

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Consolidated Matter of:

PARENTS on behalf of STUDENT

v.

MODESTO CITY SCHOOLS

MODESTO CITY SCHOOLS

v.

PARENTS on behalf of STUDENT

OAH CASE NO. 2008030735

OAH CASE NO. 2008040702

DECISION

This hearing convened in Modesto, California, from May 20 to 23, June 10 to 13, and June 26, 2008, before Administrative Law Judge (ALJ) Suzanne Brown, Office of Administrative Hearings (OAH).¹

Attorney Tamara Loughrey represented Student, and attorney Justin Arnold was also present on behalf of Student. Student's mother (Mother) attended the hearing. Student's father (Father) attended most days of the hearing.

¹ As detailed further in the May 15, 2008 Order Following Prehearing Conference, pursuant to the joint request of the parties, the ALJ conducted this hearing concurrently with the hearing regarding Student's twin brother in OAH Consolidated Case No. 2008030731/2008040643. However, the respective cases for each pupil remain separate.

Attorney Marcy Gutierrez represented Modesto City Schools (District).² SELPA director Virginia Johnson attended the hearing on behalf of the District.

On March 18, 2008, OAH received Student's due process hearing request, identified as Case No. 2008030735.³ On April 3, 2008, OAH granted a motion to continue Case No. 2008030735. On April 21, 2008, the District filed its due process hearing request, which OAH identified as Case No. 2008040702. On April 28, 2008, OAH granted a motion to consolidate the two cases, and ordered that all applicable timelines and hearing dates would run pursuant to OAH Case No. 2008030735. Following the hearing, the parties filed written closing briefs on July 21, 2008. On that date, the record was closed and the matter submitted for decision.

STUDENT'S ISSUES

Both Student's issues and the District's issues pertain solely to the 2007-2008 school year. Student's issues are as follows:⁴

² Previous OAH orders had identified Modesto City Schools Special Education Local Plan Area (SELPA) and the District separately. However, at hearing the District clarified that it is the only school district in the SELPA and that there need be no distinction drawn between the two agencies for purposes of this proceeding. Thus, all references to the District also include the SELPA.

³ Student initially named both the District and VMRC as parties. However, in an order dated April 14, 2008, OAH dismissed VMRC as a party because VMRC is not a local educational agency (LEA) subject to special education due process hearings under California Education Code section 56501, subdivision (a).

⁴ The issues in a due process hearing are limited to those identified in the written due process complaint. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Student's

1. Did the District procedurally deny Student a free appropriate public education (FAPE) by:
 - A. Denying his parents (Parents) a meaningful opportunity to participate in the individualized education program (IEP) process;
 - B. Failing to consider a continuum of placement options;
 - C. Pre-determining that Student would not be offered a placement in an intensive one-to-one applied behavior analysis (ABA)/discrete trial training (DTT) program prior to his September 10, 2007 and October 16, 2007 IEP meetings?
2. Did the District deny Student a FAPE by failing to offer him a program with intensive one-to-one ABA/DTT services?
3. Did the District fail to develop an appropriate functional behavioral assessment (FBA) with an appropriate behavior support plan?
4. Did the District fail to conduct an appropriate speech-language assessment, which failure denied Student a FAPE and entitles Parents to an independent educational evaluation (IEE)?
5. Did the District deny Student a FAPE by failing to offer him appropriate speech-language services?
6. Are Parents entitled to reimbursement for an IEE in the area of functional behavior because:

Complaint alleged that the District had failed to offer appropriate occupational therapy (OT) services. However, during the hearing, the parties settled their dispute regarding that issue, and filed a stipulation that the OT issue was resolved. Accordingly, this Decision does not address that issue.

- A. Parents properly requested an IEE and the District failed to file for due process without unnecessary delay;
- B. The District improperly attempted to limit Parents' choice of assessors for the IEE?

DISTRICT'S ISSUES

- 1. Did the District offer Student a FAPE for the 2007-2008 school year, so that the proposed IEP may be implemented over Parents' objections?
- 2. Did the District conduct an appropriate speech-language assessment of Student?
- 3. Are Parents entitled to an IEE in the area of speech-language?
- 4. Did the District conduct an appropriate FBA?
- 5. Are Parents entitled to reimbursement for an IEE in the area of functional behavior?

EVIDENTIARY MATTERS

- 1. On May 9, 2008, the District requested that OAH take official notice of three documents: (1) California State Senate Bill 527, introduced by Senator Steinberg on February 22, 2007, with subsequent amendments; (2) California State Senate Bill 1563, introduced by Senators Steinberg and Perata on February 22, 2008, with subsequent amendments; and (3) a September 2007 report from the California Legislature's Blue Ribbon Commission, entitled "An Opportunity to Achieve Real Change for Californians with Autism Spectrum Disorders."⁵

⁵ During the hearing, the parties made legal arguments regarding taking official notice of these documents. Following those arguments, the ALJ took this evidentiary matter under submission.

2. The Administrative Procedure Act (APA), California Government Code section 11515, provides that in an administrative hearing, official notice may be taken of “any generally accepted technical or scientific matter within the agency’s special field, or of any fact which may be judicially noticed by the courts of this State.”⁶ California Evidence Code section 452 lists what a court may, within its discretion, accept for judicial notice. Among the items for which a court has the discretionary option to take judicial notice are “[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States.” (Evid. Code, § 452, subd. (c).)

3. In the present case, the California State Senate bills concern proposals to create programs similar to the partnership between the Valley Mountain Regional Center (VMRC) and other agencies and stakeholders within VMRC’s geographical area, as partly described in the Early Intensive Behavioral Training (EIBT) Procedures and Program Guidelines (PPGs) that were admitted into evidence in this case. Because of the nature of Student’s claims, the ALJ admitted evidence regarding the PPGs; however, ultimately the PPGs had limited relevance to the issues for determination at hearing. The California State Senate Bills under consideration here are not relevant to the hearing issues, and there is no need to take official notice of those documents.

4. The California Legislature’s Blue Ribbon Commission Report on “An Opportunity to Achieve Real Change for Californians with Autism Spectrum Disorders” contains findings from the Commission regarding topics including appropriate programs and services for pupils with autism. Given that those topics are at issue in the present case, the Commission’s report is relevant to the hearing issues. Accordingly, the ALJ takes official notice of this document.

⁶This section of the APA is applicable to special education due process hearings. (Cal. Code Regs., tit. 5, § 3089.)

FACTUAL FINDINGS

JURISDICTION

1. Student is four years and nine months old. During all times at issue in this case, he was a resident within the boundaries of the District, where he lives with family, including his identical twin brother (Brother). Student has been diagnosed with autism and is eligible for special education services under the category of autistic-like behaviors.

FACTUAL BACKGROUND

2. In 2006, Student was determined eligible for and began receiving Early Start special education services pursuant to an individual family service plan (IFSP) from San Andreas Regional Center in Santa Cruz County, where Student and his family resided.

3. In November 2006, Student turned three years old, and began receiving special education services from the Santa Cruz County Office of Education (SCCOE), pursuant to an IEP. Student and Brother both received related services and attended SCCOE's Chrysalis program, a special day class (SDC) which primarily serves preschoolers on the autistic spectrum.

4. On or about August 7, 2007, Student and his family moved to Modesto, California, within the boundaries of the District. In late August 2007, Parents contacted the District regarding provision of special education services for Student. Also in August 2007, Student was evaluated by Dr. Michael Jones, licensed clinical psychologist. Dr. Jones confirmed a previous examiner's diagnosis of Autistic Disorder, pursuant to the

criteria of the Diagnostic and Statistical Manual, Fourth Edition (DSM-IV).⁷ Dr. Jones also gave Student a provisional DSM-IV diagnosis of Mild Mental Retardation.

5. On September 10, 2007, the District convened an IEP meeting for Student.⁸ Based upon Student's previous IEP from SCCOE, the District offered a 30-day interim placement at an autism SDC at the District's Garrison Elementary School (Garrison) for 30 hours per week. The IEP also offered related services of speech-language therapy twice a week for 30 minutes per session, and occupational therapy (OT) delivered in the SDC twice a week for 30 minutes per session. During this IEP meeting, Parents signed their consent to the District's proposed assessment plan, which proposed assessing Student in the areas of academics, speech-language, and OT/motor skills.

6. Also during the September 10, 2007 IEP meeting, Parents stated that they were interested in placing Student and Brother in an intensive one-to-one ABA program. District staff explained that, for the upcoming 30-day period, the law required the District to offer an SDC placement similar to the one Student and Brother attended in Santa Cruz County. However, District staff agreed that they would make a referral to VMRC for Student and Brother to be placed on an "interest list" for an intensive one-to-one ABA program operated by a non-public agency (NPA). VMRC and local educational agencies (LEAs) in the region have an agreement to co-fund EIBT programs for young children with autism. Once a child becomes eligible for an EIBT program through VMRC,

⁷ Both Dr. Jones and the previous examiner, Dr. Arnold Herrera, made the same DSM-IV diagnoses for Brother.

⁸ The IEP team members also participated in an IEP meeting for Brother on the same date.

the District IEP team then determines whether that program would be appropriate for the child.

7. The EIBT PPGs distributed by VMRC, defines EIBT in part as an intensive one-to-one ABA program provided by an NPA to children with autism. The PPGs state that EIBT programs are “highly structured, typically in-home or center-based program[s],” wherein “[c]hildren receive instruction from trained tutors for 35 to 40 hours a week (20 to 30 hours a week for children under age 3)” for 47 weeks a year. The PPGs distinguish EIBT programs from SDCs operated by public schools. In contrast, the District defines EIBT more broadly. The District’s special education director explained that, while VMRC uses the term “EIBT” to mean only programs delivered by NPAs, the District defines EIBT to include all intensive behavioral programs for preschool students with autism, not just programs provided by NPAs.

8. On September 13, 2007, Parents signed their consent to the District’s IEP, but wrote that they agreed to the IEP with the understanding that it was a 30-day interim placement while they waited for placement in an EIBT program.

9. On September 17, 2007, Student and Brother began attending the Garrison SDC. Subsequently, Student missed days of school due to illness. On October 2, 2007, Student fell from a 5-foot play structure on the school playground. Thereafter, except for a few days, Student no longer attended the Garrison SDC due to Parents’ concerns about the safety and educational benefit of the class.

10. On October 16, 2007, Student’s IEP team convened to review the 30-day administrative placement. In part due to Student’s absences from the Garrison SDC, District staff had not completed the assessments of Student. Parents agreed that Student would temporarily return to the Garrison SDC for half-days, until the assessments were completed. During the meeting, Parents explained their concerns about why they believed the Garrison SDC was inappropriate for Student. District staff

again discussed with Parents the process of obtaining placement in an EIBT program through the VMRC co-funding option, but warned Parents that VMRC had at least a three-month wait for such placement. On October 17, 2007, Parents signed their consent to portions of the IEP, stating in part that they were "signing this IEP in agreement to an interim placement while we await placement in the intensive 1:1 ABA program."

11. On October 22, 2007, the IEP team convened to review Brother's 30-day interim placement. During that meeting, Parents requested an FBA for Student, due to concerns about biting and other behaviors. The District agreed to conduct an FBA, and Parents signed an assessment plan.

12. During this time period, the parties also communicated by telephone, electronic mail (e-mail), and formal correspondence regarding educational programs for both Student and Brother. For example, in a letter dated October 22, 2007, Parents requested several changes to Student's October 16, 2007 IEP, including that both Student and Brother be placed in a general education preschool with a behaviorally trained aide. In a letter dated October 23, 2007, Parents requested that the IEP team consider an intensive one-to-one ABA program for 35 to 40 hours per week, or a general education setting with supplemental aids, supports, and services. The District's special education director, Virginia Johnson, responded with a letter stating in part that, regarding the Parents' for an ABA program provided by an NPA, "the District must defer a more specific response until the agreed-upon assessments are completed."⁹ Ms. Johnson's letter further explained that the IEP team will reconvene once the assessments

⁹ Ms. Johnson's letter reflects a date of October 26, 2006. However, testimony at hearing established that the actual date of the letter was October 26, 2007.

are completed, and that IEP meeting “will provide an opportunity to discuss your request for ABA services through an NPA.”

13. On November 20, 2007, Student’s IEP team convened to review the assessment results and discuss Student’s placement and services. Following presentation of the assessment results, the District offered the Garrison SDC as Student’s placement, and offered various related services including OT services, OT consultation, speech-language therapy, speech-language consultation, one-to-one aide supervision during recess, and behavioral consultation by the school psychologist. The District’s proposed educational program offered Student a total of 30 hours of instruction per week. Parents did not agree to the District’s offer.

14. In late October, 2007, Parents stopped bringing Student to the Garrison SDC altogether. For the remainder of the 2007-2008 school year, Mother and her sister home-schooled Student and Brother, primarily using strategies Mother learned from attending 40 hours of ABA training.

15. On December 5, 2007, Brother’s IEP team convened. During the meeting, Parents disagreed with the results of the FBAs for both Student and Brother, and requested that the District fund IEEs for both boys in the area of functional behavior.

PARENTS’ MEANINGFUL PARTICIPATION IN IEP PROCESS

16. Student argues that the District denied Parents meaningful participation in the IEP process because District staff failed to consider the possibility of placing Student in a one-to-one ABA program operated by an NPA. The District argues that Parents meaningfully participated in the IEP process, and that District staff fully considered Parents’ opinions and responded to Parents’ requests.

17. Parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. An LEA must fairly and honestly

consider the views of parents expressed in an IEP meeting. An LEA that does not consider the parents' requests with an open mind has violated the parents' right to participate in the IEP process.

18. When a special education student with an approved IEP transfers from one California district to a new California district in a different SELPA within the same academic year, the receiving district must provide the student services comparable to those described in his previously approved IEP. Within the 30-day period the receiving district must also adopt the previously approved IEP or develop, adopt, and implement a new IEP that is consistent with federal and state law.

19. Because Student began the 2007-2008 school year as a pupil transferring from another California school district in a different SELPA, District staff offered the Garrison SDC as a 30-day interim placement comparable to the SDC placement identified in his last approved IEP from SCCOE.¹⁰ Student does not dispute that, at this meeting, the District was only obligated to offer a 30-day administrative placement comparable to his IEP from his previous school district, and was not yet obligated to develop his IEP for the 2007-2008 school year. Moreover, Parents participated in this meeting, and District staff responded to their questions and made adjustments to the interim placement based upon Parents' input. Parents accepted the Garrison SDC as the interim placement.

20. When developing each pupil's IEP, the IEP team shall consider the pupil's strengths, the parents' concerns, the results of the most recent assessments, and the

¹⁰ Because Student's transfer occurred over the summer, it is not clear whether the District was obligated to offer a placement comparable to Student's last approved IEP from SCCOE, or could have treated Student as a new pupil pursuant to 34 Code of Federal Regulations part 300.323.

academic, developmental, and functional needs of the pupil. At the time of Student's October 16 IEP meeting, the District's new assessments of Student were not completed, and his past assessments did not provide sufficient current information about his needs to support development of a new IEP. Because Student's October IEP team did not yet have his assessment results, the District reasonably sought to extend Student's interim placement and delay a formal offer for his placement for the 2007-2008 school year, until the assessment results were available. After discussion, Parents agreed to this proposal.

21. The September and October 2007 IEP teams discussed potential NPA placement only as it could be obtained through the VMRC co-funding process; despite Parents' stated interest in an NPA placement, District staff did not inform Parents that they could request such placement through the District's IEP process. The lack of such discussion suggests that the District staff did not have an open mind about offering an NPA placement through the IEP process. However, because the IEP team's FAPE offer for the 2007-2008 school year was not yet being determined at either the September or October 2007 meetings, the IEP team members did not need to discuss all placement options at that point. Moreover, because an interim placement was warranted at that time, any failure to discuss future placement options would not have affected Student's placement from September 10 to November 20, 2007. Nonetheless, while Parents meaningfully participated in the September and October 2007 IEP meetings, the District's failure to inform Parents that they could request NPA placement through the IEP process is pertinent to the eventual placement offer made at the November 2007 meeting, as discussed further below.

22. As noted above in Factual Finding 12, on or about October 26, 2007, the District's special education director, Ms. Johnson, responded to Parents' request in a letter stating in part that "the District must defer a more specific response until the

agreed-upon assessments are completed.” Ms. Johnson wrote that the IEP team will reconvene once the assessments are completed, and that IEP meeting “will provide an opportunity to discuss your request for ABA services through an NPA.” Ms. Johnson reiterated this position in a letter dated November 14, 2007.

23. On November 20, 2007, Student’s IEP team convened to discuss the assessment results and decide upon Student’s educational program for the 2007-2008 school year. Contrary to what Ms. Johnson had written to Parents on October 26 and November 14, 2007, the IEP team did not discuss Parents’ request for ABA services from an NPA. When the IEP team discussed placement, the only options discussed were a general education classroom and the Garrison SDC. When Parents raised their request for an NPA program of intensive one-to-one ABA services, Ms. Johnson stated that the IEP team had to “stop there because we have to provide education in the least restrictive environment and this is the least restrictive environment that can meet [Student’s] needs.” When Parents persisted in asking about an NPA program, the District members of the IEP team would not discuss whether that option was appropriate for Student, and instead replied by emphasizing how the Garrison SDC was appropriate and in the least restrictive environment (LRE) for Student.

24. The District’s refusal to discuss or consider the Parents’ request for an NPA’s one-to-one ABA program deprived Parents of a fair opportunity to discuss that placement option with open-minded District representatives. Regardless of whether the District was correct that the Garrison SDC was appropriate for Student, the District was required to allow Parents to present their proposed placement to the IEP team, and was further required to fairly consider that proposal as an option for Student. Because Student’s IEP team had not reached agreement on whether placement in the Garrison SDC could meet Student’s needs, there was no consensus on whether that SDC was the LRE. IEP team members must consider and decide whether a placement constitutes the

LRE for a particular pupil, based upon whether the placement is designed to meet the pupil's unique needs. As Student correctly points out in his closing brief, if a school district could simply stop the discussion at the placement it felt was appropriate, in many instances parents would effectively lose the right to participate in the determination about placement.

25. The IEP team's discussions about NPA placement through the VMRC interest list did not fulfill the District's obligation to discuss Parents' request for NPA placement, nor does the District contend otherwise. Regardless, placement through the VMRC co-funding process would not meet legal standards for offering a FAPE under the IDEA, because receipt of an EIBT program through the VMRC process is dependent on factors beyond the FAPE criteria, such as program availability and the date of the child's autism diagnosis.¹¹

26. On December 5, 2007, the IEP team reconvened for Brother's IEP meeting. Brother's IEP team is generally comprised of the same individuals as Student's IEP team, and thus the members of Student's IEP team were present at this meeting. During Brother's IEP meeting, Mother referred to a statement by Ms. Johnson at Student's November 20 IEP meeting that placement in an NPA needed to be determined by the entire IEP team. Mother then asked whether the IEP team could now consider NPA placement, since all of the members were present. Ms. Johnson replied that "we're not, we have presented our offer of FAPE." When Mother reiterated her concerns, District members of the team reiterated that they believed that the Garrison SDC was appropriate and was the LRE. Thus, at this meeting, the District reinforced its position

¹¹ VMRC is not an LEA under the Individuals with Disabilities in Education Improvement Act (IDEA), and is instead governed by the Lanterman Act of the California Welfare & Institutions Code.

that it would not allow the IEP team to discuss the Parents' proposed placement in an NPA, and would not consider that proposed placement for either Student or Brother.

27. Over the course of the IEP team meetings, Parents meaningfully participated regarding other topics, such as Student's assessments, goals, and related services. District members of the IEP team gave fair consideration to Parents' views on those topics, and made additions and modifications based upon Parents' input. However, at least as of November 20, 2007, the District would not allow Parents' meaningful participation regarding the key topic of placement. Because this procedural violation significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a FAPE to Student, it constituted a procedural denial of FAPE regarding the District's placement offer for the remainder of the 2007-2008 school year.

CONSIDERATION OF CONTINUUM OF PLACEMENT OPTIONS

28. Each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services, as required by the IDEA. The continuum of program options ranges from the least restrictive to the most restrictive, from general education settings to special classes, NPAs, special schools, home instruction, and instruction in hospitals and institutions.

29. Student contends that a procedural violation occurred because, at the IEP meetings, the District failed to consider a continuum of placement options for him. However, the statutes and regulations regarding continuum of placements state only that a continuum must be available, not that the IEP team must consider a continuum for each pupil. Thus, the District's failure to consider an NPA placement for Student did not violate this procedural requirement. Moreover, as determined in Factual Finding 23, the November 20, 2007 IEP team considered more than one option on the placement

continuum. Because no procedural violation occurred, there was no procedural denial of FAPE on this basis.

PREDETERMINATION PRIOR TO SEPTEMBER AND OCTOBER 2007 IEP MEETINGS

30. Student contends that, prior to his September 10, 2007 and October 16, 2007 IEP meetings, the District predetermined that he would not be offered a placement in an intensive one-to-one ABA program operated by an NPA. The District argues that no predetermination occurred, and that Parents fully participated in the September and October IEP meetings.

31. Predetermination is a procedural violation which deprives a student of a FAPE in those instances where placement is determined without parental involvement at the IEP. Predetermination prohibits parents from meaningfully participating in the IEP process. The test is whether the LEA comes to the IEP meeting with an open mind and several options are discussed before final recommendation is made.

32. Student's predetermination claim has already been addressed within Factual Findings 16-27. As determined in Factual Finding 21, because the IEP team's FAPE offer for the 2007-2008 school year was not yet being determined at either the September or October 2007 meetings, the IEP team members did not need to discuss all placement options at that point. Hence, no procedural violation or procedural denial of FAPE occurred on that basis in September or October 2007.

SUBSTANTIVE FAPE DENIAL DUE TO FAILURE TO OFFER ONE-TO-ONE ABA PROGRAM

33. Because of this Decision's finding that the District's November 20, 2007 placement offer did not comply with the IDEA's procedural safeguards, it is unnecessary to address Student's substantive claims regarding denial of FAPE related to that placement offer. Even if that placement offer was substantively appropriate, the offer

was nevertheless a denial of FAPE because the IDEA's procedural requirements were not met.

FUNCTIONAL BEHAVIORAL ASSESSMENT (FBA) AND BEHAVIOR SUPPORT PLAN (BSP)

34. Student contends that the District failed to develop an appropriate FBA with an appropriate behavior support plan. The District argues that its FBA was appropriate and met all legal requirements.

35. In the case of a child whose behavior impedes his or her learning or that of others, the IEP team must consider, when appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior. If an FBA is used to evaluate an individual child to determine special education eligibility or assist in determining the nature and extent of special education and related services that the child needs, the FBA is considered an evaluation under federal law. Consequently, an FBA must meet the IDEA's legal requirements for an assessment, such as the requirement that assessment tools and strategies provide relevant information that directly assists in determining the educational needs of the child.

36. District school psychologist Sarah Benevides conducted the District's FBA in November 2007, prior to the November 20, 2007 IEP meeting. This FBA targeted two problem behaviors that Parents had reported: biting and non-compliance. The FBA included identification of the antecedent, behavior, and consequences of each problem behavior, and proposed treatment plans to decrease the problem behaviors.

37. Behavior analyst Katie Morrison conducted an independent FBA of Student in April 2008, at Parents' request. As part of her review of records, Ms. Morrison reviewed the District's FBA. In her testimony, Ms. Morrison credibly pointed out several deficiencies in the District's FBA. Ms. Morrison explained that the District's FBA lacked sufficient data because an examiner conducting an FBA needs at least three instances of

the problem behavior to establish the antecedent and consequences. Moreover, the District's FBA did not clearly state the functions of Student's problem behaviors, which is necessary to determine if proposed replacement behaviors serve the same purpose as the problem behavior.¹² Ms. Morrison also testified persuasively that the FBA's proposed replacement behaviors do not follow the ABA principle that replacement behaviors should require the same or less effort than the problem behavior. Because of these limitations, the District's FBA and resulting BSP may be ineffective at decreasing Student's problem behaviors.

38. Ms. Benevides and Ms. Morrison were both credible witnesses with expertise in behavior analysis related to pupils with autism. Nonetheless, neither Ms. Benevides' testimony nor any other evidence addressed why her FBA lacked the necessary components identified by Ms. Morrison.¹³ Thus, Ms. Morrison's persuasive testimony on this topic was unrefuted. Given that the District's FBA lacked sufficient data, did not follow ABA principles regarding replacement behaviors, and did not clearly state the functions of the problem behaviors, the District's FBA did not sufficiently fulfill the requirement of providing relevant information to assist the IEP team in determining

¹² Notably, the FBA conducted by Ms. Morrison relied upon ample data obtained by observations and interviews, and identified the functions of each problem behavior. Ms. Morrison also explained how she proposed replacement behaviors that required the same or less effort than Student's problem behaviors.

¹³ Ms. Benevides testified prior to Ms. Morrison. However, the District did not seek to recall Ms. Benevides to rebut Ms. Morrison's testimony, nor did the District put on any other evidence to rebut Ms. Morrison's testimony regarding the deficiencies in the District's FBA.

Student's educational needs related to decreasing his problem behaviors. Considering all of the above, the evidence did not establish that the District's FBA was appropriate.

SPEECH-LANGUAGE ASSESSMENT

39. Student alleges that the District's speech-language assessment was not appropriate because it failed to accurately identify his unique needs. The District argues that its speech-language assessment was appropriate.

40. Among the legal requirements for an LEA's assessment is the requirement that the pupil must be assessed in all areas related to the suspected disability.¹⁴ Special attention shall be given to the unique educational needs including, but not limited to, skills and the need for specialized services, materials, and equipment consistent with guidelines for pupils with low incidence disabilities.¹⁵

41. Tresa Ford, a licensed and credentialed speech-language pathologist, conducted the District's speech-language assessment of Student in November 2007. Ms. Ford's assessment utilized observation, review of records, parent interview, and administration of the Receptive One-Word Picture Vocabulary Test (ROWPVT), the Expressive One-Word Picture Vocabulary Test (EOWPVT), the Pre-School Language Scale – 4th Edition (PLS-4), and an oral mechanism examination. Ms. Ford observed Student on two different days in the Garrison SDC, and on four different days in his home. On the ROWPVT and EOWPVT, Student did not give sufficient responses to the test prompts to establish a basal, and thus did not receive a score on those tests. On the

¹⁴ Most of the legal requirements for the conduct of an assessment were not in dispute here. In any event, the evidence indicates that the speech-language assessment met those requirements.

¹⁵ Autism is not a low incidence disability.

PLS-4, Student's auditory comprehension score was at an age-equivalent of less than 12 months, and his expressive communication was at an age-equivalent of one year, five months.

42. Ms. Ford was a knowledgeable, credible witness with extensive expertise in speech and language. She also had significant experience related to teaching pupils with autism, including taking coursework on autism-related topics, designing classes for pupils with autism, delivering speech-language therapy to pupils with autism, and teaching pupils with autism in an SDC designed for pupils with communicative handicaps. Regarding Student, Ms. Ford persuasively described how she developed his present levels of performance and goals in speech language based upon the results of her own assessment, the results of the Assessment of Basic Language and Learning Skills (ABLLS), and Student's records from his previous school district.

43. Student points to testimony from speech-language pathologist Hilda Man regarding Ms. Ford's assessment report. Ms. Man observed Student and Brother in her office on two days in May 2008, for approximately one hour each day. Unlike Ms. Ford, Ms. Man did not conduct any testing or other formal assessment of Student.

44. Ms. Man described how, based upon the District's assessment report, she expected to see Student functioning at a lower level than she observed. Nevertheless, her testimony did not establish that Ms. Ford's assessment was inappropriate. Ms. Man observed Student six months after Ms. Ford's assessment, in a different setting, without the demands of formal testing placed on him. Given these circumstances, Ms. Man's May 2008 observations of higher-than-expected functioning did not establish that Ms. Ford's assessment results were incorrect in November 2007. Rather, the District's assessment results were a reflection of the skills Student displayed for Ms. Ford at that time. Moreover, Ms. Man did not establish any way in which Ms. Ford conducted the assessment incorrectly. Finally, while Ms. Man and Ms. Ford were both credible

witnesses, Ms. Ford had greater knowledge of Student's functioning in November 2007, because she formally assessed him and spent much more time observing him than Ms. Man did. In light of all evidence, nothing in Ms. Mann's testimony established that Ms. Ford's assessment was inappropriate. Instead, Ms. Ford's testimony and written assessment report established that she assessed Student in all areas of suspected disability related to his speech and language needs, and accurately identified his needs and abilities at that time.

OFFER OF SPEECH-LANGUAGE SERVICES

45. Student contends that the District's offer of speech-language therapy did not constitute an offer of FAPE because the District did not offer a sufficient amount of speech-language therapy time and did not offer it on a "pull-out" basis. The District contends that its offer was appropriate to meet Student's needs related to speech and language and was reasonably calculated to allow him to make educational progress in that area in the least restrictive environment (LRE).

46. An educational program offered by a school district must be designed to meet the unique needs of the student and be reasonably calculated to provide the student with some educational benefit. A school district must offer a pupil related services if they may be required to assist the child in benefiting from special education. However, school districts are not required to offer instruction or services to maximize a student's abilities. In addition, an IEP cannot be judged in hindsight and must take into account what was, and what was not, objectively reasonable at the time the IEP was drafted.

47. At the IEP meeting on November 20, 2007, the District's offer included individual speech-language therapy for 20 minutes per week on a "push-in" basis, two hours per month of consultation between the speech-language therapist and the SDC

teacher, and 60 minutes of consultation per trimester between the speech-language therapist and Parents.

48. Ms. Ford, the speech-language pathologist who assessed Student, testified persuasively about why the District's offer of speech-language services would address Student's speech and language needs. The two hours per month of speech-language consultation would allow the SDC staff to implement Student's speech-language goals throughout the school day. Working on speech-language goals within the classroom would promote generalization and Student's development of functional communication, which was a particular area of need for him. Delivery of the speech-language therapy within the classroom, instead of on a "pull-out" basis, would promote generalization. Developing functional communication was a key goal, because doing so allows a child to get his needs met, which decreases negative behaviors.

49. In contrast, Ms. Man testified that Student required at least two 30-minute sessions of individual speech-language therapy sessions per week in a "pull-out" format. While Ms. Man was generally a credible witness, this recommendation was not ultimately persuasive. There is little question that Student could have benefited from a greater amount of individual speech-language therapy, but that is not what is required for provision of a FAPE. As discussed above in Factual Findings 42 through 44, Ms. Ford was more knowledgeable about Student's needs in the area of speech and language than Ms. Man was, particularly his needs at the time the District made its offer in November 2007. In light of all of the above, the evidence established that the District's offer of speech-language services in November 2007 was appropriate.

REIMBURSEMENT FOR IEEs

50. An IEE is an assessment conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question. Under certain conditions, a pupil is entitled to obtain an IEE at public expense. To obtain

an IEE, the pupil must disagree with an assessment obtained by the public agency and request an IEE. Following the request for an IEE, the public agency must, without unnecessary delay, either file a due process complaint to request a hearing to show that its assessment is appropriate, or ensure that an IEE is provided at public expense, unless the agency demonstrates in a hearing that the assessment obtained by the parent did not meet agency criteria.

51. As determined above in Factual Findings 37-38, the District's FBA did not constitute an appropriate assessment. Moreover, Ms. Morrison's testimony and written report established that the independent FBA she conducted was appropriate, and the District did not contend otherwise. Ms. Morrison is a Board-Certified Behavior Analyst (BCBA) who holds a special education teaching credential and a Master's of Science in Human Services Management and Special Education. Her testimony and report identified the antecedents, behaviors, consequences, and purposes regarding Student's four target behaviors: self-injurious behaviors, elopement, dropping, and loud vocalizations. Based upon the data that she obtained, Ms. Morrison developed an appropriate behavioral intervention plan that proposed appropriate replacement behaviors. In light of all of the above, because the District's FBA was not appropriate, and Parents obtained an appropriate independent FBA, Parents are entitled to reimbursement for their independent FBA. Accordingly, the District shall reimburse Parents in the amount of \$2,298.75 for Student's FBA conducted by Imagine Consulting.

52. As determined above in Factual Findings 41-44, the District conducted an appropriate assessment in speech and language. Therefore, Student is not entitled to an IEE in speech and language.

COMPENSATORY EDUCATION

53. Student seeks a compensatory education program consisting of placement in a one-to-one, intensive ABA program delivered by a qualified NPA. The District

argued that no award of compensatory education is warranted because the District offered a FAPE. The District also argued that Student presented little evidence regarding what compensatory education would be appropriate.

54. Appropriate equitable relief, including compensatory education, can be awarded in a due process hearing. The right to compensatory education does not create an obligation to automatically provide day-for-day or session-for-session replacement for the opportunities missed.

55. As determined above in Factual Findings 19-27, the District procedurally denied Student a FAPE beginning on November 20, 2007. Because this denial pertained to the District's offer for the 2007-2008 school year, it resulted in a denial through the end of the 2007-2008 school year. Parents could not afford to fund a private program, and Student's only instruction during this time period came from his family members.¹⁶ While there was evidence that Student made some educational gains from this instruction, there is no dispute that he suffered a loss of educational benefit because of his absence from a formal, specialized program taught by qualified personnel.

56. Placing Student back in an SDC operated by the District would not adequately compensate him for the loss of educational benefit he experienced from November 20, 2007, through the end of the 2007-2008 school year. However, there is sufficient evidence to find that prospective placement in a one-to-one, intensive EIBT ABA program operated by an NPA would meet Student's needs and adequately compensate for the educational loss he suffered. This type of program would address

¹⁶In any event, the local NPAs that provide intensive ABA instruction within the region have agreed that they will not accept privately funded pupils, pursuant to the co-funding partnership with VMRC. Hence, even if Parents could have afforded to pay for a private program for Student, they likely could not have secured a program for him.

Student's unique educational needs and would allow him to receive educational benefit. While he agreed that an NPA was not the only setting where Student could receive an appropriate program, Dr. Michael Jones testified credibly that a one-to-one intensive EIBT ABA program provided by an NPA could be also an appropriate program for Student, if the program had high quality controls such as data collection, regular staff meetings, qualified staff, aide supervision, and parent consultation.¹⁷

57. Based upon the above findings, for the 2008-2009 regular school year and 2009 extended school year (ESY), the District shall fund Student's placement in an intensive EIBT program delivered by a state-certified NPA for a minimum of 30 hours per week of instruction. This program may be delivered through either an in-home model or school-based model, but shall include data collection, regular staff meetings, qualified staff, aide supervision, and consultation with Parents. Student's OT and speech-language services may be included within the 30-hour per week minimum. Whether Student needs and can tolerate more than 30 hours per week shall be at the discretion of the NPA's educational professionals involved in Student's program, but under no circumstance shall the District be required to fund a program for more than 40 hours per week. Similarly, while the NPA's EIBT program shall be based upon ABA principles and shall include DTT, it may potentially include other well-established methodologies,

¹⁷ Moreover, when Parents requested an NPA's EIBT program at Student's September and October 2007 IEP meetings, District staff readily explained how Student would be referred for that type of program through the VMRC interest list, but never mentioned any concerns that such a program might be inappropriate for Student. Instead, at Student's October 2007 IEP meeting, the Garrison SDC teacher acknowledged that an EIBT program provided by NPAs through VMRC is a "great program."

such as Floortime, at the discretion of the NPA's educational professionals involved in supervising and delivering Student's program. Given the limited availability of such EIBT programs, the District is encouraged but not required to place Student and Brother with the same NPA.

58. Only the District's offer for the 2007-2008 school year was at issue in this hearing; the District's offer for the 2008-2009 school year was not at issue, and therefore this Decision does not address what constitutes an offer of FAPE for the 2008-2009 school year. However, because of the nature, timing, and delivery of the compensatory education ordered herein, the EIBT program ordered here must necessarily encompass Student's prospective placement for the 2008-2009 school year. Thus, the placement ordered in Factual Finding 57 constitutes both Student's compensatory education for the 2007-2008 school year and his prospective placement for the 2008-2009 school year, including the 2009 ESY.¹⁸

59. To allow the District time to arrange for Student's attendance at the NPA program ordered herein, Student's attendance at the NPA EIBT program shall begin no later than 45 days from the date of this Decision. Within 35 days of the date of this Decision, the IEP team shall convene to develop Student's IEP for the 2008-2009 school year in conformity with this Decision. The District shall provide timely advance notice to all IEP team members of the date and time of the IEP meeting. Parents and their representatives shall cooperate with the District regarding all of these steps. Parents shall also comply with the NPA's requirements for parent participation in the EIBT program, consistent with the parent obligations identified in the EIBT PPGs.

¹⁸ However, because these Findings address only the limited question of placement, this order does not include all required components of an IEP.

LEGAL CONCLUSIONS

1. In an administrative hearing, the petitioner has the burden of proving the essential elements of his claim. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528].) Here, the Student has the burden of proof on his issues, and the District has the burden of proof on its issues.

STUDENT'S ISSUES

DID THE DISTRICT PROCEDURALLY DENY STUDENT A FAPE BY DENYING PARENTS A MEANINGFUL OPPORTUNITY TO PARTICIPATE IN THE IEP PROCESS?

2. A child with a disability has the right to a FAPE under the IDEA. (Ed. Code, §§ 56000, 56026; 20 U.S.C. § 1412(a)(1)(A).) FAPE is defined as special education, and related services, that are available to the student at no cost to the parent or guardian, that meet the State educational standards, and that conform to the student's IEP. (Ed. Code, § 56031; Cal. Code Regs., tit. 5 § 3001, subd. (o); 20 U.S.C. § 1401(9).) The term "related services," called designated instruction and services (DIS) in California, includes transportation and other developmental, corrective, and supportive services as may be required to assist a child to benefit from education. (Ed. Code, § 56363; 20 U.S.C. § 1401(26).)

3. There are two parts to the legal analysis in suits brought pursuant to the IDEA. First, the court must determine whether the school system has complied with the procedures set forth in the IDEA. (*Bd. of Educ. of the Hendrick Hudson Sch. Dist v. Rowley*, (1982) 458 U.S. 176, 200 [102 S.Ct. 3034].) However, procedural flaws do not automatically require a finding of a denial of a FAPE. A procedural violation constitutes a denial of FAPE only if it impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of a FAPE to the parent's child, or caused a deprivation of educational benefits.

(20 U.S.C. § 1415(f)(3)(E); Ed. Code, § 56505, subd. (f); see also, *W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23*, (9th Cir. 1992) 960 F.2d 1479, 1483-1484.) Recent Ninth Circuit Court of Appeals cases have confirmed that not all procedural violations deny the child a FAPE. (*Park v. Anaheim Union High Sch. Dist.* (9th Cir. 2006) 464 F.3d 1025, 1033, n.3; *Ford ex rel. Ford v. Long Beach Unified Sch. Dist.* (9th Cir. 2002) 291 F.3d 1086, 1089.)

4. Among the information that an IEP team must consider when developing a pupil's IEP is the concerns of the parents or guardians for enhancing the education of the pupil. (Ed. Code, § 56341.1, subd. (a)(2).) In *W.G. v. Target Range Unif. Sch. Dist.* (9th Cir. 1992) 960 F.2d 1479, 1483, the Ninth Circuit recognized the IDEA's emphasis on the importance of meaningful parental participation in the IEP process. An LEA's predetermination of an IEP seriously infringes on parental participation in the IEP process, which constitutes a procedural denial of FAPE. (*Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2004) 392 F.3d 840, 858.)

5. When a special education student with an approved IEP transfers from one California district to a new California district in a different SELPA within the same academic year, the receiving district must provide the student services comparable to those described in his previously approved IEP. (Ed. Code § 56325, subd. (a)(1); 20 U.S.C. § 1414(d)(2)(C)(i)(I).) Within the 30-day period the receiving district must also adopt the previously approved IEP or develop, adopt, and implement a new IEP that is consistent with federal and state law. (*Ibid.*)

6. When developing each pupil's IEP, the IEP team shall consider the pupil's strengths, the parents' concerns, the results of the most recent assessments, and the academic, developmental, and functional needs of the pupil. (Ed. Code, § 56341.1, subd. (a).)

7. Based upon Factual Findings 16-27 and Legal Conclusions 1-6, the District procedurally denied Student a FAPE as of November 20, 2007, by refusing to allow the meaningful participation of Parents in the IEP process regarding consideration of Student's placement for the 2007-2008 school year. Because this procedural violation significantly impeded Parents' opportunity to participate in the decision making process regarding the provision of a FAPE to Student, it constituted a procedural denial of FAPE regarding the District's placement offer for the remainder of the 2007-2008 school year.

DID THE DISTRICT PROCEDURALLY DENY STUDENT A FAPE BY FAILING TO CONSIDER A CONTINUUM OF PLACEMENT OPTIONS?

8. Local educational agencies must ensure that a continuum of program options is available to meet the needs of individuals with exceptional needs for special education and related services. (Ed. Code, § 56360.)

9. Based on Factual Findings 28-29 and Legal Conclusions 1-4 and 8, the District did not procedurally deny Student a FAPE by failing to consider a continuum of placement options. The law requires only that a continuum must be available, not that the IEP team must consider a continuum for each pupil. Moreover, Student's November 2007 IEP team considered more than one option on the placement continuum. Thus, the District's failure to consider an NPA placement for Student did not violate this procedural requirement, and thus there was no procedural denial of FAPE on this basis.

DID THE DISTRICT PROCEDURALLY DENY STUDENT A FAPE BY PRE-DETERMINING THAT STUDENT WOULD NOT BE OFFERED A PLACEMENT IN AN INTENSIVE ONE-TO-ONE ABA/DTT PROGRAM PRIOR TO HIS SEPTEMBER 10, 2007 AND OCTOBER 16, 2007 IEP MEETINGS?

10. Based on Factual Findings 16-27 and 30-32, and Legal Conclusions 1-6, the IEP team members did not need to discuss all placement options at the September and October meetings, because the IEP team's FAPE offer for the 2007-2008 school year

had not yet been determined. Hence, no procedural denial of FAPE due to predetermination occurred in September or October 2007, and therefore no procedural denial of FAPE occurred at that time.

DID THE DISTRICT DENY STUDENT A FAPE BY FAILING TO OFFER HIM A PROGRAM WITH INTENSIVE ONE-TO-ONE ABA/DTT SERVICES?

11. Based on Factual Findings 16-27 and 33, and Legal Conclusions 1-4, it is unnecessary to address Student's substantive claims regarding denial of FAPE related to that placement offer. Even if that placement offer was substantively appropriate, the offer was nevertheless a denial of FAPE because the IDEA's procedural requirements were not met.

DID THE DISTRICT FAIL TO DEVELOP AN APPROPRIATE FBA WITH AN APPROPRIATE BEHAVIOR SUPPORT PLAN?

12. In the case of a child whose behavior impedes his or her learning or that of others, the IEP team must consider, when appropriate, "strategies, including positive behavioral interventions, strategies, and supports to address that behavior." (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324; Ed. Code, § 56341.1, subd. (b)(1).) If an FBA is used to evaluate an individual child to assist in determining the nature and extent of special education and related services that the child needs, the FBA is considered an evaluation under federal law. (*Letter to Christiansen*, 48 IDELR 161 (OSEP 2007).) Consequently, an FBA must meet the IDEA's legal requirements for an assessment, such as the requirement that assessment tools and strategies provide relevant information that directly assists in determining the educational needs of the child. (34 C.F.R. § 300.304(c)(7).)

13. Based on Factual Findings 34-38 and Legal Conclusion 12, the evidence did not establish that the District's FBA was appropriate. Because it lacked sufficient

data, did not follow ABA principles regarding replacement behaviors, and did not clearly state the functions of the problem behaviors, the District's FBA was not appropriate and did not sufficiently fulfill the requirement of providing relevant information to assist the IEP team in determining Student's educational needs related to decreasing his problem behaviors. Because the FBA and its Proposed Treatment Plan was inappropriate, any resulting BSP likely would have also been inappropriate.

DID THE DISTRICT FAIL TO CONDUCT AN APPROPRIATE SPEECH-LANGUAGE ASSESSMENT, WHICH FAILURE DENIED STUDENT A FAPE AND ENTITLES PARENTS TO AN IEE?

14. Among the legal requirements regarding for an LEA conducting an assessment is the requirement that the pupil must be assessed in all areas related to the suspected disability. (Ed. Code, § 56320, subd. (f); see 20 U.S.C. § 1414 (b)(3).) Special attention shall be given to the unique educational needs including, but not limited to skills and the need for specialized services, materials, and equipment consistent with guidelines for pupils with low incidence disabilities.¹⁹ (Ed. Code, § 56320, subd. (g).)

15. An IEE is "an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question." (34 C.F.R. § 300.502(a)(3)(i).) To obtain an IEE at public expense, the parent must disagree with an assessment obtained by the public agency and request an IEE. (Ed. Code, § 56329, subd. (b); 20 U.S.C. § 1415(b)(1); 34 C.F.R. § 300.502(b); see Ed. Code, § 56506, subd. (c).) Following the parent's request for an IEE, the public agency must, without unnecessary delay, either: (i) File a due process complaint to request a hearing to show

¹⁹ "Low incidence disability" means a severe disabling condition of hearing impairment, vision impairment, and severe orthopedic impairment, or any combination thereof. (Ed. Code, § 56026.5)

that its assessment is appropriate; or (ii) Ensure that an independent educational assessment is provided at public expense, unless the agency demonstrates in a hearing that the assessment obtained by the parent did not meet agency criteria. (Ed. Code § 56329, subd., (b); 34 C.F.R. § 300.502 (b)(2).) If the final result of the due process hearing is that the public agency's assessment is appropriate, then the parent maintains the right for an independent educational assessment, but not at public expense. (Ed. Code, § 56329, subd. (c); 34 C.F.R. § 300.502 (b)(3).)

16. Based on Factual Findings 39-44, and Legal Conclusions 14, and 15, the District conducted an appropriate speech-language assessment of Student. The November 2007 evaluation assessed Student in all areas of suspected disability related to his speech and language needs, and accurately identified his needs and abilities at that time. Based on Factual Finding 52 and Legal Conclusion 15, because the District's assessment was appropriate, Student is not entitled to an IEE at public expense in speech and language.

DID THE DISTRICT DENY STUDENT A FAPE BY FAILING TO OFFER HIM APPROPRIATE SPEECH-LANGUAGE SERVICES?

17. The substantive analysis of whether an LEA offered a FAPE involves determining whether the IEP was designed to meet the child's unique needs, was reasonably calculated to enable the child to receive educational benefit, and comported with the child's IEP. (*Rowley*, 458 U.S. at pp. 206-07.) The IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities. (*Rowley*, 458 U.S. at pp.198-200; see, *Seattle Sch. Dist. No. 1 v. B.S.* (9th Cir. 1995) 82 F.3d 1493, 1500.) School districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instructional and related services which are individually designed to provide educational benefit to the student. (*Rowley, supra* at p.201.)

18. To determine whether the District offered Student a FAPE, the analysis must focus on the adequacy of the District's proposed program. (*Gregory K. v. Longview Sch. Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) The Ninth Circuit has also endorsed the "snapshot" rule, explaining that the actions of the school cannot "be judged exclusively in hindsight...an IEP must take into account what was, and what was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted." (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (citing *Fuhrman v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1041).)

19. The IDEA requires that an eligible student receive related services, such as transportation and developmental, corrective, and other supportive services, "as may be required to assist a child with a disability to benefit from special education." (20 U.S.C. § 1401(a)(26).) In California, related services are called designated instruction and services (DIS), which must be provided if they may be required to assist the child in benefiting from special education. (Ed. Code, § 56363, subd. (a).)

20. Based on Factual Findings 45-49 and Legal Conclusions 1-2 and 17-19, the District's November 2007 offer of speech-language services, including consultation and individual therapy, was appropriate.

ARE PARENTS ENTITLED TO REIMBURSEMENT FOR AN IEE IN THE AREA OF FUNCTIONAL BEHAVIOR BECAUSE: (A) PARENTS PROPERLY REQUESTED AN IEE AND THE DISTRICT FAILED TO FILE FOR DUE PROCESS WITHOUT UNNECESSARY DELAY; OR
(B) THE DISTRICT IMPROPERLY ATTEMPTED TO LIMIT PARENTS' CHOICE OF ASSESSORS FOR THE IEE?

21. Based on Factual Findings 50-51, and Legal Conclusions 12, 13, and 15, Parents are entitled to reimbursement for the IEE in the area of functional behavior because the District's FBA was not appropriate. Ms. Morrison of Imagine Consulting conducted an appropriate independent FBA, and Parents are entitled to reimbursement

from the District for that independent FBA in the amount of \$2,298.75. Because Parents are entitled to reimbursement on this basis, this Decision need not address the questions of whether the District is obligated to reimburse for the IEE due to a failure to timely file for due process or an improper attempt to limit Parents' choice of independent assessors.

COMPENSATORY EDUCATION

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

23. Based upon Factual Findings 16-27 and 53-59, and Legal Conclusions 1-4, 7, and 22, the District shall provide Student compensatory education by funding his placement in an intensive EIBT program delivered by a state-certified NPA for a minimum of 30 hours per week of instruction. This program may be delivered through either an in-home model or school-based model, but shall include data collection, regular staff meetings, qualified staff, aide supervision, and consultation with Parents. Student's OT and speech-language services may be included within the 30-hour per week minimum. Whether Student needs and can tolerate more than 30 hours per week shall be at the discretion of the NPA's educational professionals involved in Student's program, but under no circumstance shall the District be required to fund a program for more than 40 hours per week.

DISTRICT'S ISSUES

DID THE DISTRICT OFFER STUDENT A FAPE FOR THE 2007-2008 SCHOOL YEAR, SO THAT THE PROPOSED IEP MAY BE IMPLEMENTED OVER PARENTS' OBJECTIONS?

22. Based upon Factual Findings 16-27 and Legal Conclusions 1-7, the District procedurally denied Student a FAPE as of November 20, 2007, by refusing to allow the meaningful participation of Parents in the IEP process regarding consideration of Student's placement for the 2007-2008 school year. Because of this procedural denial of FAPE, the proposed IEP cannot be implemented over Parents' objections.

DID THE DISTRICT CONDUCT AN APPROPRIATE SPEECH-LANGUAGE ASSESSMENT OF STUDENT?

23. Based on Factual Findings 39-44, and Legal Conclusions 14-16, the District conducted an appropriate speech-language assessment of Student. The November 2007 evaluation assessed Student in all areas of suspected disability related to his speech and language needs, and accurately identified his needs and abilities at that time.

ARE PARENTS ENTITLED TO AN IEE IN THE AREA OF SPEECH-LANGUAGE?

24. Based on Factual Finding 52 and Legal Conclusions 15-16, because the District's assessment was appropriate, Student is not entitled to an IEE at public expense in speech and language.

DID THE DISTRICT CONDUCT AN APPROPRIATE FBA?

25. Based on Factual Findings 34-38 and Legal Conclusions 12-13, the District did not conduct an appropriate FBA. Because it lacked sufficient data, did not follow ABA principles regarding replacement behaviors, and did not clearly state the functions of the problem behaviors, the District's FBA was not appropriate and did not sufficiently

fulfill the requirement of providing relevant information to assist the IEP team in determining Student's educational needs related to decreasing his problem behaviors.

ARE PARENTS ENTITLED TO REIMBURSEMENT FOR AN IEE IN THE AREA OF FUNCTIONAL BEHAVIOR?

26. Based on Factual Findings 50-51, and Legal Conclusions 12-13, 15, and 21, Parents are entitled to reimbursement in the amount of \$2,298.75 for the IEE in functional behavior conducted by Ms. Morrison of Imagine Consulting.

ORDER

1. Within 45 days of the date of this Decision, the District shall reimburse Parents in the amount of \$2,298.75 for the IEE in functional behavior conducted by Katie Morrison of Imagine Consulting.

2. As compensatory education, the District shall fund Student's placement in an intensive EIBT program delivered by a state-certified NPA for a minimum of 30 hours per week of instruction during the 2008-2009 school year, including the 2009 ESY. This program may be delivered through either an in-home model or school-based model, but shall include data collection, regular staff meetings, qualified staff, aide supervision, and consultation with Parents. Student's OT and speech-language services may be included within the 30-hour per week minimum.

3. Whether Student needs and can tolerate more than 30 hours per week shall be at the discretion of the NPA's educational professionals involved in Student's program, but under no circumstance shall the District be required to fund this program for more than 40 hours per week.

4. Within 35 days of the date of this Decision, the IEP team shall convene to develop Student's IEP for the 2008-2009 school year in conformity with this Decision. Student's attendance at the NPA EIBT program shall begin no later than 45 days from

the date of this Decision. The District shall provide timely advance notice to all IEP team members of the date and time of the IEP meeting.

5. Parents and their representatives shall cooperate with the District regarding scheduling the IEP meeting, developing the IEP, and arranging for the NPA placement. Parents shall also comply with the NPA's requirements for parent participation in the EIBT program, consistent with the parent obligations identified in the EIBT PPGs.

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. The following findings are made in accordance with this statute: The Student prevailed on Student's Issues 1(A) and 3, and on District's Issues 1, 4, and 5. The District prevailed on Student's Issues 1(B), 1(C), 4, and 5, and on District's Issues 2 and 3. Because this Decision did not reach Student's Issues 2 or 6, neither party prevailed on those issues.

RIGHT TO APPEAL THIS DECISION

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

Dated: August 27, 2008

A handwritten signature in cursive script that reads "Suzanne B. Brown". The signature is written in black ink on a light-colored background.

SUZANNE B. BROWN

Administrative Law Judge

Office of Administrative Hearings