructs the school staff on what steps to take when he has an allergic reaction. For example, if Student suffers from anaphylaxis, which can be life-threatening, he is to be treated with an "epi-pen," among other things. The healthcare plan includes a list of symptoms for allergic reactions that staff should

watch for and contains emergency contact information. Student's healthcare plan requires a physician's order for treatment and parental consent. The plan is generally valid for one year and renewed on an annual basis.

3. Student's mother personally signed her consent to each of Student's emergency healthcare plans and related documentation prior to the time that Jennifer Guze Campbell of the Special Education Law Firm (SELF) became the attorney of record for Student's mother. After SELF began representing Student's mother in January 2012, Student's mother no longer personally signed her consent to documents such as IEP's, assessment plans, and emergency healthcare plans. Instead, SELF would send letters stating that SELF was consenting on Student's mother's behalf.

4. For example, on March 12, 2012, after the District completed its triennial assessment (which will be discussed in more detail below), school nurse Jane Lum developed an emergency healthcare plan regarding Student's allergies. Nurse Lum presented it to Student's mother at the March 13, 2012 IEP meeting. Student's mother did not sign her consent on the plan at that meeting or at any time after that meeting.

5. On March 30, 2012, SELF sent a letter to the District's counsel which stated, in part:

> [Student's mother], parent of [Student], has retained the Special Education Law Firm to provide legal representation with respect to special education matters concerning [Student] . . . .
>
> On behalf of [Student's mother], we hereby consent to the Emergency Healthcare Plan for [Student], dated as of March 12, 2012, attached hereto and by this reference incorporated herein ("[Student's] Emergency Healthcare Plan").

We hereby reserve all rights and remedies with regard to [Student's] Emergency Healthcare Plan.

The letter was signed by Attorney Campbell. An unsigned copy of the emergency healthcare plan for Student was enclosed with the letter.

6. During the hearing, Nurse Lum testified that she was concerned by the failure of Student's mother to sign the emergency healthcare plan. In her experience, no law firm had ever "consented" to an emergency healthcare plan by way of an attorney's letter rather than a parent's signature. She questioned whether the letter constituted valid consent. She was worried that if she implemented the plan without valid consent, her nursing license might be in jeopardy if Student's mother claimed later that she had not consented to the plan.

7. The emergency healthcare plan is not just a legal form that sits in Student's records in an office. It is a working document relied upon by school staff to know how to assist Student in case of an emergency. The document is short, direct, and includes the steps to take if it is known or suspected that Student has ingested foods on his list of allergies. As Nurse Lum described it, the plan is a clarification in lay terms of the doctor's orders. It is kept in a binder with Student's name on it next to the cabinet where Student's medications are stored.

8. Nurse Lum is not always on the school campus, so other staff must be ready to administer the emergency healthcare plan procedures. Nurse Lum is in charge of training those staff members. In her opinion, an unsigned document could be confusing to staff. There were things on Student's healthcare plan that had to be done quickly to prevent Student from suffering severe health consequences.

9. Because of her concerns about whether Student's mother had consented to the plan, Nurse Lum spoke with Mr. Osborne and the school principal. They decided to do what was best for Student and follow the medication order forms, even if they

were not part of the plan. Nurse Lum testified that the confusion over the consent to the plan could put Student at risk, if the staff was not trained in the proper sequencing according to the plan.

EVENTS FROM DECEMBER 2010 TO DECEMBER 2011

10. On December 13, 2010, Student's IEP team met for Student's annual IEP review. Because Student was progressing well, the IEP team agreed to change his placement from a moderate/severe, autism-specific special education class to a mild/moderate special education class that was not specific to autism.

11. The IEP contained goals in the areas of language arts and writing, communication, fine motor skills related to handwriting, sensory processing, gross motor skills, social emotional skills, and learning to learn skills (participating in non-preferred activities and participating in small group instruction).

12. The IEP called for, among other things, individual OT services for Student once a week for 50 minutes per session, conducted by a nonpublic agency (NPA) provider, and behavior intervention services four times per week for 105 minutes per session (for a total of 420 minutes per week).[3]

13. The present levels of performance regarding adaptive/daily living skills in the December 2010 IEP noted that:

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[3] The IEP contained specialized instruction, accommodations, and additional services, including extended school year (ESY) services, that are not mentioned above. Because Student's due process hearing request focuses on assessments, parent training, and procedural violations, not the substantive appropriateness of the various IEP's, factual findings regarding IEP accommodations and services will be made only insofar as they are relevant to Student's issues. The evidence showed that Student was gaining meaningful educational benefit in his District program at all times relevant to this case.

> [Student] continues to demonstrate proficient daily living skills, and performs some of these skills (i.e. – toileting and handwashing routine, getting lunch/snack bag or tray and eating) independently. [Student] is able to button and unbutton his clothes and zip/unzip his backpack and pants.

14. On April 11, 2011, Student's IEP team met for an addendum IEP meeting to review Student's educational and behavioral needs. The IEP proposed by the District included placement in a mild/moderate special education classroom, with individual and group speech and language services, adapted physical education, behavior intervention services, OT services, and ESY services. The OT services consisted of individual sessions once a week for 50 minutes per session provided by an NPA.

15. Student's parents attended the April 11, 2011 IEP meeting and participated in the meeting. A Vietnamese translator was at the meeting, and Student's parents were offered a copy of parental rights and procedural safeguards in Vietnamese. Student's parents also had an educational advocate present at the meeting with them. (This was prior to the time that SELF began representing Student's mother, so the advocate was not from SELF.) At the time, Student was making academic progress in his classroom and participating more actively in small group instruction. The team discussed, among other things, concerns Student's mother had raised regarding Student's eating habits.

16. The IEP notes reflected the following:

> A discussion was had about OT and feeding issues. The IEP team (inside & outside of the IEP process) has already discussed the feeding issue -- it is not an educationally related issue & the parents are encouraged to discuss this with Regional Center of Orange County (RCOC). The mother

> provided input to the IEP team -- [Student] is a picky eater, doesn't like certain textures, and hard for him to eat a variety of foods. The student Advocate provided input to the IEP team -- requests that RCOC attend future IEP team meetings and feels that there is a connection between school and RCOC. Further discussion was had about [Student] and other students not eating their full lunches, so they can go and play. IBI noted that there have been no misbehaviors due to not eating. Lunch supervisors encourage all the students to eat. The IEP team encourages RCOC to attend future IEP team meetings.

17. Clark Osborne, who was at that time a District Program Supervisor, attended the April 2011 IEP team meeting. During the hearing, he testified about the IEP discussion regarding feeding issues. He explained that Student's mother had been concerned about Student eating at school because Student was a picky eater who did not like foods with certain textures. Student's mother wanted to make sure he was eating his lunch at school. According to Osborne, the school lunch staff and behavior intervention specialists had noticed no eating problems for Student while he was at school, and the District IEP team members did not believe that any eating problems were interfering with his education. For this reason, the District suggested that Student's mother contact RCOC to obtain assistance for any eating problems Student might have at home.

18. Elizabeth Milliman was Student's special education teacher from the time he transitioned into her mild-moderate classroom in the middle of his first grade year (beginning in January 2011) through the end of his second grade year in the summer of 2012. She received her master's degree in education from California State University at

Fullerton in 2002, and her CLAD certification (assisting with language acquisition development for second language learners) through the University of California in San Diego in 2003. She holds a special education teaching credential and has worked in the field of education for 12 years. She recently completed her autism certificate training through the Orange County Department of Education, and she has taught many autistic children over the years.

19. Ms. Milliman attended Student's December 2010 and April 11, 2011 IEP meetings and participated in the discussions. In her opinion, Student did not exhibit any problems with eating that were educationally related during any of the school years relevant to this case. She testified that Student ate a sufficient amount of food at school and would typically finish half to all of his lunch.

20. No specific concerns regarding toileting issues were noted in the April 2011 IEP, but in a paragraph discussing lunch/recess behavior and socialization, part of the notes stated: "Further discussion was had about [Student] going to the bathroom before he comes to school. [Student] goes to the bathroom @ 9:15 am every day." During her testimony, Ms. Milliman could not remember Student's mother raising any concerns regarding Student's toileting at either the December 2010 or April 2011 IEP meetings.

21. Student's parents signed the April 2011 IEP as attendees, but did not consent to the IEP on that date. Instead, they took the document with them for further consideration.

22. On May 2, 2011, Student's mother sent a letter to the District requesting a new IEP meeting to be held in June 2011. Her letter included the following request:

> Very importantly I am formally asking for an OT assessment of [Student] in the specific area of feeding issues. I do believe that [Student] has problem with feeding at school

that adversely impacts his educational performance. I will sign right away for this specific assessment.

23. On May 6, 2011, Mr. Osborne sent a "prior written notice" letter[4] to Student's mother. The letter addressed the request made by Student's mother for an OT assessment in the specific area of feeding issues. In the letter the District denied the request for an OT assessment to address feeding issues, in part, because the District did not believe Student's feeding was an educationally related issue. The letter was sent by regular and certified mail.

24. Subsequent to receiving the District's prior written notice letter, Student's mother withdrew her request for an IEP team meeting. In her withdrawal letter, she noted the following:

> I am withdrawing my request for an IEP. I have signed recently developed IEP -- agreeing to its implementation except for GGUSD refusal to conduct an OT assessment regarding feeding issues.

25. On May 10, 2011, Student's mother signed her agreement to the April 11 IEP, with the following comment: "I agree to implement IEP except for GGUSD refusal to conduct an OT assessment regarding feeding issues."

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[4] As will be discussed in the Legal Conclusions below, special education law requires a school district to give a parent "prior written notice" when it is denying a request made by a parent. (See 34 C.F.R. § 300.503 (2006).)

26. Student contends that the District committed a procedural violation of IDEA by failing to send the May 6, 2011 prior written notice letter to Student's mother in Vietnamese. The copy of the prior written notice letter introduced into evidence at hearing was in English. During the hearing, Student's mother testified that she could not recall whether she received the letter in Vietnamese. Mr. Osborne testified that it is generally the practice of the District to translate this type of document for a parent, but he did not know whether the May 6, 2011 letter had been translated into Vietnamese.

27. Student has the burden of proof on the issue of whether the District failed to provide the prior written notice letter in Vietnamese. Student did not bring in sufficient evidence to show that occurred. Further, as will be explained in the Legal Conclusions below, even if the evidence showed that the letter was not translated into Vietnamese, there was insufficient evidence to show any substantive denial of FAPE. It was clear from the letters sent by Student's mother after receipt of the prior written notice letter that she understood the District was denying her request for an OT assessment.

28. The parties also dispute whether the District should have conducted an OT assessment regarding feeding issues based on Student's mother's May 2011 request for an assessment. Mr. Osborne, who holds both a mild/moderate special-education credential and a multiple subject teaching credential, did not believe that feeding was a problem for Student in the educational environment. He explained that the problems Student's mother raised about feeding during the IEP team meeting were not being observed at school. As stated above in Factual Finding 19, Ms. Milliman shared his opinion.

29. At hearing, Student did not present any expert testimony to refute the opinions of the District educators. Aside from the testimony of Student's mother, Student did not bring in any testimony to show that Student's feeding was a suspected

area of disability for Student at any time during the 2010-2011 school year. While Student's mother was sincere in her concerns about Student's eating habits, her concerns involved Student's conduct at home, not at school.

30. In place of expert testimony, Student relied upon two written reports regarding OT and feeding issues. The first was an outpatient consultation dated July 19, 2007, done by Joseph Donnelly at For OC Kids. The consultation noted, in part, that "Mom still feels that he is having difficulty with eating and, specifically, troubles chewing and swallowing. Once in a while, he will choke. There is no excessive drooling or persistent problem. He seems to do fine with liquids." The consultation recommended that "either OT and/or Speech and Language should work on his feeding."

31. The second report was an occupational therapy evaluation conducted by Newport Language and Speech Centers (Newport) dated September 14, 2011. The report recited that the evaluation was being done "due to parental and physician's concerns regarding his difficulties with feeding and fine and gross motor skills." The report noted that Student's parents accompanied him to the evaluation and provided background information. According to the report, Student's parents reported "difficulty with self-care (limited food repertoire, and utensil use, and dressing skills), difficulty with pencil grip and control in handwriting, and gross and fine motor skills."

32. The Newport report was written by Juliet Aucreman, M.S., OTR/L, who identifies herself in the report as a registered/licensed occupational therapist. According to the report, she administered the Bruininks-Oseretsky Test of Motor Proficiency II, the Michigan Developmental Programming for Infants and Young Children, and the Sensory Profile. She also took a handwriting sample, conducted clinical observations and a parent interview. She found Student to have severe impairment across areas. With respect to feeding, her report stated:

> [Student] does not eat an entire meal with a spoon, does not unwrap candy/peel fruits, does not get a drink without help, cannot spoon feed with no spills, and cannot spread soft food with a table knife. He feeds himself with a spoon with some spills, drinks from open cups, chews and swallows well if the food is preferred (if not, he will vomit/spit up). He discriminates edibles, sucks through straws and uses a fork.

33. The Newport evaluation recommended that Student receive OT services and suggested, among other things, goals to help Student increase his food repertoire, such as a goal that Student "touch, kiss, and taste non-preferred foods with minimal aversive behaviors."

34. Ms. Aucreman did not testify at the hearing, so it is difficult to tell which part of her concerns about feeding were based on her testing and which were based on parent report. There is no indication in the assessment that Ms. Aucreman spoke to any of Student's teachers or observed Student at school.

35. The evidence does not support a finding that feeding was an area of suspected disability for Student in the educational environment between April 2011 and December 2011. Neither of the two OT reports submitted by Student as evidence is sufficient to rebut the testimony of the District educators. The For OC Kids consultation was conducted in July 2007, when Student was less than four years old. Student presented no testimony or other evidence to show that the findings of the report were still applicable to Student almost four years later.

36. The Newport OT assessment was not done until after the end of the 2010 – 2011 school year, so the District could not have considered it at the time that the May 2011 request for an assessment was made. Even if it had been available, it does not show that feeding problems were affecting Student in his school environment or

interfering with his education. There was no evidence that Ms. Aucreman assessed Student in a school setting or spoke with the school staff. Student failed to bring in sufficient evidence to show that an OT assessment related to feeding was necessary during the 2010-2011 school year.

37. Student also contends that the District denied Student a FAPE between May 2011 and December 2011 by failing to include OT goals in the IEP related to adaptive daily living skills in the areas of eating and toileting.

38. The evidence does not support a finding that eating was an area of educational need for Student between May 2011 and December 2011 which would require an IEP goal. As stated above, Student presented no persuasive expert evidence to contradict the testimony of the District educators.

39. Likewise, there was no evidence that Student required a goal related to daily living skills in the area of toileting between May 2011 and December 2011. Every assessment done prior to December 2011 that mentioned toileting found that Student was independent in toileting. The For OC Kids consultation in 2007 noted that Student was toilet trained and did not wear diapers. During the District's 2009 triennial assessment, Student's mother reported that Student could urinate in the toilet without adult assistance. The December 2009 IEP determined that Student was able to complete a toileting routine independently. As stated above in Factual Finding 13, the December 2010 IEP found the same. The December 2011 IEP (which will be discussed below) stated that Student was able to toilet independently, but requires "reminders how to ask appropriately to use the restroom prior to leaving the classroom." The Newport OT assessment conducted in September 2011 (discussed in Factual Findings 31 – 36 above) made no mention of any concerns about toileting. As will be discussed below, the District educators and staff never noticed any problems related to Student's toileting.

40. Student's mother did not raise any toileting concerns to the District either before or during the December 2011 IEP meeting. The first mention of toileting concerns arose after SELF began to represent Student's mother in January 2012. At hearing, Student's mother testified that she was too embarrassed to raise the subject prior to that time. Even assuming her testimony is correct, the District was not required to include a goal in an IEP to address a problem that had never been brought to its attention by a parent, school staff, or any assessors. There was no violation based on the District's failure to include a goal related to toileting in Student's IEP's between May 2011 and December 2011.

THE DECEMBER 7, 2011 IEP TEAM MEETING

41. Student's IEP team met for Student's annual IEP on December 7, 2011. Student's mother attended the meeting. She presented the Newport OT assessment to the IEP team during the meeting, and the IEP team considered the report. The District team members believed that the Newport report discussed issues (such as handwriting) that were already addressed in Student's educational program, or raised medically-based issues regarding self-care and feeding that were not educational issues to be addressed at school. As stated above, there was no mention of any problems regarding Student's toileting in the Newport OT assessment report.

42. The proposed December 7, 2011 IEP contained the following paragraph regarding present levels of performance for adaptive/daily living skills:

> [Student] is able to take care of toileting needs at school, however, he still needs reminders how to ask appropriately to use the restroom prior to leaving the classroom. He is able to go to the speech room independently. [Student] is able to get his lunch without help whether he buys or brings.

> [Student] continues to pick his nose often until it bleeds he does not use tissue when needed. He needs prompting to use a tissue and not to lick his hands after picking.

43. Aside from the concern about Student asking appropriately to leave the room, there were no concerns regarding Student's toileting raised during the December 2011 meeting.

44. The health section of the present levels of performance in the December 2011 IEP noted Student's severe allergies and referred to an attached care plan. The present levels of performance listed Student's vision as normal. With regard to hearing, the document noted: "unable to condition to headphones; last formal hearing evaluation 12/6/06 at Riverview (normal). Recommend continued monitoring of vision and hearing through pediatrician."

45. The IEP contained goals in the areas of reading comprehension, writing, writing conventions (such as capitalization), math (two-digit addition and subtraction problems with regrouping), vocational (taking multiple-choice tests), behavior (remaining quiet during group instruction and not touching other people's books or materials), gross motor skills (hopping on one foot while moving forward and throwing a ball overhand correctly), fine motor skills relating to writing, sensory processing (remaining on task in a non-preferred activity for at least 30 minutes) behavior (appropriate responses to questions, rather than rote phrases), receptive and expressive language, and learning to learn skills.

46. The IEP called for Student to be placed in a mild/moderate special education classroom, with speech and language services, adapted physical education services, behavior intervention services, and occupational therapy. The occupational therapy consisted of individual sessions once per week, for 50 minutes per session, provided by an NPA. The behavior intervention services consisted of group instruction

four times a week for 105 minutes per session and consultation services two times a month, for 60 minutes per session. The IEP also called for Student to receive services during the summer ESY session.

47. Nancy Randazzo, a regular education teacher, attended Student's December 7, 2011 IEP team meeting. Ms. Randazzo participated in the discussion during the meeting. She discussed the California curriculum standards with the IEP team, in particular the math standards, and answered questions for the team. She participated in a discussion about the possibility of mainstreaming Student for math.

48. Ms. Randazzo left the meeting before it ended. She was not present when the District made its offer of FAPE. She did not participate in a discussion regarding a specific amount of mainstreaming for Student.

49. Student's mother agreed verbally during the meeting that Ms. Randazzo could leave. Student's mother did not sign a written document giving consent for Ms. Randazzo to leave the meeting. Before Ms. Randazzo left, the school principal asked Student's mother if she had any further questions for Ms. Randazzo. During her testimony, Ms. Randazzo explained that Student's mother was told that Ms. Randazzo was on campus and could return to the meeting if Student's mother had further questions at any point during the meeting. Student's mother did not object to Ms. Randazzo leaving the meeting. Student's mother testified that she could not recall whether the District asked her if she had any further questions before Ms. Randazzo left. She also could not recall if the District discussed class placement and service levels during the December 2011 IEP meeting.

50. Mr. Osborne attended the December 2011 IEP meeting and took the meeting notes. During his testimony, he described the order of events during the meeting. The team discussed present levels of performance and goals. Student's mother participated in the discussion of goals and provided input to the team. There

was a discussion about mainstreaming which included Ms. Randazzo. After the team completed its discussion of goals, the team took a break and Mr. Osborne drafted a proposed offer of FAPE. After the break, the District presented its offer. The team then discussed that offer, and the designated instruction and services listed in that offer.

51. Mr. Osborne explained that, in his experience, parents prefer to have a drafted copy of an IEP in front of them when an offer of placement and services is discussed. However, the District prefers not to draft a written IEP offer prior to the meeting, because it is uncertain what goals will be agreed to by the IEP team. Therefore, it is the District's practice to wait until after the goals are agreed upon, and then prepare a draft offer of placement and services. Mr. Osborne testified that the offer is just a draft and is open to discussion and change during the IEP meeting. He denied that the District predetermined the offer of FAPE for Student. Ms. Milliman also testified that there was no predetermination. She came to the meeting open to any suggestions made by Student's mother.

52. Student's mother signed the IEP document, indicating that she had attended the December 2011 IEP meeting, but did not sign her consent to the IEP on the day of the meeting.

EVENTS LEADING TO THE DISTRICT'S MULTIDISCIPLINARY ASSESSMENT

53. On January 4, 2012, Attorney Jennifer Guze Campbell sent a letter to the District informing the District that Student's mother had retained SELF to represent her in special education matters regarding Student. The letter directed the District to send any document that required the signature of Student's mother to SELF rather than to Student's mother. The letter included an authorization for representation signed by Student's mother on January 3, 2012. Neither this letter nor any of the subsequent letters from SELF to the District stated that SELF represented Student's father or both of Student's parents. Student's father and mother both hold educational rights for

Student. Student's mother testified that her husband authorized Student's mother to make educational decisions for Student and to sign documents on his behalf.

54. On January 6, 2012, Attorney Campbell sent a letter to the principal of Student's elementary school regarding Student. The letter was carbon copied to Mr. Osborne and the District's counsel. The letter stated that, on behalf of Student's mother, "we hereby consent" to portions of the December 7, 2011 IEP, including: the eligibility of autism, "all goals and short-term objectives," "all accommodations," and "all services." The letter did not consent to placement of Student in a mild/moderate special day class, failure by the District to include adaptive/daily living skills as an area of unique need for Student, failure of the District to provide parent training for Student's parents, failure of the District to procure written permission for the general education teacher to leave the December 2011 IEP team meeting, failure to conduct all of the discussion of the offer of FAPE with Student's parents in attendance, failure by the District to assess Student in all areas of suspected disability including, but not limited to, OT, failure by the District to include goals for Student's toileting problems, and failure by the District to include goals for Student related to Student's "inability to eat appropriately."

55. Although the letter stated that Student's mother consented to portions of the IEP, no copy of the IEP signed by Student's mother was returned with the letter. Neither of Student's parents personally signed consent on the December 2011 IEP document. No attorney from SELF signed the IEP. Instead the "consent" was provided solely by counsel's letter.

56. On January 6, 2012, Attorney Campbell sent a 13 page letter to the principal of Student's school regarding Student. Once again, the letter was carbon copied to Mr. Osborne and the District's counsel. The letter requested that the District conduct numerous assessments of Student, with a description of the requested assessments that took 10 pages of the letter. The requested assessments included a

comprehensive pre-academic/academic evaluation, a "comprehensive learning potential and developmental evaluation," a comprehensive language skills evaluation, a "comprehensive auditory skills evaluation," a comprehensive central auditory processing evaluation, a "comprehensive visual skills evaluation," a comprehensive fine motor skills evaluation, a comprehensive gross motor skills evaluation, a comprehensive social/emotional behaviors status evaluation, a functional behavior assessment, an audiological assessment, an "eyesight assessment to define [Student's] visual function, ocular health, and related systemic health status with considerations for [Student's] age," a health assessment, and an assistive technology (AT) assessment.

57. Each of the requested assessments in the letter contained numerous subcategories for which Student was requesting assessment. For example, the letter requested that the "eyesight assessment" include tests of areas such as "refraction, including objective and subjective assessment of the patient's refracted correction needs," "pupil size and pupillary responses," "measurement of the anterior corneal curvature," and "subjective measurement of monocular and binocular refractive status at distance and near or at other specific working distances." In some cases, the letter insisted that the requested assessment include the equivalent of various tests and assessment instruments.

58. During the hearing, Student presented no expert testimony to explain why this plethora of assessments became necessary for Student three days after SELF began representing Student. There was no information presented at the December 2011 IEP to suggest that all these assessments were necessary – Student was making meaningful progress in his educational program. Student's areas of educational need were well known to the IEP team. There was no dispute that Student was eligible for special education due to his autism, and Student's mother consented (according to her counsel's letter) to the goals, accommodations, and services offered in the IEP.

59. The January 6, 2012 SELF letter concluded with the paragraph:

> You should address any questions or comments with regard to this request to this law firm and not to [Student's mother]. [Student's mother] requests that any document that requires [Student's mother] signature be directed to this law firm. As [Student's mother's] counsel, we will review any document that requires [Student's mother's] signature prior to any signature by [Student's mother]. This requirement is intended to protect [Student's mother's] and [Student's] rights and remedies with regard to special education matters concerning [Student].

60. Student's three-year (triennial) assessment was not due to be conducted by the District until approximately December 2012. However, after receiving the letter from SELF requesting the assessments, the District offered to conduct Student's triennial assessment early. On January 18, 2012, Ms. Milliman prepared an assessment plan for Student which included assessment in the areas of academic/pre-academic achievement, intellectual development, language/speech/communication development, psycho-motor development, health/vision/hearing, self-help/career/vocational abilities, and social/emotional behaviors status.

61. On January 20, 2012, the District's counsel sent a letter to SELF in response to the request for assessments. In the letter, the District's counsel explained that the District would agree to conduct an early triennial assessment and discussed which areas would be assessed. The letter also discussed the areas in which the District felt no additional assessment was necessary. For example, the letter explained why Student did not require a functional behavior assessment. The letter enclosed the January 18

assessment plan for Student's mother to sign, a release of information form to be filled out and signed, and a copy of the parental procedural safeguards.

62. On January 23, 2012, SELF sent a letter to the District, signed by Attorney Campbell, which stated in part:

> On behalf of [Student's mother], we hereby consent to the Garden Grove Unified School District ("District") Individualized Education Program Assessment Plan dated as of January 18, 2012, for [Student] ("Assessment Plan"), attached hereto and by this reference incorporated herein.
>
> Please consider the assessment information provided in our letter to the District dated as of January 6, 2012, RE: Request for Assessment of [Student], when conducting [Student's] testing.
>
> We hereby reserve all rights and remedies with regard to the Assessment Plan.

63. The January 23, 2012 letter from SELF included a copy of the January 18 assessment plan, but the plan was not signed by either Student's mother or her counsel.

64. In early February, Nurse Lum sent Student's mother three release of information forms to permit the District to obtain information from: 1) Student's physician regarding Student's food allergies and medications; 2) the health care provider who conducted Student's most recent eye examination; and 3) the health care provider who conducted Student most recent audiological examination. Nurse Lum needed this information in connection with a health screening that she was conducting as part of the District's multidisciplinary assessment.

65. On February 13, 2012, SELF sent a letter to the District's counsel regarding Nurse Lum's request for the three releases. The letter enclosed copies of the releases, which had been signed by Nurse Lum, but not by Student's mother. The letter stated, in part:

> Please provide us with each individual's full name, organization, and address for those professionals with whom the District wishes to exchange information with concerning [Student]. On behalf of [Student's mother], we will then provide consent to the exchange of information in accordance with [Student's mother] wishes.
>
> [Student's mother] requests that any document that requires [Student's mother's] signature be directed to this law firm. As [Student's mother's] counsel, we will review any document that requires [Student's mother's] signature prior to any signature by [Student's mother's]. This requirement is intended to protect [Student's mother's] and [Student's] rights and remedies with regard to special education matters concerning [Student].

66. After she became aware of SELF's letter, Nurse Lum telephoned and left a voicemail message explaining that she would be happy to provide the requested information, but she needed to obtain information regarding the names and addresses of Student's current health care providers from Student's mother in order to include those names and addresses on the release forms. Nurse Lum never received the three release forms signed by Student's mother.

THE DISTRICT'S MULTIDISCIPLINARY ASSESSMENT

67. School Psychologist Juan Escobar conducted the multidisciplinary assessment on behalf of the District. Mr. Escobar received his master's degree in education in 2005 and holds a pupil personnel services credential as a school psychologist. He is a behavior intervention case manager and has worked as a school psychologist for the District since September 2011.

68. Mr. Escobar's assessment consisted of testing, records review, observation, and parent and teacher interviews. To assess Student's cognitive functioning, Mr. Escobar administered the Universal Nonverbal Intelligence Test (UNIT), the Primary Test of Nonverbal Intelligence (PTONI), the Developmental Profile 3 (Parent Rating), and the Psychoeducational Profile -- Third Edition (PEP-3).

69. Mr. Escobar chose the UNIT and the PTONI because they tested cognitive ability without reliance upon the use of language. The UNIT was completely nonverbal, while the PTONI required some language. Student's standardized, full-scale intelligence quotient (IQ) score on the UNIT was 71, in the delayed range, and on the PTONI was 61. The PEP-3 was not standardized or normed for a child of Student's age, so Mr. Escobar used that test solely for informational purposes to understand more of what Student could and could not do. The Developmental Profile 3 does not give an IQ score, but assesses the level of cognitive functioning. Student came out in the delayed range in each area of that test.

70. To test Student's academic achievement, Mr. Escobar administered the Woodcock-Johnson Tests of Achievement – Third Edition (WJ-III). The WJ-III is a standardized test which measures academic achievement. Student scored higher in the areas involving rote memory, such as math fluency, calculation, and letter-word identification, but lower in areas involving application of skills such as reading comprehension and applied math problems. Mr. Escobar also administered the Test of

Early Reading Ability, the Test of Early Mathematics Ability, and the Bracken Basic Concept Scale (Bracken). Student's scores on the first two tests were comparable to those on the WJ-III, with Student performing poorly in areas that involved application of skills. The Bracken was not standardized or normed for a child of Student's age, so Mr. Escobar used it only to evaluate Student's strengths and weaknesses in school readiness skills.

71. Mr. Escobar administered the Attention Deficit/Hyperactivity Disorder Test. He also administered rating scales to see if Student met the criteria for autism, including the Childhood Autism Rating Scale and the Gilliam Autism Rating Scale. These assessment instruments confirmed that Student still exhibited symptoms of autism and had attention problems. Mr. Escobar also conducted the Autism Diagnostic Observation Schedule, but he administered it in a nonstandard fashion, so his assessment report advised caution in relying upon its results.

72. To assess Student's behavior, Mr. Escobar used the Behavior Assessment System for Children, Second Edition (BASC-2). The BASC-2 was a rating scale completed by Student's mother and his teacher. Both rated Student's behaviors as clinically significant in many areas, including, but not limited to, social skills and leadership. To assess Student's adaptive behavior, Mr. Escobar administered the Vineland Adaptive Behavior Scales – Second Edition (Vineland). The Vineland was a rating scale completed by Student's mother and teacher. Student scored in the "low" range on many of the categories of the test.

73. Mr. Escobar was familiar with each of the tests and assessment instruments described in Factual Findings 68 – 72 above, was qualified to administer them, had administered them in the past, and administered them in accordance with the manufacturer's instruction manual. In those cases where the test had not been normed or standardized for Student's age group (for example, the PEP-3), Mr. Escobar noted

that in his assessment report. The tests were selected and administered so as not to be culturally, racially, or sexually discriminatory and were valid for the purposes for which they were used. Mr. Escobar believed the scores were accurate, except in the few instances noted in his report.

74. Mr. Escobar administered the tests to Student in English, because that was Student's primary language. Although Student's mother spoke Vietnamese, Student was instructed in English, and his mother spoke to him in English at home. Mr. Escobar sent the rating scales to Student's mother in English, not Vietnamese. Based on Mr. Escobar's conversation with Student's teacher, he believed that Student's mother was able to communicate in English. Her responses on the rating scales were consistent with those of the teacher, so Mr. Escobar believed that she understood the questions.

75. Wendie Wall administered the speech and language portion of the District's 2012 assessment. Ms. Wall is a speech-language pathologist who holds a master's degree in communicative disorders. She has worked as a speech-language pathologist for approximately 21 years, and has been with the District for the past six years. She is currently the department chair for speech pathologists within the District. She has provided speech-language therapy to Student.

76. During the hearing, Ms. Wall explained that she administered the assessment to Student in English because his primary language was English. As part of her assessment she made observations of Student, conducted formal and informal testing and obtained input from Student's parent and teacher. The tests she administered included, but were not limited to, the Functional Communication Profile -- Revised, the Pragmatic Language Scale Inventory, the Comprehensive Assessment of Spoken Language, the Oral and Written Language Scales -- Second Edition, the Peabody Picture Vocabulary Test, the Expressive Vocabulary Test, the Goldman Fristoe Test of

Articulation, the Examination of Oral Peripheral Mechanism, and the Kaufmann Speech Praxis Test.

77. The tests used by Ms. Wall included both normed, standardized tests and informal tests and rating scales. Ms. Wall was familiar with each of these tests and assessment instruments and had administered them in the past. The tests and assessment instruments were chosen so as not to be culturally, racially, or sexually biased. They were administered in accordance with the test manufacturers' instructions, and Ms. Wall believed the results of the tests to be accurate. A few of the tests were not normed for Student's age group, so Ms. Wall just administered those tests to gather additional information about Student.

78. In Ms. Wall's opinion, her assessment was comprehensive and addressed all of Student's areas of suspected disability related to speech and language. She did not specifically assess Student's auditory processing, but some of the tests she gave had components related to auditory processing. She did not see anything during her assessment that would lead her to believe Student had an auditory processing problem. In her opinion, Student's language problems were related to autism, not his hearing.

79. Likewise, although Mr. Escobar was not an audiologist conducting an audiological exam, some of the tests he administered to Student contained sections that touched upon auditory processing and auditory skills. Mr. Escobar explained that Student's difficulty with application skills was typical for children with autism and did not indicate an auditory processing problem.

80. The District's assessment concluded that Student continued to meet the eligibility requirements for special education under the category of autistic-like behaviors. In Mr. Escobar's opinion, the District's assessment was comprehensive and addressed all areas of need for Student.

81. Nurse Lum provided the health portion of the District's triennial assessment. Nurse Lum holds a registered nurse license and a public health nurse certificate. She has worked as a school nurse for 29 years. She is familiar with Student.

82. As part of her assessment, she conducted vision and hearing screenings of Student, reviewed health records, and prepared a report dated March 7, 2012. She obtained Student's current medical status through a health update form filled out by Student's mother and a conversation with Student's mother.

83. Nurse Lum saw no evidence of any feeding problems or malnutrition for Student. Instead, Student's body mass index indicated Student was slightly overweight for his height and age.

84. To obtain background information for the vision screening, Nurse Lum relied upon a report from Dr. Lingua, Student's ophthalmologist, that was provided to her by Student's mother. She also tested Student's vision while he was wearing his glasses, tested the ability of his eyes to track, and conducted a color blindness test. She noted no problems for Student with eye muscle imbalance or colorblindness. In her report, she made the following observations regarding Student's vision:

> Vision: 20/25 with glasses. Dr. Lingua, ophthalmologist, report dated 4/25/11 requested that [Student] be seated in the front of class due to nearsightedness. He has eye muscle balance and was able to track without nystagmus. He had normal pupillary function. He has occasional eye blinking and rubbing. He is to return for follow-up in one year.

During the hearing, Nurse Lum explained that the mention of eye blinking and rubbing came from Dr. Lingua's information, not from her own observations.

85. Nurse Lum used an audiometer to measure Student's hearing. She had difficulty testing Student's hearing, because Student was not able to follow directions with the headphones on and did not respond consistently to the test, so the results of her testing were inconclusive. Therefore, she relied upon testing done approximately two years before by a private health care provider (Providence) that found Student's hearing to be normal. Nurse Lum's report noted:

> Hearing: He was unable to follow directions for the puretone audiomentry. He had a normal hearing exam at Providence two years ago. He is able to follow simple directions.

Based on Nurse Lum's testing of Student and the information from the private provider, she believed that Student could hear normally. At the March 2012 IEP meeting, she recommended that Student's mother follow up with Providence, and Student's mother said she would do so.

86. Nurse Lum did not make a referral for a further eye examination because Student passed the tests she had administered and Student's results were normal when he was wearing his glasses. Nurse Lum spoke with Student's mother informally to remind her to follow-up with Dr. Lingua after a year in accordance with Dr. Lingua's recommendation. It is Nurse Lum's standard practice to remind parents about follow-up visits when a doctor recommends them.

87. The parties dispute whether the District's multidisciplinary assessment was appropriate. As will be discussed in more detail in the Legal Conclusions below, the testimony of Mr. Escobar, Ms. Wall, and Nurse Lum established that the District followed all requirements of the special education laws and regulations in conducting the assessment. Student called no experts to testify on Student's behalf during the hearing (except for the same District employees that the District called in its case-in-chief).

Student brought in no evidence to show that any of the District's tests or assessment instruments were improperly conducted, and Student brought in no persuasive evidence to contradict the testimony of the District witnesses that the District's assessment was comprehensive and covered all areas of suspected disability for Student. The testimony of the District witnesses was persuasive on the issue of the appropriateness of the District's 2012 assessment.

88. In March 2012, the NPA provider who had been providing Student's OT services, conducted an OT evaluation. It was considered by the IEP team at the March 13, 2012 IEP meeting along with the District's multidisciplinary assessment.[5]

THE MARCH 13, 2012 IEP TEAM MEETING

89. On March 13, 2012, Student's IEP team met to review the District's multidisciplinary assessment and to review Student's IEP in light of the new assessment results. Student's mother attended the meeting, along with James Wiley Campbell, an

[5] During the hearing, the District clarified that the NPA OT assessment was not part of the District's multidisciplinary assessment that was at issue in the instant case. For that reason, factual findings regarding the NPA OT assessment will be made only when relevant to the issues raised in Student's due process hearing request.

educational advocate working for SELF.[6] There was also a Vietnamese interpreter at the meeting.

90. The team reviewed and discussed the NPA's OT assessment and the District's multidisciplinary assessment. Mr. Campbell asked questions and participated in the discussion.

91. Nurse Lum discussed her health screening and the emergency healthcare plan. She gave a copy of the plan to Mr. Campbell for Student's mother to sign. Mr. Campbell said they would consider the request and provide a response later.

92. There was a discussion of Student's ability to hear what was being said in class. Ms. Milliman reported that Student did not always respond appropriately in class, but that behavior appeared to be a function of his attention/autism issues, not hearing problems. The team members discussed the IEP goal which worked on Student's responses to questions in class, which were not always on topic.

93. Mr. Campbell requested a central auditory processing assessment. Mr. Osborne told him that the District would consider his request and give him a response later.

[6] There are two Mr. Campbells who work as educational advocates for SELF, James Wiley Campbell (who attended Student's IEP meetings) and James Gregory Campbell (who prosecuted this case on Student's behalf). Any reference to "Mr. Campbell" in these factual findings refers to James Wiley Campbell. James Wiley Campbell was referred to simply as "Wiley Campbell" during most of the hearing and in the documentary evidence.

94. The team discussed proposed goals. Mr. Campbell participated in that discussion and made suggestions for goals. The IEP team considered his suggestions and made additions to the goals in light of his suggestions.

95. The District IEP team members made suggestions for placement and services as the District's offer of FAPE. Student's mother and Mr. Campbell were then given an opportunity to discuss those proposals with the team. Mr. Campbell participated in those discussions along with the District team members. At hearing, Mr. Campbell testified that Mr. Osborne told him that there would not be a discussion, but Student was welcome to make comments on the District's FAPE offer, but Mr. Campbell's testimony appeared to focus on one comment from the meeting taken out of context, rather than everything discussed during the meeting. The full meeting recording leaves absolutely no doubt that meaningful discussion of the IEP offer occurred.[7]

96. The IEP team, including Mr. Campbell, engaged in an extensive discussion of how much "mainstreaming" (exposure to typical peers during school) Student was receiving and if there was any additional mainstreaming that could be added to his program. The District staff explained how the "reverse mainstreaming" worked, in which typical children were brought into Student's mild-moderate special education classroom

[7] As part of the evidentiary review in this matter, the ALJ listened to all the recordings of the IEP meetings placed into evidence rather than relying solely on the transcripts of those meetings. The transcripts contained multiple errors, some of which were significant to the evidence. For example, the transcript of the March 2012 meeting used the word "violent" in place of "Vineland." One of the later transcripts mistakenly said "have" instead of "waive" regarding the parent's agreement to waive the reading of the parental rights.

for part of the week. The regular education teacher discussed the academic rigor of the typical class. The special education teacher described the learning to learn skills that Student would need to be successful in a typical class. The possibility of mainstreaming with a one-to-one aide was discussed. The District staff raised concerns that Student was already dependent on adult prompting, and a one-to-one aide could amplify that prompt dependency. Mr. Campbell also objected to the amount of speech language services offered by the District and requested additional time. The District staff explained that Student had been meeting his speech and language goals every year, so they did not believe he needed additional speech time.

97. During the meeting, Mr. Campbell also made various requests for additional services and accommodations. For example, Mr. Campbell raised a concern about Student wearing a jacket at school. Ms. Milliman explained that she made sure that Student put his jacket on and off as appropriate each day. The District agreed to have someone remind Student about his wearing his jacket. Mr. Campbell also asked for additional communication between Student's mother and his teacher, and the team discussed ways that could be done. The team discussed times in which Student's mother could come and observe at school and the ways in which Student's mother received information about the educational strategies being used at school. Mr. Campbell objected to the District's multidisciplinary assessment report and requested that the District fund an IEE.

98. At one point during the meeting, Mr. Campbell requested parent training for Student's mother from the school psychologist or the behavior specialist. He said Student's mother was "not properly educated in how to deal with different academic things that come up ..." and requested training "such that she appropriately deals with inappropriate behaviors and how to work with him on different things." The District team members did not believe that parent training was necessary for Student to benefit

educationally and suggested that Student's mother contact the Regional Center about behaviors at home. Mr. Campbell also requested a full time aide for Student to assist with his inattentive behaviors.

99. Mr. Campbell also raised concerns about how much Student was eating. The District had not noticed any problems with the amount of food he ate. They believed that Student was similar to typical children in terms of how he ate his lunch. Based on the concerns raised by Student's mother, the District discussed strategies to help encourage Student to eat his full lunch and agreed to have the lunch staff encourage him to eat more.

100. There were also discussions during the meeting about toileting issues. Early in the meeting, during the discussion of the OT evaluation, Mr. Campbell stated that Student's mother was concerned that Student was staying in the bathroom too long to avoid tasks. Ms. Milliman told the team that she had never noticed Student staying in the bathroom too long. She said Student usually used the restroom once in the morning and once in the afternoon, which was typical of other children. Mr. Campbell requested that Ms. Milliman informally assess how long Student was in the restroom. District staff asked Mr. Campbell why Student's mother believed he was spending excessive time in the bathroom, and Mr. Campbell refused to state the source of the information. The District staff had never noticed a problem, and the District declined to do an informal assessment to see how long he was spending in the bathroom.

101. Later in the meeting there was a further discussion of toileting in which Mr. Campbell mentioned a concern by Student's mother as to whether Student was properly wiping himself after using the restroom. Ms. Milliman had never noticed a problem regarding that. She told the team that Student only had one toileting accident at school in all the time she had known him and that did not involve wiping himself.

When asked, Student's mother denied that Student came home with soiled clothing. Mr. Campbell told the team it was "not really that big of an issue."

102. The proposed IEP included goals in the areas of reading comprehension, writing, math, vocational (test-taking skills), behavior (remaining quiet in a group setting and not touching materials that are not his), psycho motor/gross motor, fine motor, sensory processing, behavior/appropriate response (appropriately responding to questions or comments regarding a topic in conversation), several goals related to communication and receptive/expressive language, learning-to-learn skills (attending to nonpreferred activities and responding to instructions that are out of routine) self-help (using a tissue to clean his nose), social skills, and sensory processing/attention (following three-step novel directions without becoming distracted).

103. The District's proposed IEP called for Student to be educated in a mild/ moderate special education classroom, with individual and group speech and language services, adapted physical education, occupational therapy, group and consultation behavior intervention services, and ESY services. The occupational therapy services consisted of one session per week for 50 minutes per session conducted by an NPA.

104. At the end of the meeting, Mr. Campbell signed the IEP with Student's mother's name as well as his own name to indicate that they both attended the meeting. During the hearing he explained that his instructions from SELF were that Student's mother was not supposed to sign the IEP documents. The District stated that Student would receive a final draft of the IEP with the new goals within a few days.

105. On March 26, 2012, Mr. Osborne sent a prior written notice letter denying the requests for a central auditory processing assessment, parent training, independent educational evaluations, a one-to-one aide for Student, additional mainstreaming, and additional speech and language during ESY, made by Mr. Campbell during the March 13, 2012 IEP meeting. In response to Mr. Campbell's request that Student be

encouraged to eat lunch at school, the District stated that, although the District still felt there were no feeding problems for Student that affected his educational performance, lunch staff would encourage Student to eat his lunch, and the District would implement a lunch mat/place mat to encourage Student to eat. The lunch mat/place mat contained a list of lunchtime activities in order of completion (for example, first eat lunch, then play games).

106. Student contends that the District's prior written notice letter sent by Mr. Osborne was not sufficient to meet the statutory requirements with respect to Student's request for a central auditory processing assessment because it "(i) failed to describe each evaluation procedure, assessment, record, or report District used as a basis for the refused action; (ii) failed to list a description of the options that the IEP team considered and the reasons why those options were rejected; and (iii) failed to give a description of other factors relevant to the District's refusal."

107. Student's contention is not well taken. The District's prior written notice letter discussed the District's triennial assessment and why the District believed Student's problems were due to autism rather than auditory issues. The letter explained that an auditory processing assessment would likely "give inconclusive results, due to [Student's] nature to repeat what was just said and general difficulties with communication." The letter went on to explain that the assessment was not necessary to draft goals and objectives for Student. That discussion was sufficient to meet the statutory requirements. However, as will be discussed in the Legal Conclusions below, even if the letter did not specifically contain every single element in detail from the regulatory requirements, there was no denial of FAPE. Any procedural errors did not give rise to a substantive denial of FAPE. Student's mother and her advocate Mr. Campbell were well aware of the District's reasons for denying the assessment. The

remaining portions of the prior written notice letter also contained the requirements set forth in the law.

108. On March 30, 2012, SELF sent a letter to District's counsel in which SELF requested that the District perform an "eyesight assessment" of Student, consisting of 19 different subparts (including things such as "color vision" and "objective measurement of refractive status," as well as determining "the lens correction needed to provide optimal visual acuity for all viewing distances..."). The letter also requested that the District perform an assistive technology assessment "to determine [Student's] educational and social needs for equipment, computers, and software that will enable [Student] to benefit from [Student's] education and to express himself."

109. The letter stated the reason why eyesight was an area of suspected disability for Student necessitating an "eyesight assessment" as follows:

> [Student's] areas of suspected disability include, but are not limited to: Vision, as evidenced by [Student's] failing a vision screening, the recommendation of Dr. Lingua, Ophthalmologist, that [Student] have another eye evaluation in April 2012, [Student's] blinking and rubbing of his eyes, [Student's] diagnosis of nearsightedness, and Dr. Lingua's recommendation that [Student] be seated in the front of the class....

110. On April 3, 2012, Mr. Osborne sent a prior written notice letter to Student's mother, denying the requests for an eyesight assessment and assistive technology assessment. The prior written notice letter contained the elements required by law.

111. On April 4, 2012, SELF sent a letter to District's counsel, signed by Attorney Campbell, which stated, in part:

> On behalf of [Student's mother], out of an abundance of caution, we hereby consent, in its entirety, to the Garden Grove Unified School District ("District") Individualized Education Program, dated as of March 13, 2012, for [Student] ("[Student's] March 2012 IEP") so that Student may begin to receive promptly all offered services and goals.
>
> On behalf of [Student's mother], we wish to note that the District failed to offer [Student] appropriate parent training and services related to [Student's toileting issue. These failures by the District constitute a denial of a free appropriate public education ("FAPE") for [Student].
>
> At [Student's] IEP team meeting of March 13, 2012, [Student's] special education teacher repeatedly stated "I don't know" when asked questions about [Student]. It appears that [Student] is not being sufficiently recognized or monitored by [Student's] special education teacher. On behalf of [Student's mother], we hereby request that [Student's] special education teacher be replaced.
>
> We hereby reserve all rights and remedies with regard to [Student's] March 2012 IEP.

112. SELF's letter did not include a copy of the IEP on which Student's mother signed her consent. There was no evidence that Student's mother or father ever personally signed the March 2012 IEP, nor did Attorney Jennifer Campbell sign the

document as the agent for Student's mother. The only "consent" came from SELF's April 4, 2012 letter.

113. On April 10, 2012, Mr. Osborne sent a prior written notice letter to Student's mother regarding the request for parent training and services related to toileting made in the April 4, 2012 letter, and regarding the request that Student's teacher be replaced. The District denied the requests. That prior written notice letter contained the elements required by law.

114. On April 12, 2012, the District filed the instant due process case, seeking to defend its assessment and deny Student's request for IEE's.

EVENTS FROM THE MAY 18, 2012 IEP MEETING TO THE FILING OF THE DISTRICT'S AMENDED DUE PROCESS REQUEST

115. On May 18, 2012, Student's IEP team met again. The meeting was held at the request of Student's mother to discuss a request for a communication logbook between the teacher and Student's mother and to discuss Student's consumption of his lunch. In addition to discussing communication, the IEP team discussed the possibility of additional mainstreaming time for Student, reverse mainstreaming, Student's behavior and parent training. The District staff discussed the types of informal training opportunities that Student's mother had already received. The discussion regarding mainstreaming was extensive and Mr. Campbell participated in that discussion. Mr. Campbell requested that another IEP meeting be held within 30 days to discuss progress on goals and mainstreaming.

116. On May 23, 2012, SELF sent a letter to the District's counsel requesting a functional behavioral assessment of Student. The request included 15 different subcategories of areas to be included in the assessment. The letter stated that Student's mother "is especially concerned about [Student's] ability to pay attention in class.

Several people have observed that [Student] is unable to maintain concentration for longer than a period of one minute without prompts."

117. On June 1, 2012, Mr. Osborne sent a prior written notice letter denying the request for a functional behavior assessment. The letter explained, in part, that Student's IEP already contained agreed-upon and implemented goals to address attention and behavior. That letter contained the elements required by law for a prior written notice letter.

118. Student's IEP team met again on June 1, 2012, for a continuation of the May 18, 2012 meeting. Mr. Campbell attended the meeting as Student's advocate and requested parent training for Student's mother so there could be "consistency" between home and school. The team had an extensive discussion regarding mainstreaming and the possibility of Student having additional mainstream time in a music class two times a month for 30 minutes per session. Student once again raised concerns about Student eating his lunch and the school staff reported that he ate most or all of his lunch. The school principal explained that he had instructed staff to encourage Student to eat his food and Student was, in fact, eating his lunch. When Student's mother requested to come to school to watch Student eat his lunch, the District suggested instead that she could set up an occasional observation with the principal every couple of weeks or so to see whether he was eating.

119. Student's goals and objectives had not changed, and the District team members went over Student's IEP program and services. The District took a break and then came back with a hard copy of the District's offer of FAPE. Student's advocate requested another addendum IEP meeting to discuss progress on goals and the possibility of placing Student in a non-public school.

120. On June 6, 2012, Student filed his request for a due process hearing.

121. On June 15, 2012, the District sent a prior written notice letter denying the request for parent training, the request for placement at a nonpublic school and the request for additional mainstreaming for Student. The District agreed to have an addendum IEP meeting and proposed a date for the meeting.

122. On June 22, 2012, SELF sent a letter to the District, signed by Attorney Campbell, which stated, in part, "On behalf of [Student's mother] we hereby consent to the following portions of the District's Individualized Education Program Addendum, dated as of May 18, 2012, for Student...One hour of additional mainstreaming per month for [Student]." The letter concluded with the sentence, "We hereby reserve all rights and remedies with regard to [Student's] May 2012 IEP."

123. On June 22, 2012, the District's counsel sent a letter to SELF requesting that Student's mother or father provide handwritten consent to the assessment plan, emergency healthcare plan and the various IEP documents. On June 25, 2012, SELF sent a letter to District's counsel contending that sufficient consent had already been given to those documents. On July 16, 2012, the District filed its amended due process request.

124. Student contends that the District erred by failing to include OT goals in the areas of adaptive/daily living skills related to the eating and toileting in Student's IEP's between January 2012 and June 2012. However, Student failed to bring in sufficient evidence to show that Student's eating was an area of educational need for Student. The District witnesses were unanimous in their testimony that Student had no feeding problems at school. Without Ms. Aucreman's testimony at hearing to explain the basis for her concerns about Student's eating habits, the Newport OT report was not persuasive and not sufficient to overcome the testimony of the District experts on that issue. Mr. Osborne testified that, in his opinion, there was no denial of FAPE due to the lack of goals related to feeding. Student's mother testified that Student needed an IEP

goal in the area of feeding, but she spoke of no incidents that happened at school to raise her concern. Without some evidence of eating problems at school or persuasive expert testimony, there is no basis for finding that feeding was an area of educational need that had to be addressed in Student's IEP.

125. Likewise, Student presented no expert evidence that Student had an educational need in the area of toileting. The OT assessment conducted in March 2012 by the NPA which provided Student's OT services at school did not find toileting problems. Even the Newport OT assessment did not mention toileting concerns. Student had been toileting independently for years by the time SELF first raised the issue to the District, and the District staff had never noticed Student using toileting as an excuse to avoid work.

126. Student's mother believed that Student needed an OT goal related to toileting. She testified that she was concerned about Student spending too much time in the bathroom because that is what she noticed at home. She also believed that Student did not know how to wipe himself and how to take off his pants – in her experience, he sometimes took off his pants outside the bathroom. However, she admitted that she did not know if his toileting issues were interfering with his ability to receive benefit at school.

127. Student brought in no evidence that any of the toileting behaviors Student's mother observed at home were occurring at school. Ms. Milliman testified that she had never noticed any smell or other indication that Student was soiled. Student's mother told the IEP team that she had not noticed soiled clothing when Student returned home from school. Nurse Lum confirmed that Student had not been sent to the office due to a toileting accident. The evidence does not support a finding that Student required an OT goal related to toileting.

128. Student also failed to bring any expert evidence to support Student's claims that the District denied Student of FAPE between January 2012 and June 2012 by failing to provide a central auditory processing assessment, functional behavior assessment, audiological assessment, eyesight assessment, and AT assessment. The District experts, on the other hand, were consistent in their testimony that no additional assessments were necessary. Mr. Escobar, for example, testified that his multidisciplinary assessment was sufficient to address all of Student's areas of educational need. Ms. Wall testified that her assessment covered all areas of disability with respect to Student's speech and language needs.

129. With respect to the requests for a central auditory processing and audiological assessment, the District witnesses were persuasive in their testimony that auditory processing and hearing were not areas of suspected disability for Student. Any language or communication issues that Student exhibited were a result of his autism, not a separate auditory processing or hearing problem. Student's communication needs were well known to the District staff, and no further assessment in that area was necessary. No members of the District staff had noticed hearing problems for Student and his private hearing tests had shown no hearing problems. In Mr. Osborne's opinion, there was no denial of FAPE based on the failure to provide a central auditory processing assessment. Nurse Lum did not believe that Student had any hearing problems. In Mr. Escobar's opinion, an auditory processing assessment would not produce any relevant results for Student because of the impairment of Student's autism. Ms. Wall did not see anything during her speech-language assessment to indicate an auditory processing problem, aside from the communication problems related to Student's autism.

130. A similar situation exists with respect to Student's request for an eyesight assessment. Student's mother testified that she wanted the assessment because

Student sometimes blinks and scratches his eyes, and because his eyes open and close when he attempts to see things at a distance. However, Student brought in no expert testimony to support his mother's testimony in this regard. Mr. Osborne testified that many of the areas included in Student's eyesight assessment request were not educationally related and not the responsibility of the District to assess. In his opinion, vision was not an area of suspected disability for Student. Nurse Lum reported that Student had normal test results with his glasses on. She did not believe there was a need for further vision assessment by the District.

131. The District witnesses were also in agreement during their testimony that Student exhibited no behaviors which would necessitate a functional behavior assessment. At the time of Mr. Escobar's assessment, Student's problem behavior involved picking his nose, which occasionally caused a small amount of bleeding. On one or two occasions he got a few drops of blood on his shirt and had to change. Student's IEP team developed a goal to address that problem behavior. In Mr. Escobar's opinion, the problem was not serious and Student did not exhibit any aggressive behaviors that would necessitate a functional behavior assessment. In the past, Student had exhibited a problem with hitting his head against surfaces, but that behavior had decreased significantly by the time of Mr. Escobar's assessment. He was not aware of any self-injurious behaviors by Student that necessitated a functional behavior assessment. Likewise, Ms. Milliman testified that in the past Student had engaged in behaviors such as scratching the teacher. However, those behaviors improved as time went on and were no longer a problem by the time of the December 2011 IEP meeting. Nurse Lum was not aware of any occasion on which Student had been sent to the nurse's office due to injuries.

132. With respect to Student's inattention, Mr. Osborne explained that a functional behavior assessment was not necessary because there were already IEP goals

to address the areas of attention and concentration. The purpose of the functional behavior assessment is to identify the reason for a problem behavior and then come up with a plan to address the behavior. Student's existing IEP goals were already sufficient to address Student's needs in the area of attention. Student brought in no expert testimony to dispute the opinions of the District witnesses regarding the need for a functional behavior assessment.

133. With respect to the request for an AT assessment, Mr. Osborne explained that Student was making adequate progress on his IEP goals and objectives, so the team saw no need for him to be assessed in the area of AT. Student was verbal and had no need of an augmentative communication device to benefit from his education. Ms. Milliman did not believe an AT assessment was necessary for Student. She explained that Student is able to express himself verbally. In her opinion, an AT communication device might be detrimental to Student because it might discourage Student from using oral language to get his needs met.

134. Student's mother testified that she needed parent training so she would know how to do the same things with Student at home that the educators were doing at school. She felt she needed to understand what was happening at school so she could instruct Student at home. Mr. Osborne testified to the various opportunities that Student's mother had for parental training including, but not limited to, observations at school and classroom visits to see what strategies the teachers were using, weekly homework packets sent home with information, and parental classes offered by the District staff to the parents of children in the school. He explained that Student's mother had observed at school to see what techniques were used with Student, but did not attend the classes offered to parents. Mr. Escobar did not believe that Student's mother required training beyond the classes that the District offered to all parents. Ms. Milliman testified that the District had offered training twice for parents in the spring of

2012, but Student's mother did not attend either training. Student's mother knew parental training had been offered, but testified that she did not attend because she felt the offered classes were for all the children, not specific to Student. Student was making meaningful educational progress at all times in this case, and Student presented no evidence that Student's mother required training in order for Student to access or benefit from his special education.

135. During the hearing, Mr. Osborne described the District's concerns about SELF's practice of sending letters of consent instead of permitting their clients to sign documents. In Mr. Osborne's opinion, SELF was usurping parents' entitlement to consent to their child's educational program. He also thought the practice was detrimental to a child, because District staff might have to go through numerous documents (and even multiple IEP documents) to determine what IEP program to implement. With respect to the emergency healthcare plan, Mr. Osborne was concerned that staff might not have time to go through attorney correspondence in the event of an emergency. Student's mother testified that she was authorized to act and sign documents on behalf of Student's father with respect to every educational decision related to Student. She testified that she hired SELF to represent her and that she authorized them to send the various letters on her behalf. While she might not have understood every legal term in the letters, she understood what her son needed and asked the law firm to make requests in order to help her.

136. As will be discussed in the Legal Conclusions below, because the District provided Student with a FAPE, there is no basis for any reimbursement or compensatory education. However, even if there was, Student brought in no expert testimony or other persuasive evidence to show any educational detriment suffered by Student which would necessitate compensatory education. Likewise, Student brought in no evidence to support a need for reimbursement. Student brought in one document to show that

$350.00 was charged for the Newport assessment. However, on cross-examination, Student's mother admitted that the document was an explanation of insurance benefits, not an invoice, and that her insurer had paid for the assessment. She did not pay any money for the assessment.

LEGAL CONCLUSIONS

1. In a special education administrative proceeding, the party seeking relief has the burden of proof. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 163 L.Ed.2d 387].) Here, Student has the burden of proof in this proceeding with respect to the issues raised in Student's due process hearing request and the District has the burden of proof with respect to the issues raised in the District's due process hearing request.

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

3. The congressional mandate to provide a FAPE to a child includes both a procedural and a substantive component. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (*Rowley*) (1982) 458 U.S. 176 [102 S.Ct. 3034, 73 L.Ed.2d 690], the United States Supreme Court utilized a two-prong test to determine if a school district had complied with the IDEA. First, the district is required to comply with statutory procedures. Second, a court will examine the pupil's IEP to determine if it was reasonably calculated to enable the student to receive educational benefit. (*Id.* at pp. 206 - 207.)

4. Not every procedural violation of IDEA results in a substantive denial of FAPE. (*W.G. v. Board of Trustees of Target Range School District* (9th Cir. 1992) 960 F.2d

1479, 1484.) According to Education Code section 56505, subdivision (f)(2), a procedural violation may constitute a substantive denial of FAPE only if it:

(A) Impeded the right of the child to a free appropriate public education;

(B) Significantly impeded the opportunity of the parents to participate in the decision making process regarding the provision of a free appropriate public education to the child of the parents; or

(C) Caused a deprivation of educational benefits.

5. In *Rowley*, the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. (*Rowley, supra,* 458 U.S. at p. 201.) *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is "sufficient to confer some educational benefit" upon the child. (*Ibid.*)

6. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) An IEP is evaluated in light of information available at the time it was developed, and is not to be evaluated in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) The Ninth Circuit has endorsed the "snapshot rule," explaining that an IEP "is a snapshot, not a retrospective." The IEP must be evaluated in terms of what was objectively reasonable when it was developed. (*Ibid.*)

DID THE DISTRICT DENY STUDENT A FAPE DURING THE 2010 – 2011 SCHOOL YEAR BY FAILING TO PROVIDE AN OT ASSESSMENT FOR STUDENT, AND FAILING TO PROVIDE PRIOR WRITTEN NOTICE IN THE VIETNAMESE LANGUAGE?

7. Before any child can be found eligible for special education, a school district is required to assess the child in all areas of suspected disability. (20 U.S.C. § 1414(a); Ed. Code, § 56320.) Once a child has been found eligible for special education, a school district must reassess the child at least every three years, unless the parents and district agree otherwise. (Ed. Code, § 56381, subd. (a)(2); 34 C.F.R. § 300.303(b)(2) (2006).) A district may not assess a child more frequently than once a year, unless the child's parents and the district agree otherwise. (Ed. Code, § 56381, subd. (a)(2); 34 C.F.R. § 300.303(b)(1) (2006).)

8. As set forth in Factual Findings 1 – 38 above, prior to the request by Student's mother for an OT assessment relating to feeding issues, Student had already been found eligible for special education and was receiving OT services as part of the District's offer of FAPE. Student brought in no expert testimony or other persuasive evidence to show that feeding was an area of unique need for Student educationally.

9. In Student's written closing argument, Student contends that, because Student's mother genuinely believed that feeding was an area of need for Student and requested an assessment, the District was required to assess. Student cites to Section 1414(b)(2) of Title 20 of the United States Code and California Education Code section 56320, subdivisions (c) and (f), to support his claim that a district "must assess if Parent requests an evaluation."

10. Student's legal argument is not well taken. The law does not provide for assessments simply for the sake of conducting assessments. Assessments are necessary to determine whether a child is eligible for special education and to assist an IEP team with determining placement and services to help the child gain educational benefit. The law provides that a district is required to assess "in all areas of suspected disability" (20

U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) California law makes that even more plain, stating that tests and assessment materials should be "tailored to assess specific areas of educational need...." (Ed. Code, § 56320, subd. (c).) Nothing in the law requires a district to perform every single possible test in every possible area, no matter how remote from the child's needs, just because a parent requests it. (See *M.M. v. Government of the District of Columbia* (D.D.C. 2009) 607 F.Supp.2d 168, 173 – 174 [failure to conduct psychiatric evaluation did not deny FAPE].) Indeed, the facts of this case – in which there was a constant barrage of assessment requests made by SELF to the District – emphasizes the wisdom of the law in limiting assessments to areas of suspected disability.

11. Student also relies upon 34 Code of Federal Regulations part 300.320(a)(4) (2006). That section states, in part, that an IEP must contain a "statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child...." Student contends that the District's letter denying the assessment did not contain reasons based on peer-reviewed research. Student is confusing apples and oranges. The regulation Student relies upon deals with IEP services, not letters denying an assessment request.

12. Student failed to meet his burden of showing that the District denied him a FAPE by denying his mother's request for an OT assessment relating to feeding issues.

13. Student also contends that the District violated special education law because it failed to send Student's mother the prior written notice letter denying the OT assessment in Vietnamese.

14. Federal regulations require a school district to provide written notice that meets certain legal requirements when it proposes to initiate or change the identification, evaluation or educational placement of a child or provision of FAPE to a child or when it refuses to initiate or change the identification, evaluation or educational

placement of a child or provision of FAPE to a child. (34 C.F.R. § 300.503(a) (2006).) The notice must be provided "in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so." (34 C.F.R. § 300.503(c)(1)(ii) (2006).)

15. As set forth in Factual Findings 26 – 27 above, the evidence presented at hearing was inconclusive as to whether the prior written notice sent by the District denying the OT assessment was translated into Vietnamese. Neither Student's mother nor Mr. Osborne could remember if the notice had been sent in Vietnamese. Student has the burden of proof on this issue and failed to meet that burden.

16. However, even if Student had brought in evidence to show that the letter was not sent in Vietnamese, there still would be no denial of FAPE. As stated in Legal Conclusion Four above, a procedural violation only gives rise to a substantive denial of FAPE when certain factors are met. None of those factors is met here – Student's mother clearly understood the denial letter. She objected to that denial in two different documents sent to the District mere days after she received the prior written notice letter. Any failure to send the letter in Vietnamese did not significantly impede her right to participate in the process. Student presented absolutely no evidence of any loss of educational benefit to Student based on the failure to send the letter in Vietnamese. To the contrary, the evidence showed that Student was making meaningful educational progress at all times relevant to this case.

DID THE DISTRICT DENY STUDENT A FAPE FROM MAY 2011 TO DECEMBER 2011, AND JANUARY 2012 TO JUNE 6, 2012, BY FAILING TO PROVIDE OT GOALS IN THE AREAS OF ADAPTIVE/DAILY LIVING SKILLS RELATED TO STUDENT'S EATING AND ADAPTIVE/DAILY LIVING SKILLS RELATED TO STUDENT'S TOILETING?[8]

17. An IEP must include a "statement of measurable annual goals, including academic and functional goals, designed to do the following:"

> Meet the needs of the individual that result from the disability of the individual to enable the pupil to be involved in and make progress in the general education curriculum.
>
> Meet each of the other educational needs of the pupil that result from the disability of the individual.

(Ed. Code, § 56345, subd. (a)(2).)

18. The parties dispute whether Student had any educational needs regarding feeding or toileting. As stated in Factual Findings 28 – 40 and 124 – 127, Student failed to introduce sufficient evidence to show that Student had any educational needs relating to feeding and toileting. Aside from Student's mother's testimony about what

[8] In Student's written closing argument, Student attempts to change the issue to state that the District should have provided OT goals and services in the areas of "feeding, dressing, and hygiene." Student's issue in his due process request related solely to OT goals in the two areas of eating and toileting, not services in three areas. However, even if the issue had been alleged as Student claims in the written closing argument, Student raised insufficient evidence to show a need for OT goals and services in these areas, beyond those educationally-related OT goals and services already contained within Student's IEP.

occurred at home, Student brought in no evidence of any toileting problems for Student. None of the various assessments of Student noted toileting problems. Even the Newport assessment did not find any toileting problems. If there was no educational need related to toileting, there was no requirement for the District to create a goal.

19. In Student's written closing argument, Student relies upon the Newport assessment to show that Student had eating issues. However, as stated in Factual Findings 28 – 40 above, it is not clear to what extent the Newport assessment relied solely on the report of Student's mother in finding there were eating problems. There was no indication that the Newport assessor talked to Student's teachers or made an effort to see if Student exhibited any eating problems at school. Student did not call the Newport assessor or any other OT experts to testify at the hearing. As stated in Factual Findings 1 – 40, 99, 115, 118, the issue of Student finishing his lunch was a constant discussion at IEP meetings. The District staff never saw any problems with Student finishing his lunch at school. Student raised no persuasive evidence to counter the unequivocal testimony of the many District witnesses who saw no eating problems for Student that would require OT goals.

20. Student had the burden of proof on this issue and failed to meet that burden. There was no denial of FAPE based on the failure to include adaptive daily livings skills goals in the IEP in the areas of eating and toileting.

DID THE DISTRICT DENY STUDENT A FAPE AT THE DECEMBER 7, 2011 IEP MEETING BY: 1) FAILING TO PROCURE WRITTEN PERMISSION FOR THE GENERAL EDUCATION TEACHER TO LEAVE THE MEETING; AND 2) HOLDING DISCUSSIONS REGARDING THE OFFER OF FAPE WITHOUT STUDENT'S PARENT IN ATTENDANCE AND MAKING THE OFFER OF FAPE PRIOR TO DISCUSSIONS ABOUT PLACEMENT?

21. Both Federal and California law require that a pupil's IEP team consist of certain individuals, including: 1) one or both of the pupil's parents; 2) not less than one regular education teacher of the pupil; 3) not less than one special education teacher of the pupil, or if appropriate, not less than one special education provider of the pupil; 4) a representative of the local educational agency; 5) an individual who can interpret the instructional implications of the assessment results; 6) when appropriate, the pupil; and 7) at the discretion of the parent, guardian, or local educational agency, other individuals who have knowledge or special expertise regarding the pupil, including related services personnel, as appropriate. (20 U.S.C. § 1414(d)(1)(B); Ed. Code, § 56341, subd. (b).)

22. The regular education teacher: "to the extent appropriate, shall participate in the development, review, and revision of the pupil's individualized education program, including assisting in the determination of appropriate positive behavioral interventions and supports, and other strategies for the pupil, and the determination of supplementary aids and services, program modifications, and supports for school personnel that will be provided for the pupil, consistent with Section 1414(d)(1)(A)(i)(IV) of Title 20 of the United States Code." (Ed. Code, § 56341, subd. (b)(2).)

23. The law provides that a required member of the IEP team need not attend all or part of the meeting under the following circumstances: 1) if the parents and the local education agency agree in writing that the attendance at the member is not necessary because the member's area of curriculum or related services is not being

modified or discussed at the meeting; 2) the parent and the District consent to the excusal after conferring with the member and the member submits, in writing, input into the development of the IEP prior to the meeting. (Ed. Code, § 56341, subd. (f), (g).) Any consent under either of those two subdivisions must be in writing. (Ed. Code, § 56341, subd. (h).)

24. As set forth in Factual Findings 41 – 52 above, Nancy Randazzo, a regular education teacher, attended Student's December 7, 2011 IEP team meeting. Ms. Randazzo discussed the California curriculum standards, in particular the math standards, and answered questions for the IEP team. There is no dispute that she left the meeting before it ended and that Student's mother agreed verbally that she could leave. Before she left, the principal asked Student's mother if she had any further questions for Ms. Randazzo. Student's mother was told that Ms. Randazzo was on campus and could return to the meeting if Student's mother had further questions at any point during the meeting.

25. Student submitted sufficient evidence to show that the District committed a procedural violation of IDEA by obtaining verbal, but not written consent for Ms. Randazzo to leave the meeting.[9]

26. However, Student failed to submit sufficient evidence to show that the procedural violation gave rise to a substantive denial of FAPE. As set forth in Factual Findings 47 – 49 above, Student's mother had a full opportunity to hear input from the regular education teacher and to discuss mainstreaming with her prior to the time she

[9] In its written closing argument, the District erroneously refers to the "binding existing precedent" of *Bakersfield City School District* (2010) OAH case number 2010110795. OAH due process decisions may have persuasive value, but they are not binding precedent in cases involving different parties. (Cal. Code Regs., tit. 5, § 3085.)

left. The District members of the IEP team made it clear that the regular education teacher could return if Student's mother had further questions. Student failed to show that the early departure of the regular education teacher, with the verbal permission of Student's mother, substantially impeded the ability of Student's mother to participate in the IEP process. Student's mother did not even sign the IEP on the day of the meeting, but instead took it with her and consulted with her new law firm prior to consenting to any portion of it. Student's IEP team met again in March, May and June. Student does not allege the absence of a regular education teacher at any of those meetings.

27. Likewise, Student failed to bring in sufficient evidence to show that the early departure of the regular education teacher caused a deprivation of educational benefits to Student or denied Student a FAPE. Student was gaining educational benefit at all times in this case. Student brought in no expert to challenge the appropriateness of the placement offered by the District at the December 2011 IEP meeting.

28. Student, in his written closing argument, implies that the District's language interpreter told Student's mother to give her verbal consent for the regular education teacher to leave early. However, Student's mother did not testify to that, nor did any of the District witnesses. The remainder of the characterization of Student's mother testimony about this issue in Student's closing argument is also questionable. As set forth in Factual Finding 49 above, Student's mother testified that she could not recall whether the District asked her if she had any further questions before the teacher left, and she could not even recall if the District discussed class placement and service levels during the December 2011 IEP meeting. Student's written closing argument also asserts that "Student's IEP meetings were becoming contentious affairs" by December 2011. However, the evidence did not show that. If anything, the evidence showed that Student's IEP's became "contentious" after SELF began representing Student's mother in 2012.

29. Student failed to meet his burden to show that the procedural violation of obtaining verbal, but not written, permission from Student's mother to excuse the regular education teacher early from the December 2011 IEP meeting gave rise to a substantive denial of FAPE.

30. Student next contends that the District committed a procedural violation of IDEA by taking a break during the December 2011 IEP meeting so the District could prepare a "hard copy" of its FAPE offer for the team to discuss. Student contends that the District made an offer of FAPE prior to discussions about placement and held discussions about the FAPE offer without Student's mother in attendance. However, as set forth in Factual Findings 47 – 51, the IEP team discussed mainstreaming (which is part of a placement determination) prior to the time the draft IEP was written. Further, even if there had been no such discussion prior to the creation of a draft offer of FAPE, there still would have been no procedural violation.

31. Case law has affirmed that it is permissible for school personnel to meet to discuss a district's offer of FAPE prior to an IEP meeting (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688; *Doyle v. Arlington School Board* (*Doyle*) (E.D. Va. 1992) 806 F.Supp. 1253), and it is permissible for a school district to prepare a draft IEP offer prior to the meeting (*J.G. v. Douglas County School District* (9th Cir. 2008) 552 F.3d 786, 801, fn. 10) as long as the team engages in a subsequent discussion of the offer and listens to the parent's proposed changes in good faith. (*Ibid.*; *Doyle*, *supra*, 806 F.Supp. 1253.)

32. As set forth in Factual Findings 47 – 51 above, rather than meet prior to the meeting, the District in the instant case preferred to have the full team agree upon goals and objectives, then draft a written offer to be discussed by the team. Mr. Osborne's testimony that most parents prefer to have a "hard copy" of a District proposal in front of them during a discussion of the District's offer makes sense. As long as the District was willing to discuss the offer and keep an open mind during those

discussions, there was no violation. Both Mr. Osborne and Ms. Milliman testified credibly that the written FAPE offer was just a proposal and the District team members were willing to discuss it. Although the recording of the December 2011 IEP was not placed into evidence, the recordings of the three later IEP meetings (see Factual Findings 89 – 104 and 115 – 122 above) show unequivocally that the District staff tried to work in good faith with Student's mother to address her concerns at all times. There was nothing sinister about the District taking a recess during the December 2011 IEP meeting to place a proposed FAPE offer on paper. Student's attempt, in his written closing argument, to characterize the break as a separate IEP meeting was not supported by the testimony. There was no denial of FAPE.

DID THE DISTRICT DENY STUDENT A FAPE BY FAILING TO PROVIDE PRIOR WRITTEN NOTICE FOR THE CENTRAL AUDITORY PROCESSING ASSESSMENT WHICH WAS REQUESTED AT THE MARCH 13, 2012 IEP MEETING?

33. The law requires that written notice be given to the parents of a child with a disability within a reasonable time before a school district: a) proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or b) refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child. That notice must include: 1) a description of the action proposed or refused by the agency; 2) an explanation of why the agency proposes or refuses to take the action; 3) a description of each evaluation procedure, assessment, record, or report the agency used as the basis for the proposed or refused action; 4) a statement that the parents of a child with a disability have protection under the procedural safeguards of IDEA and the means by which a copy of the procedural safeguards can be obtained; 5) sources for parents to contact to obtain assistance in understanding the provisions of this part; 6) a description of other options that the IEP team considered and the reasons why those

options were rejected; and 7) a description of other factors that are relevant to the agency's proposal or refusal. (34 C.F.R. § 300.503 (2006).)

34. Student's written closing argument admits that the District sent a prior written notice letter regarding the District's refusal to conduct a central auditory processing assessment. However, Student contends that the letter was deficient because it failed to meet the third, sixth and seventh prior written notice requirements listed in Legal Conclusion 33 above.

35. As set forth in Factual Findings 105 – 107 above, the evidence did not support Student's contention. The prior written notice letter referred to the District's triennial assessment which was a basis for the decision. The letter discussed another option (conducting the assessment) and why that was rejected (because an auditory processing assessment would be inconclusive, given Student's autism). The letter discussed other factors, for example, the fact that the information was not necessary to draft goals and objectives for Student. The letter was a proper prior written notice letter.

36. However, even if the letter did not specifically contain every single element in detail from the regulatory requirements, any procedural errors did not give rise to a substantive denial of FAPE. Student's mother and her advocate Mr. Campbell were aware of the District's reasons for denying the assessment. Student brought in no evidence to show that a central auditory processing assessment was necessary for Student. Student's claim in his written closing argument that the District's prior written notice letter "delayed Mother's ability to have Student assessed in all areas of suspected disability" is not supported by the evidence. The prior written notice letter clearly denied her request and provided the reason for that denial. Student's mother knew how to obtain an assessment at her own expense when she chose – she had obtained an OT assessment from Newport prior to SELF's representation of her. She also had a

lawyer (from SELF) to advise her on whether to file a due process request to seek an assessment. There was no denial of FAPE.

DID THE DISTRICT DENY STUDENT A FAPE AT THE MARCH 13, 2012 IEP MEETING BY MAKING THE OFFER OF FAPE PRIOR TO THE TIME THE TEAM DISCUSSED PLACEMENT?

37. Student contends that the District committed a procedural violation of IDEA by making an offer of FAPE prior to discussing placement at the March 2012 IEP meeting. As discussed in Legal Conclusion 31 above, the law permits a district to draft a FAPE offer prior to a meeting, as long as the District does not present it as a "take it or leave it" offer. If a district can draft a FAPE offer *prior* to a meeting, it can certainly make a proposal and then discuss it *during* a meeting.

38. As set forth in Factual Findings 89 – 104 and 115 – 122 above, there was an extensive discussion of mainstreaming at the March 2012 IEP meeting and the subsequent meetings in May and June 2012. Based on mainstreaming discussions at the three 2012 IEP meetings, the parties ultimately agreed to additional mainstreaming time for Student during music instruction. Mr. Campbell participated in all those discussions. It is clear from the thoughtful responses made by the District IEP team members that they considered the opinions of Mr. Campbell and Student's mother during the March 2012 IEP meeting and at the subsequent meetings.[10]

39. Just because the parties disagree about a district's offer does not mean there was predetermination or lack of parental involvement in the process. Parental participation does not mean that a school district must accept every preference of the

[10] It is interesting to note that, despite raising multiple issues in his due process request, Student did not allege a denial of FAPE based on improper placement or lack of mainstreaming opportunity.

child's parents. A parent does not have a veto power at an IEP meeting. (*Ms. S. v. Vashon Island School District* (9th Cir. 2003) 337 F.3d 1115, 1131.) Likewise, just because the team does not adopt a placement preferred by the parent, does not mean that the parent did not have an adequate opportunity to participate in the IEP process. (*B.B. v. Hawaii Dept. of Education* (D.Hawaii 2006) 483 F.Supp.2d 1042, 1051.)

40. Student's written closing argument contends that, because the word "placement" was not used during the March 13 IEP discussion, there was no discussion about "placement" at that meeting. Under California law, a child's placement consists of "that unique combination of facilities, personnel, location or equipment necessary to provide instructional services to an individual with exceptional needs...." (Cal. Code Regs., tit. 5, § 3042.) Clearly there was a discussion of "placement" at the meeting, no matter what that discussion was called by the meeting participants.

41. Student's written closing argument also asserts, in part, that the District "failed to discuss placement in the least restrictive environment, offered placement to Parent without discussion, and refused to discuss placement with Parent." Student presented no evidence that supported any of those assertions. There was no denial of FAPE.

DID THE DISTRICT DENY STUDENT A FAPE BETWEEN JANUARY 6, 2012, AND JUNE 6, 2012, BY FAILING TO PROVIDE A CENTRAL AUDITORY PROCESSING ASSESSMENT, FUNCTIONAL BEHAVIOR ASSESSMENT, AUDIOLOGICAL ASSESSMENT, EYESIGHT ASSESSMENT, AND AT ASSESSMENT, WHICH WERE REQUESTED BY STUDENT'S MOTHER ON JANUARY 6, 2012, AND MARCH 30, 2012, AND BY FAILING TO PROVIDE APPROPRIATE PRIOR WRITTEN NOTICE?

42. As set forth in Factual Findings 28 – 40, 54 – 88, and 108 – 133, and Legal Conclusions 7 – 12 above, assessments are only required in areas of suspected disability. Student presented no expert testimony to show that any assessments were required besides those contained in the District's triennial assessments.

43. Student argues in his written closing argument: "District was duty-bound to conduct reassessments based upon Mother's request." Student believes that Education Code section 56381 and Title 34 Code of Federal Regulations, part 300.303, give Student "an absolute right to reassessment by District because of Mother's request for reassessments. It is thus immaterial whether District believed that Student warranted a reassessment."

44. Student is wrong in his interpretation of the law. As set forth in Legal Conclusions 7 – 12 above, a school district is required to assess in suspected areas of disability, not in every area which the whim of a parent (or her legal advocate) may propose. Nothing in the laws or regulations requires a district to jump at every parental request for an assessment no matter how remote it might be from the child's educational needs. A parent always has a right to an assessment at the parent's own expense, and the IEP team must consider that assessment (see Ed. Code, § 56329, subd. (b), (c)), but there is no evidence that Student's mother obtained assessments in any of these areas. She obtained a private assessment in the area of OT (prior to SELF's representation of her), and, as discussed in Factual Finding 41 above, the District properly considered that assessment at the December 2011 IEP team meeting.

45. Further, Student's legal arguments in this regard are immaterial because, as set forth in Factual Findings 53 – 91 above, even if there was a requirement to reassess, the District *did* reassess Student fully in its triennial assessment of March 2012. As will be discussed below, the District's triennial assessment was comprehensive and followed all requirements of the law. Student brought in absolutely no expert testimony or other persuasive evidence that any of the additional assessments requested by SELF were necessary. As discussed in Factual Findings 124 – 133, the District's experts were highly persuasive in their explanation for why each of the additional areas of assessment requested by SELF did not represent an area of suspected disability for Student.

Student's educational needs were well known in this case, the District was meeting those needs, and Student was gaining meaningful educational benefit from his District program.

46. Student failed to meet his burden to show there was a denial of FAPE due to any failure by the District to conduct a central auditory processing assessment, functional behavior assessment, audiological assessment, eyesight assessment, or AT assessment.

47. Likewise, Student failed to show that the District denied Student a FAPE by failing to provide appropriate prior written notice letters for each of the denials. As set forth in Factual Findings 23 – 27, 53 – 63, 105 – 113, and 117, the letters met the requirements of the law. In Student's written closing argument, Student does not contend that there was a problem with the letters, but simply disagrees with the conclusions the District sets forth in those letters. There was no denial of FAPE. However, even if the letters missed some technical, procedural requirements of the law, there was no substantive violation. The District staff did an admirable job in attempting to respond to Student's never-ending series of assessment requests.

DID THE DISTRICT DENY STUDENT A FAPE BETWEEN MARCH 2012 AND JUNE 6, 2012, BY FAILING TO PROVIDE PARENT TRAINING?

48. California law defines special education as instruction designed to meet the unique needs of the pupil coupled with related services as needed to enable the pupil to benefit from instruction. (Ed. Code, § 56031.) "Related Services" include transportation and other developmental, corrective and supportive services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401 (26).) In California, related services are called designated instruction and services (DIS services), and must be provided "as may be required to assist an individual with exceptional needs to benefit from special education…." (Ed. Code, § 56363, subd. (a).)

Parent training can be a related service when it is necessary to assist the special needs child to benefit from his special education. (Ed. Code, § 56363, subd. (b)(11).)

49. Student brought in no evidence to show that Student's mother needed parent training in order for Student to benefit from his special education. The evidence showed that Student was benefitting from his education. He was making meaningful progress each year. As set forth in Factual Findings 98, 115, and 134, the District offered various informal means for Student's mother to become familiar with her son's program, including trainings for all parents (which Student's mother did not attend) and opportunities for her to observe District staff at work with her son. Student presented no persuasive evidence that there was a need for formal parent training sessions as a related service under Student's IEP.

50. Student failed to meet his burden to show that the District denied Student a FAPE by failing to provide parent training as an IEP service. There was no denial of FAPE.

DID THE DISTRICT DENY STUDENT A FAPE BY FAILING TO PROVIDE IEE'S FOR THE DISTRICT'S 2012 MULTIDISCIPLINARY ASSESSMENT?

51. This issue will be addressed in connection with the analysis of the District's multidisciplinary assessment below.

WAS THE DISTRICT'S 2012 MULTIDISCIPLINARY ASSESSMENT APPROPRIATE?

52. For purposes of evaluating a child for special education eligibility, the district must ensure that "the child is assessed in all areas of suspected disability." (20 U.S.C. § 1414(b)(3)(B); Ed. Code, § 56320, subd. (f).) The assessment must be performed according to strict statutory guidelines that prescribe both the content of the assessment and the qualifications of the assessor(s). The district must select and administer assessment materials that appear in the student's native language and that

are free of racial, cultural and sexual discrimination. (20 U.S.C. § 1414(b)(3)(A)(i); 34 C.F.R. § 300.304(c)(1) (2006); Ed. Code, § 56320, subd. (a).) The assessment materials must be valid and reliable for the purposes for which the assessments are used. (20 U.S.C. § 1414(b)(3)(A)(iii); Ed. Code, § 56320, subd. (b)(2).) They must also be sufficiently comprehensive and tailored to evaluate specific areas of educational need. (20 U.S.C. § 1414(b)(3)(C); 34 C.F.R. § 300.304(c)(6) (2006); Ed. Code, § 56320, subd. (c).) Trained, knowledgeable and competent district personnel must administer special education assessments. (20 U.S.C. § 1414(b)(3)(iv); Ed. Code, §§ 56320, subd. (b)(3), 56322.) A credentialed school psychologist must administer psychological assessments and individually administered tests of intellectual or emotional functioning. (Ed. Code, §§ 56320, subd. (b)(3), 56324, subd. (a).) A credentialed school nurse or physician must administer a health assessment. (Ed. Code, § 56324, subd. (b).)

53. As set forth in Factual Findings 67 – 91, the evidence shows that the District performed an appropriate assessment that met each requirement of the code. The District assessors were competent and knowledgeable, performed the tests in accordance with the test manufacturer's instructions, chose valid tests that were free from bias, and chose tests that were sufficiently comprehensive and tailored to address Student's areas of need.

54. Student brought in no expert testimony to challenge any of the assessments. Instead, in his written closing argument, Student contends that the health portion of the District's assessment was incomplete because Nurse Lum was unable to obtain conclusive results on the hearing portion of her tests. However, as set forth in Factual Findings 81 – 86 above, she was able to rely upon testing done by a private assessor to fill in the gaps in her information. Likewise, Student's contention that Nurse Lum found vision problems was not well taken. Nurse Lum dutifully reported the vision

problems noted in Dr. Lingua's report, but her testing found normal vision (as long as Student was wearing his glasses).

55. The District met its burden of proving that its multidisciplinary assessment was appropriate and met the requirements of law. The District is not obligated to fund the IEE's requested by Student's mother. (Ed. Code, § 56329, subd. (c).) The District did not deny Student a FAPE by refusing to provide IEE's.

DID THE CONSENT PROVIDED TO STUDENT'S IEP'S, ASSESSMENT PLAN, AND EMERGENCY HEALTHCARE PLAN CONSTITUTE MEANINGFUL INFORMED CONSENT UNDER IDEA?

56. This is the most difficult issue of this case. Student's counsel apparently advised Student's mother not to sign IEP's, the assessment plan, and Student's healthcare plan. Instead, SELF sent letters to the District stating that Student's mother consented to each of those documents.[11]

57. The District contends that these letters do not constitute meaningful, informed consent by Student's parents to the documents. Student contends that, under California agency law, it is appropriate for Student's attorney to consent to these documents by way of attorney's letter.

58. Two different federal court judges have recently addressed this question and found in favor of Student's position. Although these unpublished court orders are

[11] Although it was not part of the evidence at the hearing, the fact that Student cited to two other federal cases involving similar situations implies that advising clients not to sign special education documents may be a regular practice with SELF.

not binding legal precedent, they are highly persuasive on the proper interpretation of the law on this issue.

59. On May 4, 2012, the Honorable George King of the United States District Court, Central District of California, in *A.T. v. East Whittier City School District*, Case number CV 10-10030-GHK(Ex) (*East Whittier*), considered the question of whether an attorney's letter consenting to a district's assessment plan, without a parent's signature on the plan, constituted valid consent. Judge King found that the letter was sufficient to constitute consent. He overturned the OAH decision to the contrary, finding that:

> In reaching a contrary decision, the ALJ emphasized that Plaintiff's parents never returned a signed copy of the Assessment Plan, as requested by District in its February 18, 2010 letter. However, we believe that analysis improperly elevates form over substance, as the consent granted in the March 1 letter was clear.

60. In a tentative ruling in *J.L. v. Downey Unified School District*, case number CV 12-2285-GW(SSx) (*Downey*), the Honorable George Wu of the United States District Court, Central District of California, found that California agency law applies to special education documents such as assessment plans and IEP's.[12] Judge Wu's tentative decision overturns the December 21, 2011 OAH decision in *Parent on Behalf of Student v. Downey Unified School District*, OAH consolidated case numbers 2011050579, 2010100321 and 2011030557, a case relied upon by the District in its written closing

[12] At the time of writing this Decision, Judge Wu's order on this issue was only a tentative ruling issued on September 27, 2012, and supplemented on October 11, 2012. Judge Wu set a further status conference for October 25, 2012.

argument. Judge Wu's tentative ruling found that the child's mother could give valid consent to documents such as assessment plans and IEP's through an attorney's consent letter under California agency laws. The tentative ruling left open the question of whether the consent provided by the attorney presented any other problems, such as whether it was ambiguous as to the scope of the consent.

61. As set forth in Factual Findings 56 – 63, the consent letter provided by SELF to the District's assessment plan was unambiguous in its acceptance of the plan. The language in SELF's letter asking the District to "consider the assessment information provided in our letter" was just a request and did not make the consent ambiguous. The District conducted the assessment in accordance with that consent. Under the plain holdings of the two recent federal cases, the SELF letter constituted valid consent.

62. The District argues that the consent was not meaningful and informed. However, as set forth in Factual Finding 135 above, Student's mother testified that she authorized SELF to send the various letters and that she had authority to act on both parents' behalf. The District brought in no evidence to dispute her testimony. The District argues that Student's mother might not have understood the consent letters because at hearing she could not articulate what some of the terms in the letters meant. However, her lack of understanding was undoubtedly part of the reason she hired legal counsel. Her testimony made it clear that she authorized her counsel to act on her behalf.

63. The District's written closing brief argues that the scope of representation in SELF's letter was so broad that even non-attorneys in the office might be "agents" and sign consent on Student's mother's behalf. However, as set forth in Factual Findings 5, 54 – 55, 62 – 63, 111 – 112, and 122, Attorney Campbell signed each of the consent letters at issue in this case, so the District's "slippery slope" argument is not relevant to these facts.

64. The District also argues that, because SELF's letters only stated that they were representing Student's mother, Student's father presumptively disagreed with SELF's actions. However, the District presented no evidence to support this presumption. The District has the burden on this issue and failed to meet that burden.

65. In its supplemental briefing, the District argues that certain parental responsibilities, including the responsibility for a child's education, are non-delegable. Therefore, the District contends that Student's mother's attorney could not consent to those activities as the agent for Student's mother.

66. The District argues: "Where statutory authority is granted to a single person or class of persons, the person statutorily authorized to commit proscribed[13] acts must give those acts his personal attention." To support this broad statement of law, the District relies upon the holding of *Valiyee v. Department of Motor Vehicles* (1999) 74 Cal.App.4th 1026, 1034, a case involving the assisting of unlicensed practice by an automobile vehicle dealer. However, that holding is distinguishable. Many licensing laws forbid unlicensed individuals from engaging in licensed activity and forbid licensees from assisting unlicensed practice by allowing non-licensees to use the licensee's name, business, or equipment. The District cites to no similar authority which forbids an attorney from consenting to educational documents on behalf of a parent. The District also cites many statutes which require written permission of a parent for certain actions related to a child's education, but cites to no related statutes which forbid an authorized agent from giving that written permission.

67. None of the District's arguments is sufficient to overcome the legal analysis of the federal courts regarding the consent of Student's mother to the assessment plan. The letter from Attorney Campbell was clear, unambiguous, and

[13] Presumably the District meant "prescribed" acts, not proscribed.

constituted valid consent to the District's assessment plan. The District properly assessed Student in light of that letter.

68. The issue of whether the attorney letters constituted consent to Student's IEP's is more problematic. There are practical reasons why consent to an IEP document should not be done solely by attorney letter, with no signature on the document itself. Unlike an assessment plan, an IEP is a working document relied upon by school staff in effectuating a child's educational program. It is not a contract (*Van Duyn v. Baker School District* (9th. Cir. 2007) 502 F.3d 811, 820) or a legal formality, such as an assessment plan. An IEP contains the elements of the child's educational program. An attorney letter could cause unnecessary confusion as to what the child's agreed-upon program is and require the District's counsel to interpret the Student's attorney's letter. This is a far cry from the cooperative IEP process envisioned by law.[14]

69. An IEP is often drafted across numerous meetings, and different versions of the document may appear at different times. In the instant case, for example, as set forth in Factual Findings 115 – 123 above, there were IEP meetings held in May and June 2012. SELF's letter of consent purported to consent to the May 2012 offer, but referred to something discussed at the June meeting. Without an actual signature on a document, a letter of consent could cause confusion as to which IEP version was actually in place for Student.

70. However, the court in *Downey* rejected similar arguments. Further, in the instant case, the District was able to implement Student's IEP's despite any potential

[14] Indeed, if Student's position is correct that no parent's signature is needed on the IEP document itself, a district might argue that the district's counsel, acting as an agent for the district, could simply send a letter to Student instead of having district educators sign the IEP document.

confusion. Student has never argued there was a failure to implement any of the IEP terms by the District.

71. The District failed to meet its burden to prove that the attorney consent letters failed to constitute meaningful, informed consent to the IEP documents. In light of the legal analysis of the *Downey* case, Student's position prevails.

72. The most troubling of these issues involves consent to Student's healthcare plan. As set forth in Factual Findings 2 – 9 and 135 above, Nurse Lum testified that this document was more than just a legal piece of paper – it was a document kept near Student's medications that was used by District staff in the case of an emergency.

73. The evidence showed that Attorney Campbell's consent letter to this document did, in fact, cause confusion by the District staff. Nurse Lum was worried that she might jeopardize her nursing license if she implemented the plan. Both Nurse Lum and Mr. Osborne testified that confusion among the District staff could cause Student harm in the case of an emergency.

74. It is difficult to understand why Student's counsel would refuse to have Student's mother sign a document related to her son's health, particularly in this case, when Student's mother consented to the plan (according to the letter) without any changes.

75. It is also hard to believe that a parent as conscientious and concerned about her son as Student's mother would knowingly endorse a policy that might cause confusion in the case of an emergency. If there was a medical emergency, did Student's mother truly want her son to lose the precious moments it might take for school staff (or a substitute teacher) to flip the pages of an attorney's letter to see if there was consent before administering emergency treatment? And no matter how frustrated Student's mother might have been with the District administrators, did Student's mother

truly want to cause distress to the school nurse and cause the nurse to worry about whether the nurse would lose her license if she provided emergency treatment without clear consent? Did Student's mother truly wish these consequences, when a simple signature on the document would end all confusion and protect her son?

76. However, as compelling as these concerns and the other policy arguments raised in the District's closing argument might seem, the District has submitted no authority to show that California agency law would not apply to the healthcare plan as well. Attorney Campbell's letter was unambiguous in its terms. In light of the holdings in the two federal cases discussed above, the letter constituted sufficient consent to the healthcare plan.[15]

77. Because the District implemented the IEP's, conducted the assessment and complied with the doctor's orders regarding Student's health care at school, there was no denial of FAPE, even though the District did not prevail on the consent issue.

78. Because there was no denial of FAPE by the District, Student is not entitled to any remedies in this case.

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[15] The District requests that if OAH is "inclined to reverse course" and rule against the District on the consent issue, the District should be allowed to withdraw the issue from this case. The District cites no authority for the proposition that a party can argue "if we win the issue remains; if we lose the issue is withdrawn." It is unlikely the District could find legal authority for such a procedural position. The District chose to submit the issue for hearing, a full evidentiary hearing was held, the case was taken under submission, and briefs were submitted by the parties. The District's remedy at this point lies with the appellate process.

ORDER

1. All of Student's claims for relief are denied.

2. The District's 2012 multidisciplinary assessment was appropriate and Student's request for IEE's is denied.

3. The consent provided to Student's IEP's, assessment plan and emergency health care plan constituted meaningful, informed consent under the IDEA.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, the District prevailed on all issues except Issue 10 regarding informed consent.

RIGHT TO APPEAL THIS DECISION

The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within 90 days of receipt of this Decision. (Ed Code, § 56505, subd. (k).)

Dated: October 22, 2012

/s/
SUSAN RUFF
Administrative Law Judge
Office of Administrative Hearings