

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS on behalf of STUDENT,

v.

CLOVIS UNIFIED SCHOOL DISTRICT.

OAH CASE NO. 2008080686

DECISION

Administrative Law Judge (ALJ) Rebecca P. Freie, Office of Administrative Hearings, State of California (OAH), heard this matter in Clovis, California, on February 10, 11, 13, 16 to 20, and March 3 to 5, 9 to 13, 16 to 19, and 25, 2009.

Attorney Maureen Graves represented Student. She was assisted by attorney Prudence Hutton each day of hearing, and attorney John Nolte on several days of hearing. Student's mother (Mother) was present for each day of hearing. Student's father (Father) was present for portions of the hearing.

Attorney Damara Moore represented Clovis Unified School District (District). Kay Lenheim, Director of the Clovis Unified School District Special Education Local Plan Area (SELPA), was present on behalf of the District for much of the hearing. In her absence, Janet Van Gelder, the former SELPA director, Shannon Greene, Assistant Special Education Director, or Ann Blue, Program Specialist for the SELPA, were present as the District representatives in place of Ms. Lenheim. The hearing was open to the public, and several members of the public attended some sessions of the hearing.

Student filed the request for due process hearing (complaint) on August 20, 2008. The matter was continued on September 19, 2008, November 10, 2008, and December 26, 2008. Student filed a first amended complaint on January 22, 2009, a second

amended complaint on January 30, 2009, and a third amended complaint on January 31, 2009. The hearing proceeded on the third amended complaint.¹

Oral and documentary evidence were received during the hearing. On March 25, 2009, the final day of hearing, the ALJ granted the parties request for leave to file written closing briefs. The matter was then continued for the submission of written closing arguments due on May 1, 2009, and reply briefs due on May 11, 2009. The record was closed on May 11, 2009, following the receipt of the reply briefs, and the matter was submitted for decision.²³

¹ In its closing brief, the District objects to the order permitting Student to proceed on the third amended complaint. During the Prehearing Conference (PHC) on January 30, 2009, the parties articulated the issues raised in Student's first amended complaint, as stated in the order following the PHC. Student withdrew the second amended complaint during the PHC, and then filed the third amended complaint. The District did not file written objection to the third amended complaint. At the commencement of the hearing the ALJ dismissed an issue concerning Section 504 of the Rehabilitation Act of 1973 as OAH does not have jurisdiction over Section 504 issues. It was agreed by the parties that the third amended complaint modified the first amended complaint only by enlarging the time period encompassed by Issue 5 in the original complaint. Therefore, the third amended complaint was filed and the hearing proceeded.

² The District's written argument has been designated as District's Exhibit D-75, and Student's closing argument has been designated as Student's Exhibit S-201. The District's reply brief has been designated as exhibit D-76, and Student's reply brief has been designated as exhibit S-202.

³ The District filed a motion to strike portions of Student's closing argument on the grounds that it contained references to evidence that had been ruled inadmissible. Specifically, the District asked that the following be stricken: 1) page 21, lines 11-14 which refers to a statement the District's attorney made at an IEP meeting which was recorded and subsequently transcribed by Student; the transcript and the recording were denied admittance; 2) page 22, lines 9-13 which refers to written declarations by members of Student's family that were proffered by Student during the hearing in lieu of those family members testifying; the District would not stipulate to their admittance, and the declarants were not called as witnesses; 3) page 30, lines 4-7 in which Student refers to evidence that was not admitted for a variety of reasons including relevance, lack of foundation and failure to provide it to opposing counsel in a timely manner, and Student criticizes the District for objecting to the admittance of this evidence. Student filed a response to the motion to strike. There are no provisions governing a motion to strike in special education hearings. Therefore, OAH looks to the California Code of Civil Procedure for guidance. Section 436 authorizes a court to strike "any irrelevant, false, or improper material inserted in any pleading . . . or any pleading not drawn or filed in conformity with the laws of this state, a court rule or an order of the court." In his closing brief, Student did ask the ALJ to consider evidence that was not admitted. A trier of fact cannot consider evidence that was not admitted at hearing. (*Brokopp v. Ford Motor Co.*, (1977) 71 Cal.App.3d 841, 862.) Accordingly, the District's request is granted, and the ALJ considered only the testimony at hearing, the documents and a video of Student with Dr. Caroline Bailey that were admitted into evidence.

ISSUES⁴

1. Did the District deny Student a free appropriate public education (FAPE) after August 20, 2006, by failing to appropriately assess Student in all areas of suspected disability, by failing to identify his unique needs, and failing to provide appropriate goals to meet his unique needs?

2. Did the District deny Student a FAPE after August 20, 2006, by failing to conduct a skills assessment through the use of probes, such as those in the Maurice and Green curriculum guide, or other equivalent, so that appropriate skills goals and objectives could be developed?

3. Did the District deny Student a FAPE after August 20, 2006, by failing to assess Student's functioning in the home so that maladaptive behaviors in the classroom that impeded his educational progress could be effectively addressed?

4. Did the District violate Student's procedural rights by predetermining the offers of placement made at individualized education program (IEP) meetings on October 18, 2006, September 10, 2007, May 12, 2008, and October 1, 2008, thereby denying his parents meaningful participation in those IEP meetings, and, therefore, denying Student a FAPE?

5. Did the District violate Student's procedural rights by not providing the parents with sufficient information about the effectiveness of his classroom program and his progress, which impeded their ability to understand the academic, developmental and functional needs of Student, which thereby denied them meaningful

⁴ The issues have been reorganized and reframed from those in the Order Following Prehearing Conference for clarity, and some issues have been converted to sub-issues. However, the issues remain the same as those pled by Student.

participation in the IEP meetings on October 18, 2006, September 10, 2007, May 12, 2008, and October 1, 2008, and, therefore, denied Student a FAPE?

6. Did the District violate Student's procedural rights by refusing to incorporate into Student's IEP social skills goals suggested by the parents at the IEP meetings on October 18, 2006, September 10, 2007, May 12, 2008 and October 1, 2008, which denied his parents meaningful participation in the IEP process and, therefore, denied Student a FAPE?

7. Did the District deny Student a FAPE for the 2006-2007 school year by:
- a) Failing to provide Student with academic goals to meet his unique needs?
 - b) Failing to provide Student with social skills goals to meet his unique needs?
 - c) Failing to provide Student with speech and language goals to meet his unique needs?
 - d) Failing to provide Student with academic instruction in a manner reasonably calculated to meet his unique needs and provide educational benefit, such as repetitive instruction using an appropriate curriculum in conjunction with an Applied Behavioral Analysis (ABA) program and researched based methodologies?
 - e) Failing to provide Student with ABA services that would allow him to develop appropriate social behavior and language?
 - f) Failing to provide Student with direct speech and language therapy?
 - g) Failing to educate Student in the least restrictive environment (LRE), with removal from general education classes only to the extent permitted by law?
 - h) Failing to address Student's behaviors that impeded his ability to learn, such as unintelligible vocalizations and repetitive movements, as well as self-injurious and aggressive behaviors, in that the District failed to conduct a

- functional analysis assessment (FAA), and failed to provide him with an appropriate behavioral intervention plan (BIP)?
- i) Failing to provide Student with appropriate educational placement by placing him in a Communicative Disorder special day class (SDC) which did not have sufficient ABA or other research-based programs?
 - j) Failing to provide him with after-school ABA services and parental ABA training?
 - k) Failing to implement goals developed in the October 18, 2006 IEP meeting?
8. Did the District deny Student a FAPE for the 2007-2008 school year by:
- a) Failing to provide Student with academic goals to meet his unique needs?
 - b) Failing to provide Student with social skills goals to meet his unique needs?
 - c) Failing to provide Student with speech and language goals to meet his unique needs?
 - d) Failing to provide Student with academic instruction in a manner reasonably calculated to meet his unique needs and provide educational benefit, such as repetitive instruction using an appropriate curriculum in conjunction with an ABA program and research-based methodologies?
 - e) Failing to provide Student with ABA services that would allow him to develop appropriate social behavior and language?
 - f) Failing to provide Student with direct speech and language therapy?
 - g) Failing to educate Student in the LRE with removal from general education classes only to the extent permitted by law?
 - h) Failing to address Student's behavior that impeded his ability to learn, such as unintelligible vocalizations and repetitive movements, as well as self-injurious and aggressive behaviors in that the District failed to conduct a functional

analysis assessment and failed to provide him with an appropriate behavioral intervention plan (BIP).

- i) Failing to provide Student with appropriate educational placement by placing him in a Communicative Disorder SDC which did not have sufficient ABA or other research-based programs?
- j) Failing to provide him with after-school ABA services and parental ABA training?

9. Did the District's IEP offer of placement in an SDC at Granite Ridge Middle School on October 1, 2008, fail to offer placement and services to Student that would meet his unique needs and provide him with a FAPE because the placement:

- a) Failed to provide Student with academic goals to meet his unique needs?
- b) Failed to provide Student with social skills goals to meet his unique needs?
- c) Failed to provide Student with speech and language goals to meet his unique needs?
- d) Failed to provide Student with academic instruction in a manner reasonably calculated to meet his unique needs and provide educational benefit, such as repetitive instruction using an appropriate curriculum in conjunction with an ABA program?
- e) Failed to provide Student with ABA services that would allow him to develop appropriate social behavior and language?
- f) Failed to provide Student with direct speech and language therapy?
- g) Failed to educate Student in the LRE with removal from general education classes only to the extent permitted by law?

- h) Failed to provide him with after-school ABA services and parental ABA training?⁵

CONTENTIONS

Student argues that the District failed to assess him in all areas of unique need and suspected disability in a timely manner, and in 2006 failed to assess his skill levels, which has resulted in him being denied a FAPE since August 20, 2006. Student contends that District should have assessed his functioning in the home so that it could effectively address maladaptive behaviors that impeded his instruction in school. Student claims that the District denied his parents (Parents) meaningful participation in the IEP process because it predetermined placement and services before IEP meetings took place, and also did not provide them with sufficient information for them to gauge the effectiveness of his educational program.

Student also contends that he was denied a FAPE for the 2006-2007 and 2007-2008 school years because the District failed to provide him with appropriate goals in several domains, and failed to provide him with sufficient related services to meet his unique needs. In addition, he claims that the District did not provide him with an appropriate ABA program to meet his needs, and did not address his maladaptive behaviors that prevented him from accessing instruction in the classroom. Student also argues that he was not provided sufficient opportunities to be educated in the LRE. Student contends that he should have been provided with after-school ABA services, and Parents should have been provided with ABA training by the District. He also claims that the District failed to implement the goals in his IEP for the 2006-2007 school year.

⁵ Student moved to dismiss one issue concerning occupational therapy during the course of the hearing. That motion was granted and the issue was dismissed.

Finally, Student argues that the District's offer of placement and services in an SDC program at Granite Ridge was inappropriate and would not provide him with a FAPE for the 2008-2009 school year. Student requests appropriate educational placement and services, reimbursement for services he received from a non-public agency (NPA) for the 2008-2009 school year, and compensatory education and services.

The District contends that it has appropriately assessed Student since August 20, 2006, that it did not predetermine his placement, that it provided Parents with sufficient information to gauge Student's educational progress, and that it did not fail to incorporate or consider social goals suggested by Parents as part of the IEP process. Therefore, the District contends that it did not deny Parents meaningful participation in the IEP process. Further, the District claims that it has provided Student with appropriate placement and services, in that Student has been placed in a program that uses ABA methodologies and methodologies that are research-based, and that its employees have been properly trained to provide him with an effective ABA program.

The District also contends that the IEPs for the school years at issue contained adequate and appropriate goals in all areas of need, and therefore Student has been provided with a FAPE for the school years in question. The District argues Student did not appear to benefit from mainstreaming efforts that were previously made, and he has been educated in the LRE. The District contends that the proper placement for him now is in a middle school intensive autism program. The District argues that Student's parents have often resisted providing information about Student, and refused to permit District personnel to communicate with outside providers. The District also contends that its efforts to provide parent training and to have Student assessed have been resisted by the parents. As a result, the District argues that it cannot be faulted and should not be ordered to provide a remedy if the ALJ finds that Student was denied a FAPE.

FACTUAL FINDINGS

JURISDICTION

1. Student is twelve years of age and is eligible for special education under the primary category of autism and the secondary category of mental retardation. He resides with his parents within District boundaries, and attended District schools until the 2008-2009 school year.

FACTUAL BACKGROUND

2. Student was diagnosed with autism at the age of two, and at age three, began attending District programs for children with disabilities. In 2002, Student began attending the Communication Disorders Special Day Class (SDC) at Maple Creek Elementary School in the District as a first grader. Cathy Wandler (Wandler) was his teacher. In his third grade year, Liza Gossett (Gossett) was a student teacher in that class.⁶ This class is now called the Primary Intensive Autism Program, and serves students in grades one through three.

3. Following the 2004-2005 school year, Student was placed in the Communication Disorders SDC at Liberty Elementary School (Liberty). This class serves children in grades four through six. During the 2007-2008 school year, the class was renamed the Elementary Intensive Autism Program. Gossett was the teacher in this class for the three years Student attended, during the 2005-2006, 2006-2007, and 2007-2008 school years.

4. On January 23, 2006, Student's triennial IEP meeting was held. The IEP team presented assessments of Student that were conducted by District personnel in

⁶ At that time, Ms. Gossett was not married and used her maiden name of Siqueros.

the weeks prior to the IEP meeting. Based on the results of these assessments, the IEP team drafted goals and objectives. Parents agreed to this IEP.

5. At the end of the 2005-2006 school year, Parents asked that Student be placed in a SDC at Mountain View Elementary School that focused on functional life skills. District IEP team members disagreed with this proposed placement because they believed it was inappropriate for Student. The size of the class was nearly twice that of the SDC class at Liberty, there were fewer instructional aides (IA), and much of the instruction was done in large groups. Therefore, the District believed that the class would not meet Student's needs as a child with autism.

6. Parents and the District have had a strained relationship for the past several years. In 2006, Parents retained the services of attorney Maureen Graves. An attorney from Ms. Graves's office participated in IEP meetings either in person, or telephonically, commencing with the October 18, 2006 IEP meeting. After retaining legal counsel, attorneys from Ms. Graves's office assisted Mother in drafting all letters she wrote to the District.

7. At the IEP meeting on October 18, 2006, Mother was in attendance, and one of her attorneys participated in the IEP meeting telephonically.⁷ Mother did not renew her request for placement in the functional living skills SDC at Mountain View. Instead, Mother and her attorney requested that Student be provided with an ABA program. District personnel informed Mother and her attorney that the SDC at Liberty used ABA methodologies to teach Student. The IEP team formulated goals and

⁷ Father testified that he has never attended an IEP meeting. However, his testimony established that he did discuss educational decisions with Mother, so in instances where both parents may have had a role in decision-making, reference will be made to "Parents."

objectives for the 2006-2007 school year. Mother subsequently wrote the District a letter in which she consented to the IEP, although she disagreed with some of the goals and objectives and wanted additional services. The District responded with correspondence containing prior written notice⁸ concerning its refusal to provide the requested services.

8. An IEP meeting was held on September 10, 2007. Mother attended that IEP meeting with Student's maternal grandmother. An attorney from Ms. Graves's office also participated in the IEP meeting telephonically. Again a request was made that Student be placed in an ABA program. District personnel explained that the program in the Liberty SDC was a program that used ABA methodologies. IEP goals and objectives were formulated. Mother subsequently wrote the District a letter in which she consented to the IEP, but again stated that she disagreed with some of the goals and objectives and wanted additional services. Again the District responded with correspondence that constituted prior written notice.

9. On May 12, 2008, an IEP meeting was held to discuss placement for Student for the 2008-2009 school year. The purpose of the May 12, 2008 IEP meeting was to discuss Student's placement for the 2008-2009 school year. Goals were not formulated for the upcoming school year, nor was a formal offer of placement made by the District at that time. The District recommended placement in the Secondary Intensive Autism program at Granite Ridge Middle School (Granite Ridge). Parents requested that Student be retained in the Liberty SDC, and subsequently filed the complaint in this matter on August 20, 2006. At that time, Student also filed a "stay put" request with OAH, requesting an order that Student's "stay put" placement be

⁸ Before a school district may alter the educational placement of a student, the school district must first provide notice to the student's parents in writing, commonly referred to as "prior written notice." (20 U.S.C. § 1415(b)(3)(A); 34 C.F.R. § 300.503.)

determined to be the Liberty SDC. OAH denied this request. Parents did not enroll Student in the Granite Ridge SDC, and instead kept him at home.

10. On October 1, 2008, another IEP meeting was held. Attending the meeting were Mother, Mr. Nolte from Ms. Graves's office, Kyla Doyle, a consultant from Ms. Graves's office, District personnel, and the District's attorney, Ms. Moore. Parents did not agree with the District's proposal for placement and services in the SDC at Granite Ridge.

11. In October 2009, Parents contracted with Pacific Child and Family Institute (PCFA), an NPA, to provide Student with 15 hours per week of in-home ABA services, with a focus on academics. Student continues to receive these services from PCFA, and also receives private speech and language services, which began in November 2008, from another NPA.

STUDENT'S UNIQUE NEEDS

12. Student has a dual diagnosis of autism and mental retardation. Various assessments have been performed by both District personnel and experts retained by Parents, and most assessment results indicated that Student's IQ is in the mild to moderate range of mental retardation. Three IQ scores on assessments for which that information was recorded ranged from 60 to 65, although one assessment in 2001 showed him to be in the moderate to severe range with an IQ of 26 to 40. However, children with autism often do not perform well on tests of cognitive ability because the autism may interfere with their performance. Nevertheless, the evidence tended to confirm that Student was moderately to severely autistic, and was functioning cognitively in the mild to moderate range of mental retardation. Therefore, Student cannot access the standard curriculum for children who are his age, or at his grade level.

13. Student has a history of engaging in "playlalic" behaviors. These behaviors were described by witnesses as loud, incomprehensible vocalizations and accompanying

body movements that appeared to be re-enactments of scenes Student had seen on television or videos. At times the playlalic behaviors have interfered with instruction in the school setting.

14. Student has difficulty generalizing and maintaining what he has been taught. Generalization is the ability to apply knowledge or skills one has acquired in a variety of situations. Although Student usually did not have difficulty acquiring a new skill such as identifying a letter on a flash card, it was much more difficult to teach him to identify the same letter in a different context, such as drawn on a white board. In addition, Student had difficulty maintaining skills he had previously mastered, and needed to be drilled on those mastered skills at least weekly for maintenance purposes. Other students in his class needed to be drilled on skills for maintenance purposes once or twice a month.

15. Among Student's preferred activities are watching videos from the Disney Studios and looking at books about Disney characters. He loves to go to the Disney Store. He has participated in sports activities for children with special needs for several years. Student is an integral part of his immediate and extended family, and is clearly loved by his family. District witnesses who have worked with him through the years spoke of him fondly.

FAILURE TO ASSESS STUDENT IN ALL AREAS OF SUSPECTED DISABILITY FROM AUGUST 20, 2006 ONWARD

16. School districts are required to assess a student in all areas related to a suspected disability whenever they conduct an assessment of a student for the first time, or when a student already eligible for special education services is suspected of having another disability. A district's failure to assess in all areas related to a suspected disability may result in a denial of FAPE. Once a student has qualified for special education, the district is required to provide goals and services in all areas of unique

need, even if those areas of unique need do not meet the criteria for qualification for special education. Districts are required to gather data from a variety of sources, including observations and interviews with teachers and parents.

17. In his closing argument, Student contends that District assessments were “defective,” in that he was referred to by staff as a “visual learner,” and Student questioned that designation. However, the evidence did not establish that any of the assessments conducted by the District were inappropriate or “defective” in this regard. Student also did not claim that the District failed to assess him in any areas of suspected disability, other than those discussed below.

Apraxia and Playlalic Behaviors

18. Student contends that from August 20, 2006, onward, District had reason to suspect that Student had apraxia,⁹ and that this was an area in which District was obligated to assess.¹⁰

19. In January 2006, the District conducted a triennial assessment of Student. District personnel conducted evaluations of Student in the areas of psycho-education, speech and language, academic achievement, and occupational therapy. There was no evidence presented that Parents or District personnel suspected that Student required

⁹ Apraxia is a neurological condition that interferes with speech and language.

¹⁰ Student’s closing argument does not claim that the District failed to assess him in any area of suspected disabilities. However, a significant amount of evidence was taken on the issue of suspected apraxia. Therefore, the issue is being addressed in this decision.

assessment in any other areas at that time. There was no evidence that Mother requested any additional assessments at the IEP team meeting of October 18, 2006.¹¹

20. At the IEP meeting on September 10, 2007, District personnel expressed concern about Student's difficulty generalizing what he learned, and his inability to maintain skills. The District was also concerned with Student's playlalic behaviors at the IEP meeting on September 10, 2007, because these behaviors had markedly increased since the previous school year. District personnel asked Mother if Student was on medication in an effort to determine if new medication, or the discontinuance of medication, was the cause of these increased behaviors. Mother denied that Student was on medication.¹² Due to these concerns, District personnel suggested that Student be assessed by the California Diagnostic Center in Fresno (CDC) to determine if solutions could be found for his difficulty generalizing and maintaining skills, and to learn the causes of his playlalic behavior. The IEP team, including Mother and her attorney, agreed to have the District refer Student to CDC for assessment.

21. The CDC referral form completed by the District indicated that the District was concerned with Student's difficulty generalizing and maintaining skills, and that it also wanted to learn the causes of his playlalic behavior to see if medication might help

¹¹ The skills assessment requested in the fall of 2006 is a separate issue and is addressed separately in this Decision.

¹² At the hearing, Mother testified that she was untruthful at the IEP meeting in responding to the question about medication. Mother testified at hearing that Student had recently been prescribed new medication at the time of that IEP meeting. There was no direct evidence at hearing that this medication had any specific effect on Student's behavior at school.

to control it. The District also wanted guidance to formulate appropriate goals and objectives for Student.

22. At the IEP meeting on September 10, 2007, District personnel gave to Mother a packet of documents that parents are required to complete for CDC referrals. Other than asking Mother to complete and return the packet, and receiving reassurances from her that she would do so, the District took no further action to have Student assessed concerning his playlalic behaviors and his difficulty generalizing and maintaining skills. The District stopped asking Mother to complete the packet in the spring of 2008, but took no other action, such as filing a complaint with OAH requesting an order for the assessment. This resulted in a failure of the District to have Student assessed in all areas of suspected disability. The District's attorney asked about the status of the CDC assessment after Student filed his complaint, and in September 2008, Student's attorney responded and rescinded Mother's consent for the CDC assessment.¹³

23. At the IEP meeting on October 1, 2008, the District agreed to conduct Student's triennial assessment immediately, although the assessment was not due to be conducted until January 2009. District personnel still had concerns about Student's difficulty generalizing and maintaining skills. However, Mother did not return the consent form for assessment until her attorney asked her to do so in January 2009. During the course of the hearing it became evident that Mother was limiting the time each week for Student to be evaluated by the District for the triennial assessment. In March 2009, during the due process hearing, the triennial

¹³ Mother testified that a few months after the IEP meeting of September 10, 2007, she became concerned about whether a CDC assessment would be independent since two current CDC employees had previously been employed by the District.

assessment was still in progress because Mother was only making Student available for assessment for just two specific afternoons each week, and the District had only a limited time to test him in the afternoons. The ALJ intervened so that certain evaluations pertinent to the issues at hearing could be completed in a timely manner. The ALJ ordered Mother and her attorney to make arrangements with District personnel to complete the evaluations as soon as possible.

24. During hearing, it became apparent that Student was contending that apraxia was an area of suspected disability, and that District should have assessed Student to determine if he had apraxia, which is a neurological condition that interferes with speech and language. Two of Student's expert witnesses, Dr. Paul Leby, Ph.D. (Leby), a neuropsychologist, and Dr. Caroline Bailey, Ph.D. (Bailey), a psychologist with degrees in clinical psychology and child development, testified that Student might have apraxia.¹⁴ However, both agreed that this diagnosis could

¹⁴ Dr. Leby is a neuropsychologist and obtained his Ph.D. degree in clinical neuropsychology from the University of California, Berkeley in 1994, and was a Postdoctoral Fellow at the University of San Francisco Medical Center from 1994 to 1995. He is licensed by the state of California as a clinical psychologist, is on the faculties of the University of California, San Francisco School of Medicine, and Alliant International University, is on the staff of Children's Hospital Central California, and has a private practice.

Dr. Bailey obtained her double Ph.D. in clinical psychology and child development in 2004 from the University of Southern California, and was a Postdoctoral Fellow from 2004 to 2006 at the University of California, Los Angeles, School of Medicine. She is currently on the faculty of California State University Fullerton.

only be made by a speech and language pathologist and based on appropriate testing.

25. Following that testimony, Student's speech and language expert, Katherine Wage (Wage), a speech and language pathologist, conducted an evaluation to determine if Student had apraxia.¹⁵ Wage initially assessed Student for speech and language services in November 2008, and her NPA then began providing Student with private speech and language therapy. Wage could not rule out apraxia when she initially assessed him, but did not directly assess him for apraxia at that time.

26. Wage testified that in evaluating Student for apraxia, she used the results from the assessments she did in November, which were the Functional Communication Profile—Revised, the Assessment Link between Phonology and Articulation (ALPHA), and the Expressive Vocabulary Test (EVT). In March 2009, she conducted the Screening Test for Developmental Apraxia of Speech, Second Edition, and thus determined that Student was apraxic.

27. The District also conducted its own evaluation for apraxia as part of the ongoing triennial assessment during the course of the hearing. Tami Campos (Campos), speech and language pathologist for the District, and the speech and language therapist assigned to Student's classroom at Liberty for the 2006-2007 and 2007-2008 school

¹⁵ Ms. Wage is the director and owner of the Center for Communication Skills (Center), a nonpublic agency that provides speech pathology services. She has a Masters degree from California State University of Fresno, and a California license to practice speech pathology. She has practiced speech pathology since 1973, and spent over 20 years working in public schools as a speech pathologist prior to starting her own private practice in 1996.

years, testified persuasively that Student does meet the diagnostic criteria for apraxia.¹⁶ One of the diagnostic criteria of apraxia is the inability to articulate words correctly. However, if a person has articulation difficulties the person will make the same articulation errors with a word, while a person with apraxia will pronounce the same word differently each time it is said. Based on her two years working with Student, she did not believe he had apraxia. Campos also testified that it was very difficult to assess for apraxia. Only one test, the Verbal Motor Production Assessment for Children (VMPAC), was normed for diagnosing apraxia, and Wage did not administer this to Student. The District did administer this test, as well as several others, at the time the hearing was being conducted, and concluded that Student does not have apraxia. Wage's evaluative testing, as testified to by Campos, was far less comprehensive than that conducted by the District in 2009 for the triennial. In addition, although Student had been receiving direct speech and language therapy from Wage's NPA, since the end of November 2008, she was not the therapist providing those services. Campos, on the other hand, had worked with Student for nearly two years, providing both direct therapy and consultation services, and observed him in the classroom on a weekly basis during the 2007-2008 school years, and was much more persuasive than Wage. Therefore, the evidence established that Student is not apraxic.

¹⁶ Tami Campos earned her Masters in speech and language pathology in May 2005 from California State University, Fresno. She is a licensed speech pathologist. Campos also completed course work to become a board certified behavioral analyst (BCBA) in 2008. She has worked for the District since June 2005 as a Language-Speech Specialist. Campos has attended nearly a dozen conferences and workshops related to working with children who are on the autism spectrum.

28. Based on the foregoing, the District had no reason to suspect Student might have apraxia until Leby and Bailey testified at the hearing, and then the District conducted appropriate assessments and determined that he did not have apraxia, and did not have needs related to this area. Further, the evidence established that Student was not denied a FAPE because the District failed to assess him for apraxia. Moreover, the evidence established that Student did not have needs in this area and, therefore, Student did not require goals and services in that area. Student presented no evidence of other suspected disabilities for which District should have assessed.

29. Student's playlalia was of concern to the District during the 2006-2007 school year, but a behavior support plan was being used in the classroom that helped to control that behavior. It was only when the playlalic behavior markedly increased at the beginning of the 2007-2008 school year that the District attempted to have it assessed by CDC. However, as discussed in Factual Findings 114 and 115, a new BSP developed after the September 10, 2007 IEP meeting was successful in addressing the playlalic behavior.

Skills Assessment Using Probes from the Maurice and Green Curriculum Guide, or Equivalent, Following a Request at the October 18, 2006 IEP Team Meeting

30. At the IEP team meeting of October 18, 2006, Mother requested that the District conduct an assessment of Student's functional skills in all areas, including pre-academics. In a subsequent letter to the District shortly after that IEP team meeting, Mother asked the District to conduct such an assessment using the Maurice and Green Curriculum¹⁷ so that appropriate goals and objectives could be formulated to maximize Student's educational opportunities.

¹⁷ Catherine Maurice and Gina Green are authors of a book for families of children with autism titled, Making a Difference: Behavioral Interventions for Autism,

31. Student contends that District failed, from August 20, 2006, onward, to assess his skills. Student's contention regarding District's alleged failure to conduct a skills assessment using probes from the Maurice and Green Curriculum Guide, or equivalent, is based primarily on the argument that District never, at any IEP team meeting, presented results of an assessment using the Maurice and Green Curriculum.

32. The evidence established that District conducted ongoing assessment of Student's skills. For example, following the IEP team meeting of October 18, 2006, the District's behavioral analyst, Wandler, informally assessed Student's skill levels using the guidelines in the Maurice and Green curriculum.¹⁸ Wandler was Student's teacher for the three school years preceding Student's entry into the Liberty program in 2005, and she knew him and his history very well.¹⁹

which lists skills that children learn in different domains, arranged in order of when they are usually learned by typically developing children.

¹⁸ Kathy Wandler is a BCBA with a Masters degree in special education, and a California teaching credential in Special Education, Moderate/Severe. She is a behavior analyst and behavioral consultant for the District. She has taught special education at California State University Fresno for the last three years. She has worked for the District since 1996.

¹⁹ A probe is conducted using discrete trial training methods to determine a student's knowledge or skill level in a particular area. For example, to determine if a student can identify numbers, flash cards will be shown to him in various arrays (groups of 2 or more) and he will be asked to find a certain number. If one wants to determine if this knowledge (the identification of a certain number) has been generalized, the student might then be asked to identify the number when written on a white board.

33. In addition, the Elementary Intensive Autism Program at Liberty used a team approach to provide services to students in the program. This team consisted of the classroom teacher, Gossett, a school psychologist Tamara Soemali (Soemali), Wandler, and the speech and language therapist, Campos, and will be referred to as the "program team." In the weeks before the IEP team meetings of October 18, 2006, September 20, 2007, and October 1, 2008, the program team met to discuss Student's present level of performance (PLOP) in each area of need, and formulated goals for the school year based on his PLOPs in each area. The program team utilized several different curriculum guides to determine Students PLOPs, and based on his PLOPs new goals were formulated. Among the curriculum guides referenced by the team were the Maurice and Green curriculum, the Hawaii Early Learner Profile (HELP) curriculum, the Ron Leaf curriculum, and the California Alternative Performance Assessment (CAPA) standards for kindergarten students. Each team member also conducted probes of Student's abilities when necessary to determine his level of functioning, and the skills he had already acquired in the academic, social skills and speech and language domains. Once the program team identified Student's PLOPs, it then formulated new goals and objectives to be presented at the next IEP team meeting. For example, Student could identify number symbols one through six at the beginning of the 2006-2007 school year, so the District proposed a math goal at the IEP meeting of October 18, 2006, that he identify numbers seven through ten by the end of that school year.

34. Based on the foregoing, the evidence established that the District performed skills assessments of Student on an ongoing basis, and also conducted a skills assessment of Student using the Maurice and Green Guide following Parents'

request in the fall of 2006. Student's IEP team formulated goals and objectives based on the results of these ongoing assessments conducted by District.

Student's Functioning in His Home

35. Student contends that from August 26, 2006, onward, the District should have assessed him in his home to better address his maladaptive behaviors in the classroom that impeded his educational progress.

36. At the IEP team meetings of October 18, 2006, September 10, 2007, and October 1, 2008, District personnel asked Mother to describe Student's current levels of functioning. Mother did not report any behaviors such as "meltdowns" and "tantrums" at home, and did not inform the District that any such meltdowns or tantrums included overturning furniture, throwing objects, and self-injurious behaviors. After Student filed his due process complaint in August 2008, the District was provided reports from Learning Arts, the NPA that was providing in-home services to Student from September 2007 through September 2008. District personnel were very surprised when they read of such behaviors described above, occurring dozens of times each week, in reports from Learning Arts. Mother had previously declined to sign a form authorizing Learning Arts to provide information to the District, so it had no way of getting this information. The evidence established that Student did not exhibit significant maladaptive behaviors in the classroom on an ongoing basis, other than playlalic vocalizations and accompanying gestures. Incidents during which Student engaged in aggressive and destructive behavior during the 2006-2007 and 2007-2008 school years were infrequent and isolated in the classroom setting.

37. The District's referral to CDC following the IEP meeting of September 10, 2007, contained a request to assess Student in his home. Parents did not follow through with the required paperwork to commence this assessment, and subsequently rescinded their consent to the CDC assessment. The fact that Parents did not report behaviors in

the home and did not authorize District to assess Student's functioning in the home substantially weakens Student's case concerning the alleged failure of the District to assess Student in his home during the operative time of the complaint, particularly since Parents did not report any behaviors in the home and the District did not observe any behaviors warranting assessment in the classroom.

38. Based on the foregoing, there was no demonstrated need during the time periods at issue to assess Student's functioning in the home as there was no indication that any maladaptive behaviors in his home were as severe as they actually were, or that they affected Student's educational performance in the school setting. Moreover, Parents did not report behaviors in the home and did not facilitate such assessment even when requested to do so.

VIOLATION OF PARENTS' PROCEDURAL RIGHTS BY PREDETERMINATION OF PLACEMENTS

39. When a child has been found eligible for special education services, the mechanism for determining appropriate services is the IEP team meeting. The IEP team includes a teacher of the student and staff members who provide services to the student, as well as the student's parents, among others. Parents are an integral part of the IEP team, and their opinions and concerns must be addressed and considered by the IEP team. If district personnel predetermine the offer of placement and services that will be made during the course of the IEP team meeting, the parents will be disenfranchised, and this may constitute a FAPE when the parents are denied meaningful participation in the IEP meetings. Student contends the District predetermined placement and services prior to the IEP team meetings of October 18, 2006, September 10, 2007, May 12, 2008, and October 1, 2008, and that this predetermination constituted a procedural denial of FAPE. Student did not make specific claims as to the basis for this allegation, other than

an argument in his closing brief that “options were ruled out in advance,” although no evidence was cited that established predetermination.

40. Without exception, District personnel who testified in this hearing and participated in IEP meetings subject to the complaint at issue persuasively established that they did not have any knowledge prior to any of the IEP meetings in question that the District intended to offer a specific placement. They also established persuasively that no other team members communicated to them that the District intended to offer a specific placement. At each IEP meeting, Parents were strongly encouraged to provide information and suggestions to the team. In addition, Student was represented by an attorney who actively participated at each IEP team meeting at issue in these proceedings. The District considered Parents’ placement requests, and when they differed from the District’s offer, Parents’ requests were thoroughly discussed. The District did not predetermine placement.

VIOLATION OF PARENTS’ PROCEDURAL RIGHTS BY FAILING TO PROVIDE THEM WITH SUFFICIENT INFORMATION ABOUT STUDENT’S PROGRESS IN MEETING HIS GOALS AND OBJECTIVES, THEREBY DENYING PARENTS MEANINGFUL PARTICIPATION IN IEP MEETING

41. If parents are to have meaningful participation in IEP team meetings, they must have access to student records and other pertinent data related to their child.²⁰ Student contends that the District’s practice of disposing of ABA logs and data, after

²⁰ OAH does not have jurisdiction to determine whether a school district’s record keeping practices comply with state or federal law. This issue concerns whether the district had a duty to maintain the records in question, pursuant to IDEA requirements, so that it could provide parents with specific information concerning their child that would enable them to meaningfully participate in IEP meetings.

progress reports were drafted, deprived Parents of their right to be fully informed about the progress or lack of progress Student was making in meeting his goals. Further, Student contends that without this data, Parents could not determine whether the District was properly applying ABA methodology in instructing the Student. As a result, Student claims that Parents were denied meaningful participation in IEP team meetings on October 18, 2006, September 10, 2007, May 12, 2008, and October 1, 2008.

42. Several witnesses testified about ABA programs generally and specifically. The evidence established that ABA programs are believed by many to be an optimal way to teach children with an autism spectrum disorder. An ABA program can be used to modify behavior and teach skills, in both home and classroom settings. ABA was described by several witnesses during the hearing as a systematic program designed to change behaviors through interventions, and involves the analysis of data that is kept to ensure that a specific strategy is effective in changing the behavior. In the context of use in the District's autism SDCs, students are taught social, academic and functional living skills using ABA strategies such as discrete trial training (DTT). With DTT, a skill is broken down into a series of single sequential steps, and then taught, step-by-step, until the skill is mastered. Each step must be learned before the next step is taught. Each step is taught in a specific way that does not vary. Data is kept and maintained that shows how the skill has been broken down into steps, and how each step is taught, as well as the student's success with each trial. Once a skill has been acquired, it is then necessary to generalize it, as described in Factual Finding 20. Once generalized, the skill must be maintained. ABA uses direct observation and also measures a student's behavior and responses, taking into account the environment in which the trial is conducted. Positive reinforcers may be used to encourage the desired behavior. DTT is just one component of an ABA program. Other methods may be utilized, but a hallmark of ABA is the collection and analysis of data collected concerning a student.

43. The District used ABA methods in Student's SDC at Liberty. Data was collected for each goal and objective worked on each day. Every time Student was drilled on a skill, whether in the acquisition phase, the generalization phase or in mastery, the teacher, therapist or IA conducting the drill recorded the accuracy of Student's response, including whether he needed any prompts, and if so, what kind and how many, to complete the task. Four times each year, the program team reviewed the data sheets, and summarized Student's progress on his goals in progress reports that were sent to his parents. The District had no policy concerning the maintenance of the data sheets once the progress report was completed, and the testimony established that there was no legal or professional requirement that these data sheets be maintained. It is likely that these data sheets were disposed of once the progress report for a quarter was completed. Therefore, they were not available for review once the progress report was completed.

44. The District established that it routinely assessed classroom service providers (speech and language therapists, IAs teachers and others) to ensure data was being collected in a systematic and consistent manner, through a technique called "inter-rater reliability." For example, the teacher, or another member of the program team, would "shadow" an IA or program team member while a student was being taught a skill through DTT, and keep a separate data sheet that would then be compared with that completed by the IA or program team member providing the instruction. This ensured that every person teaching a skill to a student followed the same steps and used the same type of prompts, if prompts were necessary. Therefore, it is evident that the data sheets were a consistent means for the District to determine Student's progress in achieving his goals and objectives during the school year.

45. Data sheets from Student's SDC at Liberty from April through May 2008 were admitted into evidence, as were data sheets from PCFA, and from Student's

previous home-based ABA service provider, Learning Arts, another NPA. Hundreds of pages of data sheets were admitted into evidence and dozens were reviewed during hearing. It was noteworthy that the District and each NPA appeared to have developed its own data forms, and recorded data according to its own policies and procedures. Even with explanatory testimony from District personnel, Student's experts, and a representative from PCFA, it was not possible for the ALJ to accurately determine Student's skill levels by reviewing these data sheets. For example, although PCFA data sheets recorded that Student had "mastered" specific skills such as the identification of some sight words, the testimony of a PCFA representative, Stephanie Finney (Finney), established that few, if any, of the skills PCFA taught Student had been mastered according to the District criteria: An ability to perform a task in three different environments, with three different stimulæ with three different providers. Without clarifying information from the entity keeping the data sheets, they have very little value. The evidence established that even with clarifying information, the review of ABA data sheets from the District is not an effective way of measuring a student's progress. Parents were issued progress reports four times a year that were much more understandable than the data sheets, and gave them accurate information about Student's progress if they reviewed the progress reports.

46. Significantly, there was no evidence produced at hearing that the progress reports were not accurate reports of Student's progress in meeting the goals and objectives in his IEP.

47. Based on the foregoing, Parents were not denied meaningful participation in the IEP meetings because the ABA data sheets and logs were not provided to them, or not available to be provided to them.

VIOLATION OF PARENTS' PROCEDURAL RIGHTS BY FAILING TO INCORPORATE INTO STUDENT'S IEP SOCIAL SKILLS GOALS THEY SUGGESTED AT IEP MEETINGS ON OCTOBER 18, 2006, SEPTEMBER 10, 2007, MAY 12, 2008 AND OCTOBER 1, 2008, WHICH RESULTED IN STUDENT NOT BEING PROVIDED A FAPE

48. The evidence at hearing established that students with autism have social skill deficits that affect their ability to interact with others. If a student's lack of social skills interferes with his ability to obtain an educational benefit in the school setting, it is an area of unique need and it must be addressed in the IEP. As previously discussed, Parents must be given the opportunity to meaningfully participate in the IEP team meeting, and their opinions and concerns must be considered. Parents contend that the IEP team failed to incorporate into Student's IEP social skills goals they suggested, thereby denying Student a FAPE.

49. There was no evidence that Parents suggested social skills goals at the IEP meeting on October 18, 2006. In a letter sent to the District after that meeting, Mother requested an intensive ABA program of 40 hours per week that would teach Student "the 'learning to learn' and early language and socialization skills addressed by the Maurice [and Green] curriculum." However, specific social skills goals were not requested. The District responded to Mother's letter with prior written notices about requests that were being refused, and stated that it was providing an ABA program. Student did not establish that the District failed to consider social skills goals suggested by Parents at this IEP meeting, because no such goals were suggested by Parents either during the meeting, or in the letter Parents wrote to the District after the meeting.

50. Moreover, for the 2006-2007 school year, the IEP team formulated the social skills goals that included responding to a peer greeting with one verbal and/or gestural prompt. In addition, two speech and language goals were also social goals: 1) forming a grammatically correct sentence of three to four words, which would assist him in social interaction, and 2) engaging in three reciprocated exchanges with a typically

developing peer tutor. The evidence established that these goals were sufficient to meet Student's social skills needs.

51. At the September 10, 2007 IEP meeting, the team discussed social skills, and Mother and her attorney were told that social skills were addressed in the classroom on a continual basis. Following the September 10, 2007 IEP meeting, Mother wrote a letter to the District that did not suggest specific social goals, but stated that all of the requests in her letter following the October 18, 2006 IEP meeting were being renewed. As discussed in Factual Finding 49, specific social skills were not suggested or requested in that letter. Therefore, Student did not establish that the District failed to consider social skills goals suggested by Parents at this IEP meeting, because no social goals were suggested by Parents.

52. For the 2007-2008 school year, one of the District's proposed social skills goals, although labeled as a speech and language goal, was that he would engage with a peer tutor with up to three reciprocated exchanges pertaining to a topic and/or structured activity that is highly motivating for him with no more than two verbal prompts.²¹ In addition, he was given a sorting goal which required him to request a needed item or items from a peer at least once a day. Another goal required him to respond to at least four personal safety questions. However, as established below, in Factual Findings 98 through 100, these goals were not sufficient.

53. At the October 1, 2008 IEP meeting, Mother was accompanied by Mr. Nolte from Ms. Graves's office, as well as Kyla Doyle (Doyle), a consultant employed by Ms. Graves. Fifteen goals were proposed by Mother, her attorney, and Ms. Doyle. These

²¹ This goal was carried over from the previous school year.

included a goal for asking “WH” questions,²² one for responding to “Hi,” one for demonstrating the ability to comment on the environment, and a goal for game-playing/turn-taking. These goals were discussed extensively by the IEP team. The evidence showed that Student was already answering “WH” questions and had already begun asking them at the end of the 2007-2008 school year. He had worked on a goal for responding to “Hi” in the 2006-2007 school year, and achieved it, and was able to make spontaneous comments in structured activities by the end of the 2007-2008 school year. In addition, he had been playing games in the SDC that involved turn-taking for the previous two school years.

54. The District also included proposed social skills goals in the proposed IEP for the 2008-2009 school year that included goals from the previous year of responding in the educational community setting to at least five personal safety questions verbally or with a communication wallet, as well as participating in up to three reciprocated social exchanges. The social exchange goal was to occur when Student purchased a priced item from a peer tutor and/or adult. Other goals with a social skills component were for Student to travel to five locations on a new campus with an icon or picture and engage in a social exchange and appropriately gain attention of a peer to make a request or comment. These District proposed social goals adequately met Student’s social skills needs.

55. In addition, Campos persuasively established that there were many opportunities in the classroom to address social skills, such as calendar time, snack time, recess, and physical education (PE), and there were peers outside who would say ‘hello,’

²² “WH” questions are those that incorporate the words “who,” “when,” “why,” “where, or “how.”

and also peer tutors “pushing into” the classroom.²³ These opportunities existed in both the 2006-2007 school year and the 2007-2008 school year. However, the evidence established that Student did not attend to or respond to attempts of others to initiate conversation, nor did he initiate conversations with others.

56. Based on the foregoing, it is clear that when Parents proposed specific social skills goals at IEP meetings, the proposed goals were discussed and considered by the team. There is no evidence that the District failed to consider social skills goals suggested by Parents. Accordingly, the Parent were not denied meaningful participation in IEP team meetings.

FAPE FOR THE 2006-2007 SCHOOL YEAR

57. The Individuals with Disabilities Education Act (IDEA) requires school districts to offer a FAPE to students with disabilities who are eligible for services. This requires the district to provide a student with a disability a program that will address his unique needs and provide him or her with educational benefit. Parents contend that Student was denied a FAPE because the District failed to provide him with an appropriate educational placement with services designed to meet his unique needs and one that was reasonably calculated to provide educational benefit.

58. On October 18, 2006, an IEP meeting was held with Mother and an attorney from Graves’s office in attendance. The District proposed ten goals for Student to work on during the 2006-2007 school year. These goals were as follows: 1) Will identify number symbols 7 through 10; 2) Will count quantities up to 5 with generalization; 3) Will identify receptively and expressively the letters of his first name; 4)

²³ These peer tutors volunteered to come into class during recess and work with the students in the SDC.

Will write within the boundaries of his work space; 5) Will bounce and catch a ball ten times with a peer or adult; 6) Will comply with the imitation request of a peer or adult by participating in three to four PE drills; 7) Will ask for "self-regulation" area to de-escalate without demonstrating self-injurious or destructive behaviors; 8) Will respond to greeting by a peer with no more than one verbal and one gestural prompt; 9) Will participate in classroom chores with no more than two prompts; 10) Will demonstrate improved functional communication skills by demonstrating the following skills: a) verbalizing a three- to four-word grammatically correct sentence; and b) engaging in up to three reciprocated exchanges with a "neuro typical peer," with no more than two verbal prompts.

Academic Goals

59. Student contends that the District denied him a FAPE because it did not formulate appropriate academic goals for him at the October 18, 2006 IEP meeting. Student is particularly concerned about failure of the District to provide him with goals in the areas of reading, writing, math, social studies and science, because he is unable to read, can write only his name, address and telephone number, cannot perform even simple addition, and has not been exposed to modified curriculum in the areas of social studies and science. The IEP is to contain goals that are measurable, including academic and functional goals that will meet the needs of the individual student. However, there is no requirement that every academic subject be addressed by goals in the IEP.

60. The evidence, and particularly the testimony of Gossett and Wandler, established that skills such as reading, and the ability to perform numerical calculations, are dependent upon a child achieving certain pre-requisite skills. Prior to the IEP meeting of October 18, 2006, and as discussed in Factual Findings 33 and 34, the program team used a variety of curricula to determine Student's PLOPs prior to formulating goals for an upcoming IEP team meeting. Before a goal was formulated, the

person or persons formulating the goal would confirm that Student had the prerequisite skills. Often program team members would conduct probes by using a DTT format to determine if Student could complete a task, thereby demonstrating that he had acquired a skill that was a pre-requisite to learning another skill.

61. The first three proposed goals in the IEP of October 18, 2006, addressed academics in the areas of math and reading. These goals built upon skills that Student had previously acquired and mastered. The goal for Student to identify receptively and expressively the letters of his first name was developed because Student knew how to write his first name, so the program team felt these letters would be especially meaningful to him, and increase his willingness to learn them. Based on Student's current levels of performance at the time these goals were formulated, they were adequate and sufficient to provide him with educational benefit. There was no evidence that Student could access even a modified curriculum in the areas of social studies and science approximating his grade level. Student's scores, when administered the CAPA for his grade level towards the end of the 2006-2007 school year, indicated that he had made gains in the areas of math and reading.²⁴ However, he was still at the level where he was acquiring prerequisite skills to begin decoding words and performing simple math calculations. In addition, although every academic area was not addressed by

²⁴ California assesses students' progress at all levels. The IEP team determines whether a Student will be administered standardized academic testing each school year, and if so, the test instrument that will be used. The CAPA has a very basic assessment tool used to assess students with cognitive limitations. There are two versions, a single version for children with severe cognitive delays, and several graduated versions that approximate grade levels for students with less severe delays. Student was tested using the grade level tests during the statutory period.

specific goals, the SDC classroom at Liberty utilized methods such as circle time and field trips to present information to students that could be considered science and social studies. Based on the foregoing, the District's academic goals for the 2006-2007 school year were adequate and addressed Student's areas of need. Student was provided a FAPE regarding academic goals for the 2006-2007 school year.

Social Skills Goals

62. Student contends that the District's failure to formulate appropriate social skills goals denied him a FAPE because he cannot interact with peers and adults in a meaningful way, he does not initiate social interaction, and he does not respond to others when they initiate social interaction. As discussed in Factual Findings 33 and 48, if a student has unique needs in the area of social skills, a school district must provide goals and services in that area.

63. The evidence established that Student's social deficits are a function of his autism and are an area of unique need for Student. He has been given social skills goals consistently, and his program since first grade has been one for children with moderate to severe autism, and mild to moderate mental retardation in which social skills training is an integral part of the program. However, Student does not initiate social interaction with others, and does not respond to the attempts of others to initiate social interaction with him without prompting. For the 2006-2007 school year the IEP team formulated the social goals that included responding to a peer greeting with one verbal and/or gestural prompt. In addition, two speech and language goals were also social skills goals: 1) forming a grammatically correct sentence of three to four words, which would assist him in social interaction, and 2) engaging in three reciprocated exchanges with a typically developing peer tutor. These goals were appropriate, given Student's level of functioning, and did provide him with a FAPE in the social skills domain. Student had achieved these goals by October 2007, but had not maintained them, according to the

progress report sent to Parents at that time. Based on the foregoing, the evidence established that the District did provide Student with adequate social skills goals for the 2006-2007 school year.

Speech and Language Goals

64. If a student's unique needs require speech and language services to obtain educational benefit, a school district is required to provide those services, and the IEP should contain goals related to speech and language. Student contends that the District failed to formulate appropriate speech and language goals, thereby denying him a FAPE for the 2006-2007 school year.

65. As referenced in Factual Finding 58, the two-part tenth goal is a speech and language goal that met Student's unique needs and would confer an educational benefit. As discussed in Factual Finding 63, Student does not engage in spontaneous interaction with others. The evidence established that his vocabulary is functional, but limited. Given Student's level of functioning, the tenth goal was sufficient to provide Student with a FAPE for the 2006-2007 school year. Therefore, he was provided with appropriate speech and language goals.

Appropriate Academic and Social Skills Instruction and ABA Services

66. Student originally complained that the District failed to provide him with appropriate instruction in the areas of academics and social skills because he was placed in a class that did not utilize an ABA program. When it became evident, through the testimony of witnesses, that the District's SDC at Liberty utilized ABA methodologies such as DTT as the primary means of instruction, Student argued in his closing brief that the District did not utilize these methodologies appropriately. However, he presented no testimony or admissible documentary evidence that supported this argument.

67. The evidence established that Student was provided appropriate academic and social skills instruction, and appropriate ABA services. Student's SDC for the 2006-2007 school year was called a Communicative Disorders SDC. In the fall of 2007 it was renamed the Elementary Intensive Autism Program. The methodology used was primarily a research-based ABA program, and the evidence established that this was explained to Mother and her attorney by District personnel at the IEP meeting on October 18, 2006. In addition, the prior written notices sent to Mother in response to her letter written after the IEP meeting of October 18, 2006, stated that Student's program was based on ABA, and all staff were trained to implement researched-based ABA strategies. Ninety percent of the time Student spent in the SDC involved staff utilizing ABA methods, much of it DTT, to assist Student in achieving his IEP goals. The evidence established that neither of Student's parents, nor any staff from his attorneys' law offices, ever observed the classroom to ascertain that this was the case.²⁵ There were six students in the class for both of the school years at issue, all of whom had a dual diagnosis of autism and mental retardation. The students were primarily taught by the teacher (Gossett), and several IAs who worked individually with students most of the school day, usually utilizing ABA methodologies for instruction and behavior modification. In addition to the teacher, the classroom was supported by a speech and language therapist (Campos), a behaviorist (Wandler), the school psychologist (Soemali), as well as an occupational therapist. These individuals and Gossett were called the program team, and all of them testified about the program, with the exception of the

²⁵ Parents would occasionally transport Student to school and bring him to the classroom or pick him up from the classroom, but would not stay more than a few minutes at most each time they did so. They never arranged for a formal observation of the class to observe instruction.

occupational therapist. All of these individuals established through their testimony that they would spend several hours a week in the classroom observing and providing direct services to children and consultation services to staff. There were program team meetings lasting at least an hour to discuss the needs of the individual students in the SDC at least three times each month that were attended by Gossett, Campos, Wandler, Soemali, and the occupational therapist assigned to the program. The description of how a typical day in the classroom by Gossett, and testimony from Wandler, Campos, Blue and Soemali, established that the SDC at Liberty was a classroom that utilized research-based ABA methodologies. Student did not produce any evidence that these methodologies were not utilized appropriately most of the time, if not all of the time.

68. Based on the foregoing, the evidence established that instruction in the SDC was appropriate to meet Student's academic, social skills and ABA needs.

Speech and Language Therapy

69 If a student requires direct speech and language therapy to obtain educational benefit as a result of his or her unique needs, it is a related service that a school district is required to provide. Student contends that he was denied a FAPE because he was not provided with appropriate speech and language therapy for the 2006-2007 school year. The IEP formulated on October 18, 2006, required that Student be provided two 30-minute sessions of direct speech and language therapy each week. During the October 18, 2006 IEP meeting, Mother requested three hours of direct speech and language therapy each week. However, Student did not establish that he required three hours of speech and language therapy during the 2006-2007 school year. In addition to the direct speech and language therapy she provided to Student, Campos worked with the teacher and IAs to ensure that Student received speech and language support throughout the school day in all areas of instruction. The evidence established that the speech and language services provided by Campos met Student's need.

Accordingly, the speech and language services provided for him during the 2006-2007 school year were appropriate, and the District did not deny him a FAPE in this regard.

Least Restrictive Environment (LRE)

70. The IDEA requires that students with disabilities be educated in the LRE. Therefore, a student with a disability should be removed from a regular classroom only to the extent necessary to receive educational benefit. A student placed in the more restrictive environment of an SDC may attend regular education classrooms, or participate in activities with nondisabled peers, for a portion of the school day. Therefore, students in an SDC are mainstreamed into the general education environment for a portion of the school day, if this is appropriate and necessary to educate the students in the LRE. The appropriateness of this mainstreaming is determined by the educational and social benefit received by the student. Another factor that is considered in determining the appropriateness of mainstreaming is whether the student's presence in the mainstream environment is disruptive to the other students in that general education class. Student did not dispute his placement in an SDC, but he contends that the District should have provided him with additional time to interact with nondisabled peers during the school day. Specifically, Student contends in his complaint that he should have been offered 10 hours of time per week with typically developing peers in a general education classroom.²⁶ Student further claims that the District should also have provided him with this exposure by permitting him to participate in extra-curricular activities and/or attend a child care facility on the Liberty campus after school.

²⁶ In his closing brief, Student did not request any specific amount of time or frequency for interacting with typically developing peers.

71. At the IEP meeting on October 18, 2006, Student was offered 15 minutes each day in a general education classroom, as well as 30 minutes a week of music and 30 minutes a month of art in general education classrooms, in addition to participation in the exercise portion of a general education PE class several times a week. The evidence established that Student also participated in lunch, recess and assemblies with the general education population. Some typically developing peers ate lunch at the SDC students' table in the lunchroom, and some were "pushed in" to the classroom to participate in activities with the SDC students. SDC staff were always available to facilitate interaction between the SDC students and the typical peers. However, the evidence established that Student would not interact with them.

72. There was no credible evidence that Student asked to participate in extracurricular activities after school at any of the IEP meetings at issue, nor was there evidence that he could have participated in the activities offered, which included choir, oral interpretation, cross-country, wrestling, and track.²⁷ The evidence established that Student lacks the most basic of safety skills. For example, he never checks to make sure it is safe before crossing the street, and he has left his school bus through the rear exit door at bus stops other than his own. He requires direct adult supervision at all times. There was evidence that there was an after-school program on the Liberty campus, but it was never established that the District operated the program, as opposed to a private provider. In any case, it was unclear that Parents would have permitted Student to

²⁷ Mother testified that she asked about Student participating in after-school sports activities at an IEP meeting, but could not recall when that meeting occurred. The notes recorded by District personnel at each IEP team meeting at issue do not reflect such a discussion, nor did any District witnesses testify that Mother asked about after-school sports activities.

participate in any after-school activities, had they been offered. When the District offered Student an after-school art class the following school year as compensatory education because the District failed to provide him with the 30 minutes per month of art during the 2006-2007 school year, Mother refused to let him participate. She claimed that he would think he was being punished if he had to stay after school for any reason, and as a result would act out.

73. The evidence established that Student received very little, if any, educational or social benefit from being mainstreamed into a general education class for a small portion of the school day. Matthew Lucas (Lucas), a fourth grade general education teacher during the 2006-2007 school year, testified about Student mainstreaming for 15 minutes each day in his classroom during the 2006-2007 school year. Student came to his class before lunch, accompanied by an IA. This was the period of time when Lucas taught his students mathematics. His students were working on fractions and decimals. Student was working on simple counting. Lucas's students were usually working silently on worksheets during this time. Student had little interaction with other students, although some tried to work with him. During lunch, some of the students would sit at the table where Student's SDC classmates ate. Student also joined Lucas's class for PE. He did stretching exercises with them, but usually left when other activities such as ball games or tag began, partly because he wanted to leave, and partly due to safety issues. Student did participate in relay activities during PE.

74. Occasionally, art would occur during the math portion of Lucas's class, and Student would come to class at those times and work on very simple art projects. Approximately every two weeks, Student would experience outbursts in the general education classroom when he would shout out and refuse to do his work. If the shouting lasted more than a couple of minutes he and the IA would leave. His shouting was so loud he could be heard even after leaving the classroom when he was in the

hallway. This was disruptive to the class, as were the noises (playlalic behavior and vocalizations) he made consistently in class. Lucas opined that Student did not receive any academic benefit from being in his class. Student could not access the math curriculum. Lucas described Student as "overwhelmed" when he was in the regular education fourth grade class. Student also attended a third grade class for music because it was considered to be more appropriate than the fourth grade class. However, there was no evidence concerning the music class mainstreaming experience for Student.

75. Based on the foregoing, the evidence established that Student was educated in the LRE to the maximum extent possible and was regularly provided as many mainstreaming opportunities as possible. The Parents did not provide any persuasive evidence to the contrary and did not contend that Student should have been in the general education classroom full time.

Behavior

76. When a student exhibits serious behavior problems in the school setting, a behavior support plan (BSP) may be created to eliminate the behavior. If a BSP has been ineffective in controlling the behavior, the district must conduct an FAA so that a BIP can be formulated. Student contends that the District failed to address his behaviors that impeded his ability to learn, such as playlalic behaviors, as well as self-injurious and aggressive behaviors. Student claims that the District should have conducted a FAA and provided him with an appropriate behavioral intervention plan.

77. The evidence established that at the beginning of each IEP meeting, Mother was asked if she had any concerns. Mother did not provide the District with much information, concerning Student's frequent tantruming at home. District personnel were told that Student would engage in disruptive behavior if he was not allowed to do something he wanted, but they did not know that this included

destructive and self-injurious behavior, dozens of times each week. There were some instances of tantrum-like behavior in the classroom the previous school year, and therefore a goal was established in the IEP of October 18, 2006 to teach Student to go to a specific area of the classroom to de-escalate his behavior when frustrated. It was also observed that close supervision diminished these behaviors. A BIP was not shown to be necessary to address these behaviors. The evidence established that the tantrum-like behaviors at school were far more infrequent, and much less violent, than those at home. During the 2006-2007 school year, the goal to have Student seek out his self-regulation area was successful in addressing these behaviors. The evidence showed that the District appropriately addressed Student's behaviors that were aggressive and destructive.

78. Student's playlalic behaviors did interfere with instruction during the 2006-2007 school year, but they were addressed with a BSP that was created by Wandler. The BSP required staff working with Student to introduce an exercise by establishing a contract using an "First. . . then" sentence, i.e., "First, if you finish this trial, then you will get [whatever reinforcer Student had chosen for that exercise]." Staff also would use the phrase, "quiet mouth," to discourage playlalic behavior when it interfered with instruction. Student did not demonstrate a need for anything more than this BSP that was occasionally updated to address the playlalic behavior. He also had another BSP to address his behavior on the school bus as described in Factual Finding 72. The evidence did not establish that the BSPs were ineffective in addressing Student's maladaptive behaviors, and therefore warranted an FAA. Accordingly, he was not denied a FAPE due to a failure of the District to conduct an FAA and formulate a BIP to address Student's his maladaptive behaviors.

Appropriate Classroom Placement

79. Placement is a combination of program and services offered to a student with a disability. Placement not only includes the type of classroom in which the student is educated, but also the type of program in the classroom and the related services provided to the student. In addition, there is no legal requirement that a student with the disability of autism be educated with a specific methodology.

80. As discussed above in Factual Findings 42 and 43, Student contends that the District should not have placed him in a Communicative Disorders SDC without sufficient ABA or other research-based programs. The evidence established that the Communicative Disorders SDC did utilize ABA programs, and it was subsequently renamed the Elementary Intensive Autism Program without changing the methodologies used in the classroom. The evidence established that placement in this classroom at Liberty for the 2006-2007 school year was appropriate, and this placement did not deny Student a FAPE. Factual Findings 42, 43, and 67, demonstrate that the placement used many ABA strategies and research-based programs, and staff was qualified and trained to provide this type of program. Therefore, Student's placement in the SDC class at Liberty was appropriate.

After-School ABA Services and Parental ABA Training

81. If a student with a disability has a unique need for in-home services and parental training as a result of in-home behaviors that affect the ability of District to educate him at school, a school district must provide them as part of its obligation to provide a FAPE. Parents contend that these services were necessary, and the District refused to provide them.

82. Student has received in-home ABA services from an NPA for most of the statutory time periods covered by the complaint. The evidence established that these services were designed, for the most part, to address behavioral issues and functional

living skills in the home. The cost of these services was borne by Central Valley Regional Center (CVRC).²⁸ When CVRC funds these services, the expectation is that the NPA, using ABA methodologies, will address behavior issues, communication, self-help and pre-academics. As discussed in Factual Finding 77, Student had severe behavior issues in the home. However, the District would be required to fund in-home ABA services to address in-home behaviors only if the behaviors affected the ability of the District to educate him in school. There was no evidence that Student's in-home behaviors resulted in him being unable to function in the school setting, or that they affected District's ability to provide educational benefit to him at school. Indeed, the evidence established that District was unaware of the extent of the behaviors until after Student filed his due process complaint and District obtained information from the NPA. Prior to that time, Parents had refused to sign a waiver to permit District staff to speak with NPA staff regarding Student. For all of the above reasons, there was no evidence that Parents required in-home ABA services to assist Student's functioning at school. Therefore, the District had no duty to provide Student with in-home ABA services, or ABA training for Parents during the 2006-2007 school year.

²⁸ The evidence established that there were several times that the NPA taught Student skills in the home that had already been taught in school, or the school taught Student a skill that had already been taught by the NPA. However, the evidence established that the District and NPA were not able to collaborate regarding the provision of services. Parents refused to sign releases to permit collaboration between the NPA providers and school staff.

Failure to Implement Goals and Objectives Developed in the October 18, 2006 IEP Meeting?

83. An IEP developed for a child with special needs is required to contain the present levels of the child's educational performance and measurable annual goals, including benchmarks or short-term objectives, related to the child's needs. The purpose of goals and measurable objectives is to permit the IEP team to determine whether the pupil is making progress in an area of need. A district's failure to implement IEP goals can constitute a denial of FAPE.

84. The evidence established that Mother did not sign the IEP consenting to implementation of goals and objectives during the IEP meeting of October 18, 2006. After that IEP meeting, Mother sent a letter to the District in which she disagreed with the goals and services in the IEP, and suggested other goals and services. District personnel believed that mother was withholding her consent the IEP after they read the letter. The letter was two typewritten, single-spaced pages. In the second paragraph, Mother wrote that she "consents to the implementation of the goals presented, but does not believe they are appropriate. . . ." The remainder of the letter includes only a recitation of services and goals Mother wanted the District to provide. Given the circumstances, the evidence established the District's confusion was reasonable. Following the receipt of the letter, the District responded to it with a document containing several prior written notices to explain why the District was not agreeing to the goals and services requested in the letter. Although the District believed that Mother had not consented to the IEP of October 18, 2006, the evidence established that the District conducted ongoing probes of Student's skills as he acquired new ones during the 2006-2007 school year, and continued to build on these skills, using the proposed goals and objectives in the IEP of October 18, 2006, for guidance. Progress reports were sent to Parents as they came due, but because the District believed that there was no consent to the IEP of October 18, 2006, the progress reports referred to the goals and

objectives from the IEP the District believed Parents had last agreed to: the IEP from January 23, 2006. Parents never contacted the District to ask why the progress reports were addressing skills from this out-dated IEP.

85. After the IEP meeting of September 10, 2007, the District assessed Student using probes, and a progress report was sent to parents that showed he had mastered most of the IEP goals from the IEP of October 18, 2006. It was noted that Student was having difficulty maintaining the goal of going to his self-regulation area when frustrated, verbalizing three- to four-word grammatically correct sentences, and engaging in three reciprocated exchanges with a typically developing peer.²⁹

86. Accordingly, the evidence showed that the District continued to provide appropriate services to Student, in spite of its belief that Parents had not consented to the IEP of October 18, 2006, and Student did receive a FAPE for the 2006-2007 school year.

FAPE FOR THE 2007-2008 SCHOOL YEAR

87. The Individuals with Disabilities Education Act (IDEA) requires school districts to offer students with disabilities a FAPE. This requires the district to provide a

²⁹ At the, IEP meeting of September 10, 2007, it was also discovered that the District had failed to “mainstream” Student in art for 30 minutes per month as required by the October 18, 2006 IEP. After the September 10, 2007 IEP meeting, the District offered to have Student participate in an after-school art class with typically developing peers accompanied by an IA for the class, with transportation home after the class on a bus, accompanied by Gossett. As described in Factual Finding 56, Mother rejected this offer of compensatory services. Student did not raise this failure to provide services as an issue, and it is not addressed in this Decision.

student with a disability a program that will address his unique needs and provide him or her with educational benefit. Parents contend that Student was denied a FAPE because the District failed to provide him with an appropriate educational placement with services designed to meet his unique needs and reasonably calculated to provide educational benefit for the 2007-2008 school year.

88. The goals formulated at the IEP meeting of September 10, 2007, were that Student will do all of the following: 1) Correctly sequence and complete two or more functional activities: folding towels, simple meal preparation, dressing-out for PE, etc. with no more than three gestural and/or verbal prompts; 2) Receptively sort functional objects (i.e. laundry, building materials, etc.) by two relevant attributes (i.e. color, size, shape, etc., given a visual model and when necessary, and expressively request needed items from a peer to complete a sorting task using at least one attribute during his educational day; 3) Receptively identify five community and/or safety signs when presented amongst a field of three; 4) Respond to at least four personal safety questions by using a communication wallet and/or verbalizing the correct answer with no more than 2 verbal prompts; 5) Travel to a location within the campus (shadowed by an adult) with an icon or picture, and engage in a social exchange (i.e. return books, deliver mail, request an item, etc.) with 5 or less prompts; and 6) Engage with a peer tutor with up to three reciprocated exchanges pertaining to a topic and/or structured activity that is highly motivating for him with no more than two verbal prompts.³⁰

89. These goals are primarily functional because the program team believed Student might be able to master his IEP goals if they were more functional than in the past, and related more directly to his life.

³⁰ This goal was carried over from the previous school year.

Academic Goals

90. Student contends that the District denied him a FAPE because it did not formulate appropriate academic goals for him at the September 10, 2007 IEP meeting. Student is particularly concerned about failure of the District to provide him with goals in the areas of reading, writing, math, social studies and science. Therefore, he is unable to read, can write only his name, address and telephone number, cannot perform even simple addition, and has not been exposed to modified curriculum in the areas of social studies and science.

91. As discussed in Factual Findings 12 through 14, Student's disabilities preclude him from being able to access the general education curriculum for his age and grade level. At the IEP meeting on September 10, 2007, as noted in Factual Findings 20 and 21, District personnel expressed concern about Student's difficulty generalizing and maintaining skills. The IEP team agreed that Student should be assessed at CDC. The District, in the referral form it completed for CDC, asked for assistance in formulating appropriate goals and objectives for Student.

92. The IEP developed on September 10, 2007, contains only six goals, all of them functional. There are no academic goals, although District personnel testified that some of the six goals could assist Student in developing skills that are pre-requisites to developing academic skills. For example, a goal to identify five safety or community signs, and another to be able to write personal information such as his address and telephone number could assist Student in developing skills in letter identification and phonemic awareness. Vocabulary could be developed through sorting activities, and learning life skills such as making a bed.

93. In formulating the IEP goals for the 2007-2008 school year, Gossett, Wandler and Campos believed that Student might respond more readily to instruction that focused on functional tasks as a means of establishing prerequisites for instruction

in academic areas of reading and math. As previously discussed, District personnel were concerned about Student's inability to generalize and maintain previous skills that were more academic in nature. It appears that the six functional goals formulated for the IEP meeting of September 10, 2007, were intended to be "stop-gap" goals that would remain in place only until the CDC assessment was conducted, and a new IEP meeting was held to discuss the results and formulate new goals and objectives in accordance with those results. However, the fact remains that the IEP for the 2007-2008 school year offered no academic goals, unlike his previous IEP.

94. There was extensive testimony and evidence concerning Student's readiness to learn to read. Prior to the 2007-2008 school year, Student's IEPs contained goals for letter recognition. District personnel testified that when they formulated IEP goals for the 2007-2008 school year, they believed that Student had not achieved sufficient prerequisites to begin formal instruction in reading, and some of the functional goals were designed to provide him with these prerequisites. However, this evidence was not persuasive. There was no evidence that Student could not learn. To the contrary, the evidence showed that he did learn at the initial phase of acquiring new skills, but once he had acquired a skill, he lacked the ability to easily generalize and then maintain that skill. For example, the goal that Student have three reciprocal exchanges with a peer had been carried over from the previous school year because he was not able to maintain it for a three week period.

95. Mother wrote a letter to the District following the IEP meeting of September 10, 2007, consenting to these goals, but asking for additional goals to address academics, among others. The District responded on November 16, 2007, with a

letter and several other documents that constituted prior written notice of the District's refusal to agree to most of Mother's requests.³¹

96. As discussed in Factual Finding 70, it appears that the District was relying on information from the proposed CDC assessment to assist the IEP team in developing additional goals and objectives once CDC had completed its assessment. However, this assessment did not take place because Parents did not complete the required application information, and the District did not convene a new IEP team meeting to address adding new goals for that year, nor did it file a due process hearing request to ask OAH to order the assessment, as it could have done.

97. The evidence included Student's ABA data sheets from the Liberty SDC for April and May 2008. These sheets show that the District was still working with Student on some of the six functional goals, although District personnel testified that they believed Student would acquire, generalize and maintain more functional goals. The evidence did not establish that the six functional goals provided Student with more than a de minimus educational benefit. Because of the lack of academic goals, the IEP team did not have the opportunity to discuss placement and services in relation to those goals, and did not have progress report. The IEP is the centerpiece of special education. It must target all of the educational needs of a student with disabilities, both academic and nonacademic. If the IEP does not contain goals to meet Student's unique needs, the entire IEP process is bypassed and subverted. Accordingly, the District's failure to

³¹ Mother testified that she did not receive this letter, but her testimony in this regard was not persuasive. Mother testified that her attorney assisted her in writing this letter, and there was nothing in the record to suggest that her attorney did not receive the letter, either from her or the District, in that the complaint contained no allegations of failure of the District to provide prior written notice.

provide Student with true academic goals and objectives denied him a FAPE for the 2007-2008 school year.

Social Skills Goals

98. A student must have IEP goals in the area of social skills if the student has unique needs in this area. Student contends that the District's failure to formulate appropriate social skills goals for the 2007-2008 school year denied him a FAPE because he cannot interact with his peers or adults in a meaningful way, he does not initiate social interaction, and he does not respond to others when they initiate social interaction.

99. As discussed in Factual Findings 88 and 89, all of Student's goals for the 2007-2008 school year were functional. Some of these goals appear to have some social skills objectives. For example, responding to personal information questions, going to different locations on campus to deliver or retrieve items, and engaging in three reciprocated exchanges with a peer all appear to involve social interaction. Student achieved these goals by the end of the 2007-2008 school year, and they did provide him with educational benefit. However, Student had no goals in the area of social skills. The evidence established that social skills was an area of unique need for Student. Student spent recess playing on the play structure on the playground, or standing near the basketball court, but he did not interact with other students at these times. He did not respond to greetings from others unless prompted. The District established through the testimony of the general education teachers that Student did not socialize with typically developing peers when he was mainstreamed. Although students in the general education class attempted to interact with him in the classroom and at lunch or recess, he did not respond. His preferred reinforcers for DTT were solitary activities such as watching a video, or looking at a book. Because there were no social skills goals, other than the speech and language goal that Student engage in three reciprocated

exchanges with a peer, the IEP team was unable to discuss placement and services to be directed at the goals, and the District was not required to track Student's progress in this area of unique need.

100. As discussed above, the IEP is the centerpiece of special education. If the IEP does not contain goals to meet Student's unique needs, the entire IEP process is bypassed and subverted. Because Student was not provided IEP goals in the area of social skills, he was denied a FAPE.

Speech and Language Goals

101. A student is entitled to IEP goals in the area of speech and language if the student has unique needs in the area of speech and language. Student contends that the District denied him a FAPE for the 2007-2008 school year because it refused to provide him with appropriate speech and language goals. The goals that Student respond to questions about personal information, travel through the campus on errands to deliver or retrieve items, and engage in three or more reciprocated exchanges with a peer all appear to be speech and language-related goals. However, Student's IEP contained no specific speech and language goals.

102. The evidence established that Student had unique needs in the area of speech and language. He had articulation issues that the District addressed by requiring him to pronounce responses correctly during DTT instruction. However, Student did not communicate with typically developing peers, as discussed above. He did not participate in circle time. While District provided instruction in speech and language, this is not a substitute for a goal. As discussed above, if there are no goals in an area of need, the IEP team is not given the opportunity to agree on any services that would meet those goals. For example, without a specific speech and language goal, the team did not need to consider whether Student required direct speech and language services. Moreover, without a specific IEP goal, the District is not required to track Student's progress in this

area of unique need. In all, the failure to have goals in an area of need bypasses the entire IEP process.

103. Based on Student's speech and language deficits, he required speech and language goals to be provided with educational benefit. Accordingly, the lack of speech and language goals in the IEP for the 2007-2008 school year deprived him of a FAPE.

Appropriate Instruction in the Areas of Academics and Social Skills

104. Student originally complained that the District failed to provide him with appropriate instruction in the areas of academics and social skills because he was placed in a class that did not utilize an ABA program. When it became evident, through the testimony of witnesses, that the District's SDC at Liberty School utilized ABA methodologies such as discrete trial training as a means of instruction, Student then argued that the District did not utilize these methodologies appropriately.

105. During the fall of 2007, the name of Student's SDC program was changed from the Communicative Disorders SDC to the Elementary Intensive Autism Program. However, the methodologies utilized in the program remained the same. As previously discussed in Factual Findings 42, 43, 67 and 80, this was a program where Student received appropriate instruction in all areas. During the IEP meeting of September 10, 2007, District personnel informed Mother that the SDC used a research-based ABA based program, and she was sent a three-page description of the program that detailed how ABA methodologies were used in the classroom, as part of the District's prior written notice and response to her letter following the IEP meeting of September 10, 2007.

106. Based on the foregoing, although Student lacked appropriate goals in academics, social skills and speech and language, the evidence established that the classroom was one that utilized an ABA program, and would have provided him with appropriate instruction, had he appropriate goals in these areas.

Direct Speech and Language Therapy

107. If a student with a disability has unique needs that require direct speech and language therapy, it is a related service that a school district is required to provide. At the IEP meeting of September 10, 2007, Campos explained to the IEP team that Student no longer needed direct speech and language therapy. Prior to the 2007-2008 school year, Student received direct speech and language therapy from a credentialed speech and language therapist. Some of these services were due to his speech and language deficits as the result of his autism. However, Student also suffered from an articulation disorder.³² Campos was Student's speech and language therapist during the 2006-2007 school year and most of 2007-2008 school year.³³ She worked with him directly during the 2006-2007 school year to correct articulation issues. All of the adults providing instruction to Student in the SDC were trained to correct Student's articulation errors, and when he mispronounced a word, he was able to correct his pronunciation with a prompt using ABA methodology. Campos estimated that this method of addressing Student's articulation errors was the equivalent of three hours of direct speech and language therapy by a speech pathologist. She observed staff providing services to Student, and provided guidance in ensuring that his articulation issues were addressed. She also provided consultation services for the program, and spent several hours each week in the classroom, observing students and working with the program team to design appropriate instruction. Speech and language issues relating to autism were also addressed in classroom instruction using ABA methodology. Her testimony was persuasive on this issue. The evidence established that Student's articulation

³² As previously discussed, it was not established that Student has apraxia.

³³ Campos was replaced by another therapist while on maternity leave.

improved during the 2007-2008 school year. Therefore, the District's refusal to provide Student with direct speech and language therapy for the 2007-2008 school year did not deny him a FAPE.

LRE

108. As previously discussed in Factual Finding 70, IDEA requires students to be educated in the LRE. Therefore, they should be removed from a regular classroom only to the extent necessary. Student contends that the District should have provided him with additional time to interact with nondisabled peers during the school day, and further claims that the District could also have provided him with this exposure by permitting him to participate in extra-curricular activities and/or attend a child care facility on the Liberty campus after school. Specifically, Student requested 10 hours per week in the general education environment.

109. For the 2007-2008 school year, the District's offer of participation in the general education environment replicated that as detailed in the offer for the 2006-2007 school year, except that participation in art in the general education environment was eliminated because general education art instruction in the fifth grade was primarily academic rather than hands-on art projects. Again, as noted in Factual Finding 55, typically developing peers were "pushed in" to the SDC to engage with Students, and some sat with the students from the SDC at lunch. The same issues discussed in Factual Finding 72 concerning extracurricular activities and after school day care were factors in the District's stance that these mainstreaming opportunities were not appropriate for Student.

110. Sandra Drolshagen (Drolshagen), a general education teacher, testified about Student's 15 minutes of daily mainstreaming in her classroom during the 2007-2008 school year. This testimony very similar to that of Lucas about mainstreaming in his classroom the previous school year, except that it appeared that Student had even less

engagement with the typical students in this class than he had in the Lucas classroom. The evidence established that Student did not gain much, if any, educational or social benefit from his time in the general education classroom. Drolshagen testified that Student engaged in playlalic behavior five or six times each 15 minute period he was in the classroom, and it was disruptive to the students in the class. Therefore, in light of the evidence at hearing, and considering all of the factors regarding LRE placement: educational benefit, social benefit and disruption to other students, the evidence established that Student was educated in the LRE for the 2007-2008 school year, and not denied a FAPE due to insufficient mainstreaming.

Behavior

111. When a student exhibits serious behavior problems, and a BSP has been ineffective in controlling the behavior, the district must conduct an FAA so that a BIP can be formulated. Student contends that the District failed to address his behaviors that impeded his ability to learn, such as playlalic behaviors, as well as self-injurious and aggressive behaviors. Student claims that the District should have conducted an FAA and provided him with an appropriate BIP.

112. As discussed in Factual Finding 77, Mother did not provide the IEP team with accurate information concerning Student's problematic behaviors at home. District personnel were not aware that at the time of the IEP meeting of September 10, 2007, Student was engaging in destructive and self-injurious behavior approximately 50 times a week at home. They did not discover this fact until they were provided with reports from the NPA, Learning Arts, after the complaint in this matter was filed. At school, Student had the ability to remove himself to a designated self-regulation area (the reading area of the SDC) when he was frustrated or upset. Several District witnesses described him as "compliant" in the SDC. There was no need for either a BSP, or a BIP for aggressive and self-injurious behaviors, during the 2007-2008 school year.

113. Student's playlalic behaviors notably increased at the beginning of the 2007-2008 school year. They seriously interfered with Student's ability to attend to instruction, even in the DTT setting, and greatly diminished the amount of time Student was able to receive instruction. At the IEP meeting of September 10, 2007, Mother was asked if Student had recently been placed on medication that might be causing the behaviors, or removed from medication that had controlled these behaviors. Mother denied that Student was on medication. Mother admitted during her testimony that she had not been truthful with the IEP team in this regard, and Student had been placed on a new medication at the beginning of the 2007-2008 school year. Neither side presented evidence as to whether this medication would have had the effect of increasing or decreasing the incidence of playlalic behaviors.

114. After the IEP meeting, when it was clear that the previous BSP to address the playlalic behavior was no longer working, Wandler began the process of formulating a new BSP. She observed Student in a variety of instructional conditions to determine the function of the behavior. Wandler found that the behavior was an automatic positive reinforcer for Student, and had an internal purpose, not an external purpose. In other words, Student preferred to engage in the playlalic behavior rather than receive instruction, even though he was offered positive reinforcers when he successfully completed instructional tasks. He engaged in the behavior to avoid instruction. Therefore, it was necessary to find a way to encourage and reward Student for attending to instruction and not engaging in playlalic behavior at this time, and the evidence established that this was done by District.

115. For example, Student was primarily instructed using DTT. Student would be asked to choose a positive reinforcer before instruction began that he would get at the end of the instructional session. Sometimes he would choose a few minutes in the SDC's reading area. Often he would choose to watch part of a video. The adult

instructing him would then engage him in ten identical trials. For example, Student might be learning to identify a certain number symbol in a field of three. The adult would place a card with the number symbol with two other cards that had different number symbols, and Student would be asked to point to the card with the symbol that he was being taught to identify. This would be repeated until he had completed ten trials. The same words would be used with each trial, such as, "Find the number 3." Each time he responded correctly, he would receive a poker chip. When he accumulated ten chips, he would get the positive reinforcement he had previously chosen. Wandler proposed a BSP where Student would be given a different color of poker chip when he was able to refrain from playlalic behavior for a certain length of time, and this time was gradually increased. He would receive his reinforcer when he had accumulated the requisite number of both colors of poker chips. Wandler instructed all of the SDC staff who worked with Student in how to implement this BSP to diminish the playlalic behavior and keep him on task during instruction, and it was very effective. Towards the end of the 2007-2008 school year, Mother and staff from his then in-home ABA provider, Learning Arts, came to the SDC to observe how the BSP worked to stem the playlalic behavior that interfered with instructional time in the home. Parents did not consent to the BSP to control the playlalic behavior before it was implemented, but there is no legal requirement for parental consent prior to the implementation of a BSP. Based on the foregoing, the evidence established that Student did not require an FAA or BIP for the 2007-2008 school year because Student's behaviors in the educational setting were properly addressed through his BSP.

Appropriate Classroom Placement

116. As noted in Factual Finding 79, placement is a combination of program and services offered to a student with a disability. Placement not only includes the type of classroom in which the student is educated, but also the type of program in the

classroom and the related services provided to the student. There is no legal requirement that a student with the disability of autism be educated with a specific methodology. Student contends that the District should not have placed him in a Communicative Disorder SDC without sufficient ABA or other research-based programs. Factual Findings 42, 43, and 67 accurately describe Student's SDC at Liberty for both the 2006-2007 and 2007-2008 school years. The evidence did not establish that Student's placement in the SDC was inappropriate or denied him a FAPE for the 2007-2008 school year. The SDC program was renamed in the fall of 2007, and the letter sent to Mother by the District on November 17, 2007, contained a three-page description of that program with its new name, the Elementary Intensive Autism Program, and contained information, supported by evidence at hearing, that the program provided ABA services and programming based on ABA methodology, that was research-based. Accordingly, Student was placed in a classroom that was appropriate to address Student's level of need.

After-School ABA Services and Parental ABA Training

117. If a student with a disability has a unique need for in-home services and parental training as a result of in-home behaviors that affect the ability of District to educate him at school, a school district must provide them as part of its obligation to provide a FAPE.

118. The evidence established that District was unaware of Student's serious behavior issues in the home at the IEP meeting of September 10, 2007, because Parents were not forthcoming about those issues, and Parents did not sign a waiver that would authorize District personnel to speak with NPA providers about Student's behavior in the home. Nevertheless, the District offered to provide Parents with training by the SDC program team, after school in the Liberty classroom. A schedule for these sessions was included with the District's letter to Mother of November 16, 2007. However, Mother

called shortly before the initial session to say she was unable to attend, and did not reschedule. Mother's testimony at hearing was equivocal as to whether she really would have participated in parent training at this time, as she testified she probably did not need it since the in-home ABA provider had begun to provide Parents with in-home ABA training. Moreover, District established that it offered to provide this training in the classroom, but Parents did not access it. The evidence that the Parents did not access the training bolsters District's contention that it was not aware of the severity of Student's behavior problems in the home. In addition, as discussed in Factual Finding 115, Mother received training on the use of the BSP to control Student's playallic behavior in the latter part of the 2007-2008 school year. Based on the foregoing, there was no evidence that Parents required in-home ABA training for Student to receive educational benefit from the District's program, or that District was aware of any such need for the 2007-2008 school year.

OFFER OF PLACEMENT AND SERVICES FOR THE 2008-2009 SCHOOL YEAR AT GRANITE RIDGE MIDDLE SCHOOL

119. The IDEA requires school districts to offer students with disabilities a FAPE in the LRE. This requires the District to provide the student with a disability a program that are reasonably calculated to address his unique needs and provide him with educational benefit. In the operative complaint for the hearing, Parents contend that the Student was denied a FAPE because the District offered him placement and services at Granite Ridge Middle School in the Secondary Intensive Autism SDC at IEP meetings on May 12, 2008, and October 1, 2008. The parents opposed this placement claiming that Student was too young to be placed at a middle school, although Student's chronological age would have placed him in middle school for the 2008-2009 school year. Parents wanted Student to be retained in the Liberty SDC. The District refused to retain him.

120. Student's position in regard to placement at Granite Ridge became unclear during the course of the hearing. One of his expert witnesses, Bailey, who observed the Granite Ridge SDC for several hours and the Liberty SDC for an hour, rendered an expert opinion that the Granite Ridge placement was appropriate, with certain modifications to services. However, another of Student's expert witnesses, Lebby, who had not visited Granite Ridge, testified that it was his opinion that Student continue to receive ABA services from PCFA in the home, and that placement in an SDC with other students was totally inappropriate. Student's Father testified that he wanted his son to attend the Liberty SDC. Student's closing brief did not provide any clarity as to which placement he believed to offer him a FAPE for the 2008-2009 school year.

121. The Secondary Intensive Autism SDC at Granite Ridge is a continuation of the Liberty program in which Student was previously enrolled. The 2008-2009 school year is the first year of the program. It is taught by a teacher who is in her first year of teaching, Cynde Walton, but she was previously an IA in Student's SDC at Liberty during the three school years when he was attending the Liberty SDC. As with the Liberty SDC, the Granite Ridge SDC is supported by a team consisting of a school psychologist, an occupational therapist, a behavioral analyst, and a speech and language therapist. There are currently five students in the class and Student would be the sixth enrolled in the class. Four of the Students were in his SDC at Liberty during the 2007-2008 school year, and the fifth student attended another program with Student prior to his enrollment at Liberty. The SDC at Granite Ridge functions very much as the SDC at Liberty as described in Factual Findings 42, 43, 67, 80 and 105. It is a program that relies heavily on ABA methodology and research-based programs.

122. The offer of placement at Granite Ridge following the October 1, 2008 IEP meeting includes 2035 weekly minutes of "Intensive Individual Instruction" in the SDC, 30 monthly minutes of psychological consult services, and extended school year (ESY)

from June 22, to July 30, 2009, for a total of 5520 minutes, as well as ESY, yearly. Parents would be informed of Student's progress every six weeks by way of a written "progress summary report." Pursuant to this IEP offer, Student would receive special education transportation with a one-to-one IA.³⁴

123. The IEP meeting of October 1, 2008, was attended by Mother, one of her attorneys, and Doyle, as well as numerous District personnel and the attorney for the District. Staff from both the Liberty and the Granite Ridge Intensive Autism programs were present. Staff from the Liberty program presented proposed goals and objectives. Doyle also proposed goals and objectives, several of which addressed skills Student already had. The teams from both Liberty and Granite Ridge had collaborated to produce the goals District suggested be included in the IEP. These goals were discussed, as were the goals proposed by Doyle. Following the IEP meeting, the two teams from Liberty and Granite Ridge reviewed the Doyle goals, and several were added to the District's offer of placement and services. The final offer made by the District for the 2008-2009 school year contained 17 goals.

124. The goals proposed after the IEP meeting of October 1, 2008, stated that Student would do the following: 1) Respond in the educational community setting to at least five personal safety questions with either communication wallet, or verbally; 2) Follow a visual recipe of up to five steps, with no more than two gestural prompts; 3) Expressively identify the functional use of daily life skill items necessary to complete at least two individual life-skills chores (i.e., while holding a box of laundry detergent can respond to question: what do you do with laundry detergent?), with no more than two verbal prompts; 4) Participate in up to three reciprocated social exchanges while

³⁴ Granite Ridge is Student's neighborhood school, so the District is not necessarily obligated to provide him with transportation to and from school.

purchasing a priced item from a peer tutor and/or adult with no more than two verbal prompts; 5) Give the appropriate number of dollar bills to purchase a priced item up to \$5.00, with two or less verbal or gestural prompts; 6) Within the special education setting, will match and/or verbalize images, words, and/or icons to a minimum of five community locations: grocery stores, restaurants, campus store, to items available for purchase; 7) In the special education setting, will perform all steps to complete at least two individual, life-skills chores (i.e. loading the dishwasher, doing laundry) with no more than two gestural prompts; 8) Write address when given verbal cue in special education setting; 9) Travel to five locations on new campus with an icon or picture and engage in a social exchange with five or less prompts; 10) Appropriately gain attention of a peer to make a request or comment with no more than two gestural and/or verbal prompts; 11) Match 12 high frequency sight words to corresponding pictures and text; 12) Demonstrate understanding of prepositional concepts (in, out, on, off, under) with no more than one gestural prompt by completing functional tasks; 13) Demonstrate number to object correspondence to 12 when presented with a visual stimulus of the number paired with the verbal cue of "give me ____." 14) Using classroom calendar, will identify when a highly preferred activity will occur by matching the day of the week to the corresponding activity on the calendar independently; 15) Receptively and expressively identify an additional 6 lower case letters of the alphabet; 16) Write 13

lower case letters; and, 17) Expressively and receptively identify 21 number symbols from a field of three.³⁵

Academic Goals

125. Student contends that the District's offer denied him a FAPE because he had unique needs in the area of academics, and appropriate academic goals were not formulated for him at the October 1, 2008 IEP meeting. In order to prevail, Student must establish that District was aware at that "snapshot in time" that Student had unique needs in the area of academics. Student was particularly concerned about failure of the District to provide him with goals in the areas of reading, writing, math, social studies and science. Therefore, he is unable to read, can write only his name, address and telephone number, cannot perform even simple addition, and has not been exposed to modified curriculum in the areas of social studies and science.

126. Nine of the 17 goals were labeled as academic, or functional academic, and some of the other goals, such the third goal, include some academic components, in the areas of reading, writing and math, where Student has unique needs, although not all are labeled as academic goals. Although there are no specific goals addressing social studies or science, these areas are addressed in class activities. In addition, the SDC program will provide Student with other academic benefits outside of these goals. Most importantly, however, Student did not establish that he had unique needs for

³⁵ The benchmarks for mastery, i.e., "will do so four out of five times, maintained over a three week period," have been eliminated here. All of these goals were stated as relating to a specific area of need such as "functional academics," or "social communication," but several witnesses noted that often goals will be related to more than one area of need, although only one area will be listed on the IEP.

goals beyond reading, writing and math. Therefore, Student was not denied a FAPE for the 2008-2009 school year in this area.

127. At the time of the October 1, 2008 IEP meeting, District personnel believed that Student was still attaining the prerequisites that are necessary before a student can be taught to read. The evidence established that this was the case at that time. However, Jeannie Cox, a District reading specialist, testified on March 18, 2009, that she had recently conducted an assessment of Student's reading readiness, and the results showed that formal reading instruction could begin.³⁶ Bailey, Student's expert witness in the area of reading readiness, also testified that Student was ready to begin reading instruction.

128. In October 2008, Student privately retained the services of PCFA, an NPA that provides ABA services. Parents wanted PCFA to provide Student with academic instruction because they refused to allow him to attend the Secondary Intensive Autism SDC at Granite Ridge. PCFA contracted to provide Student with 15 hours of services a week, most of which was academic instruction in a DTT format, some of which included drills in which he identified sight words on flash cards. However, PCFA did not have any reading goals for Student. At the time of the hearing Student was able to identify four or five of these sight words.³⁷ In addition, Student began watching "Leapfrog" videos in the

³⁶ Student attempted to suggest that a specific reading curriculum should be used to teach Student to read. However, the methodology for teaching Student to read is a decision that is best made by an IEP team that includes a reading specialist. The evidence established that a combination of methods might be more successful than relying on just one specific curriculum.

³⁷ Questions were raised during the hearing about the DTT format used by PCFA. Although it appeared that Student was being given instruction in the area of skills

fall of 2008 that were of high interest to him, and he began learning to recognize letters and their sounds. Although the evidence did not establish causes for Student's marked increase in reading readiness, it is clear that Student now requires additional academic goals to address reading instruction. Nevertheless, the evidence established that the academic goals developed as a result of the October 1, 2008 IEP meeting were sufficient to provide Student with a FAPE for the 2008-2009 school year.

Social Skills Goals

129. If a student with a disability has unique needs in the area of social skills, the district is required to provide goals and services to address that need. Student contends that the District's failure to formulate appropriate social skills goals for the 2008-2009 school year denies him a FAPE because he cannot interact with his peers or adults in a meaningful way. He does not initiate social interaction, and he does not respond to others when they initiate social interaction. Student objects to the goals formulated at the October 1, 2008 IEP meeting as they pertain to social skills. In addition, there was testimony that one of the goals suggested by Doyle, game-playing with peers, was not adopted as part of the District's final offer, and this was a necessary goal.

130. The District included two goals in the IEP that followed the meeting of October 1, 2008, which were specifically directed to the development of social skills. These were the fourth goal which required Student to engage in 3 reciprocated exchanges with a peer, and the tenth goal which required him to gain the attention of a peer. However, several other goals not designated as "social," for example, traveling around the campus to do errands and engaging in a social exchange, will also provide acquisition that included tasks related to learning to read, skills that were initially acquired were not being moved into generalization.

Student with the opportunity to learn social skills. Therefore, the proposed IEP would provide him with a FAPE in the area of social skills for the 2008-2009 school year.

131. Although Doyle wanted a game-playing goal added to the goals, Student has already been playing games in class with peers and adults since at least the 2006-2007 school year, as a way of learning turn-taking, a prerequisite for engaging in conversation, and there are games in the Granite Ridge SDC that are used to facilitate learning some skills. There are many opportunities to learn in the Granite Ridge SDC that are not part of Student's goals. For example, a portion of each morning is called "Bronco Time," in which the entire class will discuss upcoming activities, a newspaper article of interest might be read, and then discussed, and "social stories" will be told.³⁸ This is much like "Circle Time," in the Liberty Program. Accordingly, the proposed goals, with the addition of reading goals, as well as the program in the Granite Ridge SDC, will provide Student with academic educational benefit.

Speech and Language Goals

132. Student contends that the District's offer for the 2008-2009 school year does not offer appropriate speech and language goals to address Student's unique needs in the area of speech and language. An IEP team formulates goals based on the information available to them at the time the IEP is created. Specifically, Student contends that there should have been extensive goals to address his inability to engage in social discourse with others.

133. One of the 17 proposed goals for the 2008-2009 school year is labeled in a manner that indicates it is a speech and language goal. The goal related to learning prepositions is labeled as addressing needs in the area of "receptive language."

³⁸ A social story is created to explain social concepts to students, such as how to have a conversation, or what to expect and do on a field trip.

However, although not specifically labeled as such, Campos testified at length, and described how six of the District-proposed goals were related to speech and language needs, including needs for pragmatic language. For example, responding to safety questions in an understandable manner, the first goal, was a speech and language goal, as was the goal for traveling the campus and engaging in a social exchange. Bronco Time also provides an opportunity for Student to acquire speech and language skills

134. The evidence established that Student's autism severely restricted his social interaction, particularly with peers. There was no evidence that Student initiated any conversation with peers or adults, or even responded the attempts of others to engage him in conversation. The District's program and goals and objectives addressed Student's speech and language needs based on his previous gains. Unfortunately, due to the severity of Student's disabilities, his gains in the areas of social skills and speech and language were slight for both the 2006-2007 school year and the 2007-2008 school years. There was no evidence that these slight gains were due to the District not addressing Student's needs in these areas.

135. Prior to the statutory period of the underlying complaint in this matter, Student received direct speech and language therapy for articulation issues. However, after the 2006-2007 school year, Student's articulation issues were addressed during his DTT instruction, with correct responses being noted only when Student clearly articulated his verbal answers. A few weeks prior to the beginning of the hearing, Campos observed Student in his home. He had not been part of any District program since the end of ESY five to six months before, and without the ongoing corrections of his articulation, he presented as a student who requires speech and language goals and direct speech and language therapy. This opinion was confirmed by the results of the District's speech and language triennial assessment, performed during the course of the due process hearing, and testified about by Campos. It appears that this articulation

deficit developed as a result of Student's lengthy absence from an educational program where his articulation was addressed multiple times each day. He now requires speech and language goals to address his articulation. Nevertheless, at the time of the IEP meeting of October 1, 2008, based on the District's then-current knowledge, Student did not require additional speech and language goals beyond the six that were addressed in Factual Finding 133. Accordingly, the proposed goals for the 2008-2009 school year related to speech and language, whether designated as such or not, were an offer of FAPE to Student in this area of need at the time the offer was made.

Appropriate Instruction in the Areas of Academics, Social Skills and ABA

136. Student originally complained that the District failed to provide him with an offer of appropriate instruction in the areas of academics and social skills because he would be placed in a class that does not utilize an ABA program and research-based methodologies. The evidence established that the District's SDC at Granite Ridge utilizes ABA methodologies such as DTT, and further that these methodologies are utilized appropriately. The SDC at Granite Ridge is a continuation of the District's intensive autism program that previously provided services to Student at Liberty, and before that at Maple Creek. The descriptions evidenced by Factual Findings 42, 43, 67, and 105, are also applicable to the Granite Ridge SDC. Accordingly, the District's offer of placement for the 2008-2009 school year is an offer of placement in an environment where Student will be provided appropriate instruction in the areas of academics and social skills and will be provided with ABA services.

Direct Speech and Language Therapy

137. As discussed in Factual Finding 109, Student now requires direct speech and language therapy for articulation. Wage stated in her assessment of November 21, 2008, and in her testimony at hearing, that it was difficult to understand Student when

he speaks. Although Wage opined that Student could have apraxia, the evidence did not substantiate this opinion. As discussed in Factual Finding 133, some of Student's speech and language issues are addressed by six of the 17 goals in the IEP of October 1, 2008. Although Student's articulation issues for the 2007-2008 school year were addressed by requiring him to respond with correct articulation during DTTs, as discussed in Factual Finding 107, this is not sufficient to address Student's current articulation issues, and he also now requires direct speech therapy. Nevertheless, there was no evidence that at the time of the IEP meeting of October 1, 2008, that Student's speech and language issues required direct services. Accordingly, the lack of direct speech and language services in the IEP offered after the meeting of October 1, 2008, did not deny Student a FAPE.

LRE

138. The IDEA requires that students with disabilities be educated in the LRE. Therefore, they should be removed from a regular classroom only to the extent necessary to receive educational benefit. Students placed in the more restrictive environment of an SDC may attend regular education classrooms, or participate in activities with nondisabled peers for a portion of the school day, depending on whether they receive educational and social benefits from this participation, and are not disruptive to other students. Student contends that the District's offer of placement does not provide him with sufficient interaction with nondisabled peers because the proposed IEP does not have any provision for him to spend time in any general education classrooms. Student contends he should have had 10 hours per week in the general education classrooms or programs.

139. At Granite Ridge, students in the Secondary Intensive Autism Program are exposed to the general education population in a number of ways. David Oakley (Oakley), school psychologist for the Secondary Intensive Autism Program SDC, testified that general education students spend time in the SDC interacting with the SDC

students. During the lunch period, over 25 typically developing students join the SDC in the lunch area and classroom. Students eat lunch with the general education population, and are encouraged by general education students to participate in after-lunch playground activities such as playing basketball or throwing a Frisbee. Adults are present to facilitate the interaction SDC students have with the general education students. In addition, there is a student-run store operated on campus. Members of the SDC purchase items at the store, and it gives them additional opportunities to interact with typically developing peers. Oakley established through his testimony that there is a leadership class in the general education curriculum, and students in that class are actively participating in activities with the SDC students as part of their community service. In addition, at the time he testified, Oakley was in the process of organizing a group of students called Circle of Friends, which has the specific purpose of encouraging social interactions between students with disabilities in the SDCs at Granite Ridge (there is another SDC on campus) and to help the SDC students generalize skills. Several witnesses testified credibly, and established through that testimony, that some studies have shown that SDC students gain a greater benefit from spending time with typically developing students in the SDC environment, rather than being sent to a general education classroom for a period of time each day because they are in more familiar areas, and are not being pulled in and out of classes each day.

140. As discussed in Factual Findings 73, 74 and 110, Student's removal from his SDC at Liberty to attend a general education classroom for 15 minutes each day did not appear to provide Student with any educational or social benefit, and he disrupted those classes. At the IEP meeting of October 1, 2008, Drolshagen informed the IEP team about Student's problematic behaviors during his mainstreaming time in her general education classroom the previous school year, and told them that she did not find that there was any benefit to him attending a general education classroom for any portion of

the day. The District members of the IEP team on October 1, 2008, recommended that Student spend some time acclimating to his new environment at Granite Ridge before a decision was made about the most effective way to mainstream him. Most of the students in the SDC do spend some time in general education classes. It should be noted that parents are not contesting placement of Student in a general education class; they just feel that he should be mainstreamed in a general education class for more than 15 minutes a day as he was at Liberty. There was no evidence that the 10 hours a week of mainstreaming at Granite Ridge that Parents requested was necessary for Student to be provided with a FAPE, and it was reasonable to let Student get used to his new learning environment before addressing mainstreaming in a general education class or classes. Therefore, the District's proposed offer placed Student in the LRE, and did not deny him a FAPE for the 2008-2009 school year.

After School ABA Services and Parental ABA Training

141. If a student with a disability has a unique need for in-home services and parental training as a result of in-home behaviors that affect the ability of District to educate him at school, a school district must provide them as part of its obligation to provide a FAPE. Student contends that these services were necessary for the 2008-2009 school year, and the District refused to provide them.

142. Student has received in-home ABA services for most of the statutory time periods covered by the complaint. These services were designed, for the most part, to address behavioral issues and functional living skills in the home. Until October 2008, the cost of these services was borne by Central Valley Regional Center (CVRC). After August 2008, Student's in-home ABA service provider, Learning Arts, moved into a consultation model, rather than providing direct services. It did so because Learning Arts believed that direct services were no longer required based on the criteria of CVRC. However, in October 2008, Parents privately retained the services of PCFA to provide in

home academic services to Student for 15 hours per week, because they were not allowing Student to attend the SDC at Granite Ridge.³⁹ The evidence established that Student has outgrown the program at Liberty, that Student was not a candidate for retention based on state or District criteria, and that he was ready to move to Granite Ridge with his classmates and peers who were also moving to the next grade level, rather than being retained at Liberty. There was no evidence that Student requires in-home ABA services to provide him with a FAPE if he attends the Granite Ridge SDC, nor that parental training was required.

REMEDIES

Reimbursement

143. Parents may be entitled to reimbursement for the costs of services they have procured for their child when: (1) the school district has failed to provide a FAPE and (2) the private placement or services are determined to be proper under the IDEA. Student procured the services of PCFA and Center because he did not believe the offer of placement and services at Granite Ridge would provide him with a FAPE. However, as established in Factual Findings 119-142, the District's offer of placement and services would have provided him with a FAPE, based on the knowledge of the IEP team at the time the offer was made. Therefore, Student is not entitled to reimbursement for services from PCFA and Center for services for the time period at issue in this decision.

³⁹ There was some testimony that indicated that Parents retained SDC following action by the District through a Student Attendance Review Board because parents would not let Student attend school at the beginning of the 2008-2009 school year if the District would not allow him to return to the SDC at Liberty.

Compensatory Education

144. When a school district fails to provide a FAPE to a student with a disability, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. Compensatory education is a form of equitable relief that may be granted for the denial of appropriate special education services to help overcome lost educational opportunity. The purpose of compensatory education is to ensure that the student is appropriately educated within the meaning of the law. Where the actions of parents are unreasonable, equitable relief may be reduced or denied.

145. Based on Factual Findings 20-22, the District failed to assess Student to determine the causes of his playlalia and deficiencies in generalizing and maintaining skills. Although Factual Finding 23 demonstrates that the District has recently performed a triennial assessment of Student, the District's failure to assess during the 2007-2008 school year entitles Student to an independent assessment as compensatory education.

146. Based on Factual Findings 88 through 103, the District denied Student a FAPE for the 2007-2008 school year by not providing Student with appropriate academic, social skills and speech and language goals and objectives. Student is therefore entitled to compensatory education. The compensatory education should be delivered by an NPA, instead of the District, because there was no evidence that it has qualified school staff to provide compensatory services.

147. Student has not requested any specific amount of compensatory services for any of the school years at issue. Therefore, it has been necessary to calculate the amount of compensatory education due Student in the following manner: There are 180 school days in each school year. (Ed. Code § 46200 [requires schools to provide 180 school days each school year for the maximum amount of financial support from the state].) Gossett testified that for 5 hours of each school day during the 2007-2008 school year Student was receiving one-on-one instruction. Based on the testimony of Gossett

and other members of the IEP team, many of the functional goals were necessary to teach Student safety and other functional skills. It is estimated that if Student had academic goals, three hours per day would have been spent on those goals. Although social skills are generally not practiced in a one-to-one setting, it can be estimated that two hours per week would have been spent on those goals, which in a compensatory education setting might be facilitative services for social interaction in the community. Student was not receiving direct speech and language services, but with the addition of appropriate speech and language goals, it is likely that the amount of consultation time for Campos would have increased from 30 minutes per week to 15 minutes a day. Therefore, it is reasonable to infer that had Student been provided with appropriate goals in the areas of academics, social skills and speech and language, four hours of each school day would have been spent in one-on-one or small group instruction in those areas with Student. Therefore, Student is entitled to 585 hours of compensatory education from an NPA. In addition, given the nature and severity of the District's failure to provide Student with appropriate IEP goals, an additional 100 hours shall be allotted for consultation services, supervision, and any other services deemed necessary by the NPA(s) retained. The total of 685 hours shall include direct services (one-to-one and/or small group) at school and in the community, including supervision of the delivery of the services, and consultation with Student's teachers, aides, school staff, and employers. However, the total hours may be allocated and delivered as reasonably provided for by contract between the LEAs and the NPA. Due to the excessive amount of time Student would be receiving compensatory education services if it were to be provided over the course of one year, the entitlement for compensatory education services shall not end until three years from the date of this order.

LEGAL CONCLUSIONS

APPLICABLE LAW

Burden of Proof

1. Under *Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528], the party who files the request for due process has the burden of persuasion at the due process hearing. Student filed the request for due process, and therefore has the burden of persuasion in this matter.

Elements of a Free Appropriate Education (FAPE)

2. Under both the federal Individuals with Disabilities Education Act (IDEA) and state law, students with disabilities have the right to a free appropriate public education (FAPE). (20 U.S.C. § 1400; Ed. Code, § 56000.)⁴⁰ A FAPE means special education and related services that are available to the student at no charge to the parent or guardian, that meet the state educational standards, and conform to the student's IEP. (20 U.S.C. § 1401(9).) A child with a disability has the right to a FAPE under the IDEA and California law. (20 U.S.C. § 1412(a)(1)(A); Ed. Code, § 56000.)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034] (hereafter *Rowley*), the United States Supreme Court addressed the level of instruction and services that must be provided to a student with a disability to satisfy the requirements of the IDEA. The Court determined that a student's IEP must be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not require school districts to provide the student with the best education available or to provide instruction or services that

⁴⁰ All statutory citations to the Education Code are to California law, unless otherwise noted.

maximize a student's abilities. (*Rowley, Id.* at pp. 198-200.) The Court stated that school districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instructional and related services that are individually designed to provide educational benefit to the student. (*Rowley, Id.* at p. 201.) The Ninth Circuit refers to the "some educational benefit" standard of *Rowley* simply as "educational benefit." (See, e.g., *M.L. v. Fed. Way School Dist.* (2004) 394 F.3d 634.) It has also referred to the educational benefit standard as "meaningful educational benefit." (*N.B. v. Hellgate Elementary School Dist.* (9th Cir. 2007) 541 F.3d 1202, 1212-1213; *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) Other circuits have interpreted the standard to mean more than trivial or "de minimis" benefit, or "at least meaningful" benefit. (See, e.g., *Houston Indep. Sch. Dist. v. Bobby R.* (5th Cir. 2000) 200 F.3d 341; *L.E. v. Ramsey Bd. of Educ.* (3^d Cir. 2006) 435 F.3d 384.) A child's academic progress must be viewed in light of the limitations imposed by his or her disability and must be gauged in relation to the child's potential. (*Mrs. B. v. Milford Board of Education* (2^d Cir. 1997) 103 F.3d 1114, 1121.)

The IEP

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

5. Federal and state special education law require generally that the IEP developed for a child with special needs contain the present levels of the child's educational performance and measurable annual goals, including benchmarks or short-term objectives, related to the child's needs. (20 U.S.C. § (d)(1)(A)(ii); Cal. Educ. Code §

56345, subd. (a).) The purpose of goals and measurable objectives is to permit the IEP team to determine whether the pupil is making progress in an area of need. (34 C.F.R. § 300.347(a)(2)(i)(ii); 34 C.F.R. Part 300, Appendix A, Q.1; Cal. Ed. Code, § 56345.)

6. For a school district's IEP to offer a student a substantive FAPE, the proposed program must be specially designed to address the student's unique needs, must be reasonably calculated to provide the student with some educational benefit, and must comport with the student's IEP. (20 U. S.C. § 1401(9).) To determine whether the District offered Student a FAPE, the focus is on the appropriateness of the placement offered by the District and not on the alternative preferred by the parents. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.)

7. "In striving for 'appropriateness,' an IEP must take into account what was, and was not, objectively reasonable... at the time the IEP was drafted." (*Adams v. State of Oregon, supra*, 195 F.3d 1141, 1149, quoting *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1041 (3d Cir. 1993).) A school district is obligated to revise a student's educational program if it becomes apparent over the course of the school year that the student's educational needs have changed and/or the student is not receiving educational benefit. (Ed. Code, § 56380, subd. (a).)

8. The IEP is the "centerpiece of the [IDEA's] education delivery system for disabled children" and consists of a detailed written statement that must be developed, reviewed, and revised for each child with a disability. (*Honig v. Doe* (1988) 484 U.S. 305, 311 [108 S.Ct. 592, 98 L.Ed.2d 686]; 20 U.S.C. §§ 1401 (14), 1414 (d)(1)(A); Ed. Code, §§ 56032, 56345.) An IEP is a written statement that includes a statement of the present performance of the student, a statement of measurable annual goals designed to meet the student's needs that result from the disability, a description of the manner in which progress of the student towards meeting the annual goals will be measured, the specific services to be provided, the extent to which the student can participate in regular

educational programs, the projected initiation date and anticipated duration, and the procedures for determining whether the instructional objectives are achieved. (20 U.S.C. § 1414 (d)(1)(A)(i),(ii); 34 C.F.R. § 300.320(a)(2), (3); Ed. Code, § 56345, subds. (a)(2), (3).) It shall also include a statement of the program modifications or supports for school personnel that will be provided to the student to allow the student to advance appropriately toward attaining the annual goals and be involved and make progress in the general education curriculum and to participate in extracurricular activities and other nonacademic activities. (34 C.F.R. § 300.320(a)(4)(i), (ii); Ed. Code, § 56345, subds. (a)(4)(A), (B).)

9. In developing the IEP, the IEP team shall consider the strengths of the child, the concerns of the parents for enhancing the education of their child, the results of the initial evaluation or most recent evaluation of the child and the academic, functional and developmental needs of the child. (20 U.S.C. § 1414(d)(3)(A).) For each area in which a special education student has an identified need, the IEP team must develop measurable annual goals that are based upon the child's present levels of academic achievement and functional performance, and which the child has a reasonable chance of attaining within a year. (Ed. Code, § 56344.)

Assessment

10. A child must be assessed by a school district in all areas related to the suspected disability. (20 U.S.C. § 1414(A)(2), (3); 34 C.F.R. § 300.304 (c)(4); Ed. Code, § 56330(f).) A parent who wishes that a child receive special education services must allow reassessment if conditions warrant; "if the parents want [their child] to receive special education under the Act, they are obliged to permit such testing." (*Gregory K. v Longview School Dist. supra*, 811 F.2d 130, 1315.) "A parent who desires for her child to receive special education must allow the school district to reevaluate the child using its

own personnel; there is no exception to this rule." (*Andress v. Cleveland Independent School Dist.* (5th Cir. 1995) 64 F.3d 176, 179.)

11. A student must be reassessed every three years, unless the parents agree otherwise, and a student cannot be assessed more than once per year. (Ed. Code, § 56381, subd. (a)(2).) If a district "determines that the educational or related services needs, including improved academic achievement and functional performance of the [student] warrant a reassessment," the District can request a reassessment. (Ed. Code § 56381(a).) A reassessment requires parental consent. (20 U.S.C. § 1414(c)(3); Ed. Code, §§ 56321, subd. (c), 56381, subd. (f).) To obtain consent, a school district must develop and propose a reassessment plan. (20 U.S.C. § 1414(b)(1); Ed. Code, §§ 56321, subd. (a), 56381, subd. (f).) If the parents do not consent to the plan, the district may conduct the reassessment only by showing at a due process hearing that it needs to reassess the student and is lawfully entitled to do so. (20 U.S.C. § 1414(a)(1)(D); 34 C.F.R. § 300.300(c) (2006); Ed. Code, §§ 56321, subd. (c), 56381, subd. (f), 56501, subd. (a)(3), 56506, subd. (e).)

12. A school district's failure to assess in all areas of suspected disability may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High Sch. Dist.* (9th Cir. 2006) 464 F.3d 1025, 1031-1033.) Procedural violations may constitute a denial of a FAPE if they result in the loss of educational opportunity to the student or seriously infringe on the parents' opportunity to participate in the IEP process. (*W.G. v. Board of Trustees of Target Range School Dist.* (9th Cir. 1992) 960 F.2d 1479, 1484.) These requirements are also found in the IDEA and California Education Code, both of which provide that a procedural violation constitutes a denial of FAPE only if the violation: (1) impeded the child's right to a FAPE; (2) significantly impeded the parent's opportunity to participate in the decision making process; or (3) caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); Ed. Code, § 56505, subd. (f)(2).)

13. The assessments shall be conducted by trained and knowledgeable personnel, except that individually administered tests of intellectual or emotional functioning shall be administered by a credentialed school psychologist. (Ed. Code, § 56320, subd. (b)(3).) In conducting an assessment, a district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student. This may include information provided by the parent that may assist in determining whether the student is a child with a disability, and the content of the student's IEP, including information related to enabling the child to be involved and progress in the general education curriculum. (34 C.F.R. § 300.304(b)(1)(i), (ii) (2006).) No single measure or assessment shall be used as the sole criterion for determining whether a student is a child with a disability or for determining an appropriate educational program for the student. (34 C.F.R. § 300.304(b)(2) (2006).) Tests and assessment materials must be validated for the specific purpose for which they are used; must be selected and administered so as not to be racially, culturally or sexually discriminatory; and must be provided and administered in the student's native language or other mode of communication unless this is clearly not feasible. (Ed. Code, § 56320, subd. (a); 20 U.S.C. § 1414(b)(2), (3); 34 C.F.R. § 300.304(c)(1)(i), (ii) (2006).)

Procedural Violations

14. A procedural violation constitutes a denial of FAPE only if it impeded the child's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a FAPE to their child, or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E); Ed. Code, § 56505, subd. (f); see also, *W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23*, *supra*, 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.*

supra, 464 F.3d 1025, 1033, n.3; *Ford v. Long Beach Unified Sch. Dist.* (9th Cir. 2002) 291 F.3d 1086, 1089.)

15. A failure to implement a Student's IEP will constitute a violation of the Student's right to a FAPE if the failure was material. There is no statutory requirement that a District must perfectly adhere to an IEP and, therefore, minor implementation failures will not be deemed a denial of FAPE. A material failure to implement an IEP occurs when the services or program a school district provides to a disabled student fall significantly short of the services required by the Student's IEP. However, an IEP document is not a contract and, therefore, it is inappropriate to frame challenges to an IEP as a breach of contract claim. (*Van Duyn, et al. v. Baker School District 5J* (9th Cir. 2007) 481 F.3d 770, 778-780.)

Predetermination

16. 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. Board of Trustees of Target Range Unif. Sch. Dist No. 23*, *supra*, 960 F.2d at p.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.)

17. 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. Merely pre-writing proposed goals and objectives does not constitute predetermination. The test is whether the school board comes to the IEP meeting with an open mind and several options are discussed before final recommendation is made.

(*Doyle v. Arlington County School Board* (E.D. Va 1992) 806 F.Supp. 1253, 1262; *Deal, supra*, 392 F.3d at p. 858.)

Meaningful Participation

18. The IDEA imposes upon the school district the duty to conduct a meaningful IEP meeting with the appropriate parties. (*W.G. v. Board of Trustees of Target Range Unif. Sch. Dist No. 23., supra*, at p. 1485.) Those parties who have first hand knowledge of the child's needs and who are most concerned about the child must be involved in the IEP creation process. (*Shapiro v. Paradise Valley Unified School District No. 69* (9th Cir. 2003) 317 F.3d. 1072, 1079, citing *Amanda J., supra*, 267 F.3d. 877, 891.) Parents play a "significant role" in the development of the IEP and are required and vital members of the IEP team. (*Winkelman v. Parma City School Dist.* (2007) 549 U.S. 1190 [127 S.Ct. 1994, 2000-2001; 167 L.Ed. 2d 904].); 20 U.S.C. § 1414 (d)(1)(B)(i); 35 C.F.R. § 300.322; Ed. Code, § 56341, subd. (b)(1).) In order to fulfill the goal of parental participation in the IEP process, the school district is required to conduct, not just an IEP meeting, but also a meaningful IEP meeting. (*W.G. v. Board of Trustees of Target Range School District No. 23 supra*, 960 F.2d 1479, 1485 (*Target Range*); *Fuhrmann v. East Hanover Bd. of Educ. supra*, 993 F.2d 1031, 1036.) A parent has meaningfully participated in the development of an IEP when she is informed of her child's problems, attends the IEP meeting, expresses her disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools.* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann, supra*, 993 F.2d at p. 1036.)

Instructional Methodology

19. The *Rowley* opinion established that, as long as a school district provides an appropriate education, methodology is left up to the district's discretion. (*Rowley, supra*, 458 U.S. at p. 208.) The most important issue is whether the proposed

instructional method meets the pupil's needs and whether the pupil may make adequate educational progress. (*Deal v. Hamilton County Dept. of Educ.* (E.D.Tenn. 2006) 2006 U.S. Dist. LEXIS 27570, pp. 51-57; see also § 1414(d)(1)(IV); 34 C.F.R. § 300.320; Ed. Code, § 56345, subd. (a)(4).) Courts have consistently rejected the proposition that an ABA-only program is the only effective method of instruction for autistic students. (*Deal, supra*, 2006 U.S. Dist. LEXIS 27570 at pp. 51-57 [comprehensive summary of decisions discussing this issue].)

20. Effective July 1, 2005, the IDEA provided that the related services provided to a student under an IEP "should be based on peer-reviewed research to the extent practicable." (20 U.S.C. § 1414(d)(1)(A)(4); 34 C.F.R. § 300.320.) However, prior to the implementation of this change in the IDEA, case law held that the choice regarding the methodology to be used to implement an IEP, even IEPs for children with autism, is left up to the district's discretion so long as it meets a student's needs and is reasonably calculated to provide some educational benefit to the child. (See *Rowley*, 458 U.S. at p. 208; *Adams v. State of Oregon, supra* 195 F.3d at p. 1149; *Pitchford v. Salem-Keizer Sch. Dist.* (D. Or. 2001) 155 F.Supp.2d 1213, 1230-32; *T.B. v. Warwick Sch. Comm.* (1st Cir. 2004) 361 F.3d 80, 84.)

21. California administrative decisions that have applied the IDEA requirement that related services "should be based on peer-reviewed research to the extent practicable" have determined, based on the language used in the statute and regulation and the comments to the regulations, that the lack of peer review for a particular methodology, or the fact that one methodology may have had more peer-review than others, is not determinative. (*Fremont Unified School District* (SEA Cal. 2007) 49 IDELR 114 [eclectic program including some ABA methods determined to have provided FAPE]; *Rocklin Unified School Dist* (SEA Cal. 2007) 48 IDELR 234 [same].) Instead, the ultimate

test remains whether a particular methodology was reasonably calculated to meet the child's unique needs. (*Ibid.*)

Speech and Language Therapy

22. In California, related services are called designated instructional services (DIS). (Ed. Code, § 56363.) DIS includes speech-language services and other services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26)(A); Ed. Code, § 56363, subd. (a); *Irving Independent School Dist. v. Tatro* (1984) 468 U.S. 883, 891 *Union School District v. B. Smith* (9th Cir. 1994) 15 F. 3d 1519, 1527.) [104 S.Ct. 3371; 82 L.Ed.2d. 664].) DIS services shall be provided "when the instruction and services are necessary for the pupil to benefit educationally from his or her instructional program." (Ed. Code, § 56363, subd. (a).)

LRE

23. Federal and state law require school districts to offer a program in the least restrictive environment for each special education student. (See 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. §§ 300.114, et. seq. (2006).) A special education student must be educated with nondisabled peers "[t]o the maximum extent appropriate," and may be removed from the regular education environment only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services "cannot be achieved satisfactorily." (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(i) & (ii) (2006); Ed. Code, § 56364.2, subd. (a).) A placement must foster maximum interaction between disabled students and their nondisabled peers "in a manner that is appropriate to the needs of both." (Ed. Code § 56031.) The law demonstrates "a strong preference for 'mainstreaming' which rises to the level of a rebuttable presumption." (*Daniel R.R. v. State Bd. of Ed.* (9th Cir. 1989) 874 F.2d 1036,

1044-1045; see also § 1412 (a)(5)(A); *Rowley, supra*, 458 U.S. at p. 181 n.4; *Poolaw v. Bishop* (9th Cir. 1995) 67 F.3d 830, 834.)

24. In *Sacramento City Unified Sch. Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1400-1402 (hereafter referred to as *Rachel H.*), the Ninth Circuit held that the determination of whether a particular placement is the “least restrictive environment” for a particular child involves an analysis of four factors, including (1) the educational benefits to the child of placement full-time in a regular class; (2) the non-academic benefits to the child of such placement; (3) the effect the disabled child will have on the teacher and children in the regular class; and (4) the costs of educating the child in a regular classroom with appropriate services, as compared to the cost of educating the child in the district’s proposed setting. However, the Supreme Court has noted that IDEA’s use of the word “appropriate” reflects Congressional recognition “that some settings simply are not suitable environments for the participation of some handicapped children.” (*Rowley, supra*, 458 U.S. at p. 197.)

Behavior

25. When a student exhibits serious behavior problems, a district can implement a BSP. If a BSP has been ineffective in controlling the behavior, the district can conduct an FAA so that a BIP can be formulated. (Cal. Code Regs., tit. 5, § 3052.) A student’s parent or guardian, teacher or other service provider may make a request for assessment including an FAA. (Ed. Code, § 56029; Cal. Code Regs., tit. 5, § 3052, subd. (b).)

Reimbursement

26. Parents may be entitled to reimbursement for the costs of services they have procured for their child when: (1) the school district has failed to provide a FAPE and (2) the private placement or services are determined to be proper under the IDEA.

(School Committee of the Town of Burlington v. Department of Education (1985) 471 U.S. 359; *Student W. v. Puyallup School District* (9th Cir.1994) 31 F.3d 1489, 1496.)

However, parents are not required to have procured an exact proper placement under the IDEA in order to be entitled to reimbursement. (*Alamo Heights Independent School District v. State Board of Education* (5th Cir.1986) 79 F.2d 1153, 1161.) The parents may receive reimbursement so long as their placement met the student's unique needs and provided the student with educational benefit. (*Ibid.*)

Compensatory Education

27. School districts may be ordered to provide compensatory education or additional services to a pupil who has been denied a free appropriate public education. (*Student W. v. Puyallup School District, supra* 31 F.3d 1489, 1496.) The conduct of both parties must be reviewed and considered to determine whether relief is appropriate. (*Ibid.*) These are equitable remedies that courts may employ to craft "appropriate relief" for a party. An award of compensatory education need not provide a "day-for-day compensation." (*Id.* at p. 1497.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (*Ibid.*)

DETERMINATION OF ISSUES

ISSUE 1: DID THE DISTRICT DENY STUDENT A FAPE AFTER AUGUST 20, 2006, BY FAILING TO APPROPRIATELY ASSESS STUDENT IN ALL AREAS OF SUSPECTED DISABILITY, BY FAILING TO IDENTIFY HIS UNIQUE NEEDS, AND FAILING TO PROVIDE APPROPRIATE GOALS TO MEET HIS UNIQUE NEEDS?

28. Legal Conclusions 10-13 establish that the District had a duty to assess Student in all areas of need. In January 2006, the District held Student's triennial IEP meeting and reviewed with Mother the assessments of Student it had recently conducted. As demonstrated by Factual Finding 18, there was no evidence that Mother requested further assessment of Student, nor was there evidence that the District had any reason to suspect Student any other disabilities than those determined by the assessments. As demonstrated by Factual Findings 23-26, Student did not prove that he had apraxia at any time or that it was ever an area of suspected disability during the time frame alleged in this matter. Further, as established by Factual Finding 19, there was no reason to suspect that Student had any need for further assessment at the IEP meeting on October 18, 2006.

29. Factual Findings 14 and 20 establish that in September 2007, the District had concerns about Student's difficulty generalizing the skills that he learned, and also maintaining those skills. In addition, as shown by Factual Findings 13 and 20, Student's playlalic behaviors had significantly increased and were causing serious interference with instruction. Therefore, the District believed that Student required an in-depth assessment by CDC to determine the reasons for his difficulty generalizing and maintaining skills, and causes and possible solutions for his playlalic behaviors, as shown by Factual Findings 20-21. Although Mother initially agreed to the assessment, and was provided with the parent packet required by CDC, she did not complete and return the packet to the District so that the CDC assessment could begin, as demonstrated by

Factual Finding. Due to the strained relationship between the District and Parents, and their history of lack of cooperation with the District, as described in Factual Findings 6, 20, 22, 36-37, 77, 82, 112-113, and 118, the District should have taken aggressive action, such as filing a due process complaint, so that CDC could assess the child. In the alternative, as demonstrated by Legal Conclusion 11,, because it had been more than a year since the District had conducted its own assessment, the District could have filed for due process to have school personnel, or an independent assessor evaluate Student to determine the cause of his difficulty generalizing and maintaining skills, and his playlalic behaviors. Although the District did successfully address the playlalic behaviors, as shown by Factual Findings 113-115, it still was unable to determine why Student was not progressing as quickly as expected due to his deficiencies in generalizing and maintaining skills. The District probably could have developed appropriate strategies to address these issues if it had information from an appropriate assessment. Student established that the District failed to properly assess Student in the 2007-2008 school year, because it did not properly assess his deficiencies in generalizing and maintaining skills, and this denied him a FAPE for that school year.

30. As demonstrated by Factual Findings 22 and 23, after the District received notice from Student's attorney in September 2008 that Parents had rescinded their request for the CDC assessment, the District offered to complete the triennial assessment due in January 2009 immediately. As shown by Factual Findings 23, the District still had concerns about Student's difficulties with generalization and maintenance of skills. However, Factual Finding 23 supports the District's position that Parents' lack of cooperation hampered their ability to properly assess Student for the

2008-2009 school year.⁴¹ Student did not establish a failure of the District to properly assess Student for the 2008-2009 school year.

ISSUE 2: DID THE DISTRICT DENY STUDENT A FAPE AFTER AUGUST 20, 2006, BY FAILING TO CONDUCT A SKILLS ASSESSMENT THROUGH THE USE OF PROBES, SUCH AS THOSE IN THE MAURICE AND GREEN CURRICULUM GUIDE, OR OTHER EQUIVALENT, SO THAT APPROPRIATE SKILLS GOALS AND OBJECTIVES COULD BE DEVELOPED?

31. As shown by Legal Conclusions 7-9, and Factual Findings 30-34, it was necessary for the District to conduct ongoing probes and assess Student's skills using a variety of appropriate curriculum to formulate IEP goals and objectives for Student. Although Student requested a skills assessment at the IEP meeting of October 18, 2006, and thereafter in a letter to the District, the resulting skills assessment was never provided to Parents, However, it does not appear that Student was harmed by the failure to disclose the assessment, and the evidence established, pursuant to Factual Finding 33, that the program team composed of Gossett, Wandler, Campos, Soemali, and the OT, with the exception of the 2007-2008 school year, did formulate appropriate skills objectives. However, as demonstrated by Legal Conclusions 44 and 45, the failure to formulate appropriate goals for that school year was not due to failure to conduct an appropriate skills assessment. Therefore, the District did not deny Student a FAPE by failing to conduct a skills assessment. The District prevailed on this issue.

⁴¹ The District also had a reasonable expectation that the due process hearing concerning a complaint filed in August 2008 would be completed sooner than it was, and the issue would be dealt with at that time.

ISSUE 3: DID THE DISTRICT DENY STUDENT A FAPE FROM AUGUST 20, 2006, BY FAILING TO ASSESS STUDENT'S FUNCTIONING IN THE HOME SO THAT MALADAPTIVE BEHAVIORS IN THE CLASSROOM THAT IMPEDED HIS EDUCATIONAL PROGRESS COULD BE EFFECTIVELY ADDRESSED?

32. Factual Finding 36 demonstrates that although Student had severe behavior issues in the home, the District was not apprised of the seriousness of these behaviors by Parents. Further, Factual Findings 36-38 show that Student did not have the same behavioral issues at school. Student's issue with aggression in the 2006-2007 school year was handled by formulating a goal that he remove himself to a deregulation area in the SDC when he was frustrated, and he did meet this goal. The increase in his playlalic behaviors during the 2007-2008 school year, as described in Factual Findings 111-115, was dealt with successfully by the District when Wandler created a very effective BSP, as demonstrated by Factual Finding 115. In fact, NPA providing in-home ABA services for Student came to the SDC towards the end of the school year to learn how to implement the plan in the home, according to Factual Finding 109. There was no evidence that the District needed to assess Student in his home in order to effectively deal with his behavior issues at school.

ISSUE 4: DID THE DISTRICT VIOLATE STUDENT'S PROCEDURAL RIGHTS BY PREDETERMINING THE OFFERS OF PLACEMENT MADE AT IEP MEETINGS ON OCTOBER 18, 2006, SEPTEMBER 10, 2007, MAY 12, 2008, AND OCTOBER 1, 2008, THEREBY DENYING HIS PARENTS MEANINGFUL PARTICIPATION IN THOSE IEP MEETINGS, AND, THEREFORE, DENYING STUDENT A FAPE?

33. Legal Conclusions 14 and 16-18 establish that parents must be allowed to meaningfully participate in an IEP meeting, and it is a procedural violation that can result in a denial of FAPE if a school district predetermines a student's placement. As demonstrated by Factual Findings 37-38, every District witness was credible when responding to the questions from the District's attorney concerning predetermination.

Mother actively participated in each IEP team meeting, and with the exception of the May 12, 2009 meeting, had legal counsel participating in the meetings. As demonstrated by Legal Conclusion 17, a school district is not foreclosed from having discussions of possible placements prior to making a formal offer at an IEP team meeting. Mother was accompanied to every IEP meeting except the May 12, 2008 meeting (which was not a meeting where any formal offers were made) and she and her attorney actively participated in the meetings. The District did not predetermine Student's placement, and Parents were not denied meaningful participation in the IEP process.

ISSUE 5: DID THE DISTRICT VIOLATE STUDENT'S PROCEDURAL RIGHTS BY NOT PROVIDING THE PARENTS WITH SUFFICIENT INFORMATION ABOUT THE EFFECTIVENESS OF HIS CLASSROOM PROGRAM AND HIS PROGRESS, WHICH IMPEDED THEIR ABILITY TO UNDERSTAND THE ACADEMIC, DEVELOPMENTAL AND FUNCTIONAL NEEDS OF STUDENT AND THEREBY DENIED THEM MEANINGFUL PARTICIPATION IN THE IEP MEETINGS ON OCTOBER 18, 2006, SEPTEMBER 10, 2007, MAY 12, 2008, AND OCTOBER 1, 2008, AND, THEREFORE, DENYING STUDENT A FAPE?

34. Legal Conclusions 12, 13, and 16 to 18 establish that parents must be given sufficient information about their child so they can meaningfully participate in the IEP process. As demonstrated by Factual Findings 41-47, the District did keep data to track Student's progress in his ABA SDC. However, Factual Finding 43 shows that the District disposed of data after progress reports were completed. Nevertheless, pursuant to Factual Finding 45, the evidence established that ABA record keeping is idiosyncratic, and even with detailed explanations such as those provided by Finney and District personnel, it is difficult, if not impossible, to determine what Student did on a specific day, and where he was developmentally and functionally at that time, by looking at the raw data. Factual Findings 45-47 establish that Parents did receive the periodic progress reports concerning Student, although Factual Finding 84 raises doubts that Parents ever read these reports. Accordingly, the evidence established that the District did provide

Parents with sufficient information so they could meaningfully participate in the IEP process, and there was no evidence that Student was denied a FAPE because Parents were given insufficient information.

ISSUE 6: DID THE DISTRICT VIOLATE STUDENT'S PROCEDURAL RIGHTS BY REFUSING TO INCORPORATE INTO STUDENT'S IEP SOCIAL SKILLS GOALS SUGGESTED BY THE PARENTS AT THE IEP MEETINGS ON OCTOBER 18, 2006, SEPTEMBER 10, 2007, MAY 12, 2008 AND OCTOBER 1, 2008, WHICH DENIED HIS PARENTS MEANINGFUL PARTICIPATION IN THE IEP PROCESS AND, THEREFORE, DENIED STUDENT A FAPE?

35. Legal conclusion 18 outlines the requirements for meaningful participation by parents at IEP team meetings. Factual Findings 48-52 demonstrate that Parents did not suggest specific social goals at the IEP team meetings in October 2006, and September 2007. Accordingly, there was no refusal by the District to incorporate social skills goals suggested by Parents during the IEP process in 2006 and 2007. In addition, Factual Findings 53-54 show that only one social goal suggested by Doyle on behalf of the parents for the 2008-2009 school year, was rejected by the District, and the reason for rejecting it was because Student had already acquired the skill of playing games with others, and that was an activity that occurred often in the SDC at Granite Ridge, so there was no need for such a goal. The evidence established that the District did not refuse to incorporate social goals suggested by the parents pursuant to factual findings 48-56.

ISSUE 7 A) THROUGH C): DID THE DISTRICT DENY STUDENT A FAPE FOR THE 2006-2007 SCHOOL YEAR BY:

- a) Failing to provide Student with academic goals to meet his unique needs?
- b) Failing to provide Student with social skills goals to meet his unique needs?
- c) Failing to provide Student with speech and language goals to meet his unique needs?

36. Legal Conclusions 4-9 concern the IEP process and the development of appropriate goals and objectives. As demonstrated by Factual Findings 12-14, 33-34, and 59-65, the District considered Student's unique needs as a child with autism and mental retardation, and developed academic, social skills, and speech and language goals and objectives accordingly. For example, as demonstrated by Factual Finding 33, Student had already learned number symbols one through six, and the next step was to teach him symbols for seven through ten, so that was an appropriate academic goal. The IEP team developed appropriate goals in the areas of social skills and speech and language. Accordingly, the evidence established that the District did provide Student with appropriate goals in all three areas challenged by Student.

ISSUE 7 D) THROUGH F): DID THE DISTRICT DENY STUDENT A FAPE FOR THE 2006-2007 SCHOOL YEAR BY:

- d) Failing to provide Student with academic instruction in a manner reasonably calculated to meet his unique needs and provide educational benefit, such as repetitive instruction using an appropriate curriculum in conjunction with an Applied Behavioral Analysis (ABA) program and research-based methodologies?
- e) Failing to provide Student with ABA services that would allow him to develop appropriate social behavior and language?
- f) Failing to provide Student with appropriate speech and language therapy?

37. Legal Conclusions 2-9 and 19-21 discuss the requirement that instruction and services meet the unique needs of a student with a disability. Although Student claimed in his closing brief that the District did not provide him with appropriate academic instruction, the evidence did not demonstrate this, as shown by Factual Findings 41-47 and 66-68. As a child with autism, Student benefited from being educated in a program that used ABA methodologies such as DTT. Gossett, Wandler,

Campos and Soemali all testified at length about the instruction and research-based methodologies used in Student's SDC at Liberty. The classroom was geared to meeting the social and academic needs of children with autism and mild to moderate mental retardation. As demonstrated by Factual Findings 42-44 and 67, the instruction was repetitive and was appropriate to meet his academic, social and speech and language needs.

38. Although Student claims he required three hours per week of direct speech and language therapy from a speech and language therapist during the 2006-2007 school year, and the District only provided him with one hour per week of such services that year, Factual Finding 69 makes it clear that the entire instructional staff in the SDC was working on Student's articulation, which was why he required speech and language services. The evidence showed that the District provided speech and language services that addressed Student's needs in this area.

ISSUE 7 G): DID THE DISTRICT DENY STUDENT A FAPE FOR THE 2006-2007 SCHOOL YEAR BY FAILING TO EDUCATE STUDENT IN THE LRE WITH REMOVAL FROM GENERAL EDUCATION CLASSES ONLY TO THE EXTENT PERMITTED BY LAW?

39. As demonstrated by Legal Conclusions 23 and 24, students must be educated in the LRE. An SDC is a more restrictive placement than a general education classroom. However, as shown by Factual Findings 70-75, Parents did not object to Student's placement in an SDC for the better part of the day, they just wanted a larger portion of his day spent in mainstream education. The evidence showed that Student did not benefit educationally or socially during his 15 minutes per day in the general education classroom taught by Lucas. In addition, as shown by Factual Finding 72, the evidence established that Student's needs would not be met by participating in after school activities or child care. Although Student's participation in regular education was limited to his time in Lucas' class, recess and lunch, this appeared to be necessary to

meet his needs. Accordingly, the District did educate Student in the LRE for him, and he was not denied a FAPE for the 2006-2007 school year.

ISSUE 7 H): DID THE DISTRICT DENY STUDENT A FAPE FOR THE 2006-2007 SCHOOL YEAR BY FAILING TO ADDRESS STUDENT'S BEHAVIOR THAT IMPEDED HIS ABILITY TO LEARN, SUCH AS UNINTELLIGIBLE VOCALIZATIONS AND REPETITIVE MOVEMENTS, AS WELL AS SELF-INJURIOUS AND AGGRESSIVE BEHAVIORS, BECAUSE THE DISTRICT FAILED TO CONDUCT A FUNCTIONAL ANALYSIS ASSESSMENT (FAA), AND FAILED TO PROVIDE HIM WITH AN APPROPRIATE BEHAVIORAL INTERVENTION PLAN (BIP)?

40. A school district must address a student's maladaptive behaviors if they impede his ability to learn, as demonstrated by Legal Conclusion 25. Factual Findings 76-78 establish that Student's aggressive behaviors were the target of a goal that school year that called for Student to go to a self-regulation area when he was becoming frustrated. Student did not engage in self-injurious behavior in school. Student's behavior at school, including his playful behavior, was under reasonable control during the school day. There was no evidence that Student's behaviors in school rose to a level that required an FAA and BIP for the 2006-2007 school year.

ISSUE 7 I): DID THE DISTRICT DENY STUDENT A FAPE FOR THE 2006-2007 SCHOOL YEAR BY FAILING TO PROVIDE STUDENT WITH APPROPRIATE EDUCATIONAL PLACEMENT BY PLACING HIM IN A COMMUNICATIVE DISORDER SPECIAL DAY CLASS (SDC) WITHOUT SUFFICIENT ABA OR OTHER RESEARCH-BASED PROGRAMS?

41. As demonstrated by Legal Conclusions 2-7, and 19-22, a school district must provide a student with an appropriate educational placement. As shown by Legal Conclusion 19, IDEA and California law do not require that each and every program used in educating a student with special needs is research-based, nor is every student with autism required to be placed in an ABA program. As shown by Factual Findings 19-21, for the 2006-2007 school year, Student was placed in an SDC at Liberty that was

populated by students who also had autism and mild to moderate mental retardation. Factual Findings 42-44 and 79-80 establish that the SDC was part of a program the District operated for children with autism that utilized a team model of teacher, behaviorist, school psychologist, speech and language therapist and occupational therapist, to create an environment based primarily on ABA. Student was not denied a FAPE for the 2006-2007 school year because the District provided him with an appropriate educational placement.

ISSUE 7 J: DID THE DISTRICT DENY STUDENT A FAPE FOR THE 2006-2007 SCHOOL YEAR BY FAILING TO PROVIDE HIM WITH AFTER-SCHOOL ABA SERVICES AND PARENTAL ABA TRAINING?

42. Legal Conclusions 2-4 establish that a student must be provided with a program that will provide him with some educational benefit. District provided in-home services are not precluded if necessary to provide Student with a FAPE. The same is true of in-home training for parents. However, as demonstrated by Factual Findings 81-32, Student did not provide any evidence to show that he needed after-school ABA services, or that Parents needed ABA training, for him to receive a FAPE from the District.

ISSUE 7 K): DID THE DISTRICT DENY STUDENT A FAPE FOR THE 2006-2007 SCHOOL YEAR BY FAILING TO IMPLEMENT GOALS DEVELOPED IN THE OCTOBER 18, 2006 IEP MEETING?

43. Legal Conclusions 2-9 and 14-15 demonstrate that a district would be liable to a student if it failed to provide the student a FAPE, due to failure to implement his IEP goals and objectives. However, Factual Findings 83-86, demonstrate that the District, in spite of believing Parents had not consented to the IEP of October 18, 2006, did in fact work with Student for the 2006-2007 school year in areas of need that approximated the proposed goals in the October 18, 2006 IEP. The SDC program team continued to probe Student to determine the level of his skills development, and

continued to deliver him ABA instruction in the areas of need revealed by the probes. As a result, when the District discovered in September 2007 that Parents had indeed consented to the IEP of October 18, 2006, and they probed him to determine whether he had met any of the 10 proposed objectives, Factual Finding 85 demonstrates that Student had mastered nine of the 10 proposed goals. Factual Findings 57-65 demonstrate that the proposed goals were sufficient to confer an educational benefit on Student. Therefore, the evidence showed that the District provided a FAPE to Student for the 2006-2007 school year, in spite of the confusion about whether the parents in fact agreed to the IEP.

ISSUE 8 A): DID THE DISTRICT DENY STUDENT A FAPE FOR THE 2007-2008 SCHOOL YEAR BY FAILING TO PROVIDE STUDENT WITH ACADEMIC GOALS TO MEET HIS UNIQUE NEEDS?

44. Legal Conclusions 4-9 show that a school district must develop measurable goals and objectives that will meet a student's unique needs and, if the goals are met, or substantial progress is made, the goals will confer educational benefit on the student with special needs. Factual Findings 87-97 demonstrate that the District did not propose adequate goals and objectives for Student to meet his unique academic needs at the IEP meeting of September 10, 2007. The District expected the assessment from CDC to provide it with assistance to create appropriate goals and objectives for Student. Although the District has argued that it should not be faulted for any failings that were the result of a lack of cooperation by Parents, Legal Conclusions 29-30 make it clear that the District had an obligation to either file for a due process hearing to compel an assessment, and/or to convene another IEP team meeting to create appropriate academic goals. The District, on its own, did find a solution for the playlalic behavior, but his difficulty generalizing and maintaining skills were not addressed. The District has recently assessed Student for purposes of the triennial assessment, so it is

unclear if Student still needs assessment to determine the cause of his difficulty in generalizing and maintaining the skills he has learned. The evidence established, as shown by Factual Findings 87-97, that the District's academic goals were proposed at the September 10, 2007 IEP meeting were inadequate, because they were designed to "fill the gap" while the District awaited the results of the CDC testing, and did not meet Student's unique needs. Therefore, he was denied a FAPE, and is entitled to compensatory education.

ISSUE 8 B) AND C): DID THE DISTRICT DENY STUDENT A FAPE FOR THE 2007-2008 SCHOOL YEAR BY:

- b) Failing to provide Student with social skills goals to meet his unique needs?
- c) Failing to provide Student with speech and language goals to meet his unique needs?

45. Legal Conclusion 44 demonstrates that the District failed to provide Student with sufficient academic goals and therefore failed to provide him with a FAPE for the 2007-2008 school year. This is also true of the social skills goals and speech and language goals. These goals did not meet student's unique needs, as demonstrated by Legal Conclusions 4-9, and Factual Findings 98-103. Accordingly, Student was denied a FAPE in these areas because the social skills goals and speech and language goals were not sufficient to confer educational benefit on Student, and did not meet his unique needs.

ISSUE 8 D) AND E): DID THE DISTRICT DENY STUDENT A FAPE FOR THE 2007-2008 SCHOOL YEAR BY:

- d) Failing to provide Student with academic instruction in a manner reasonably calculated to meet his unique needs, such as repetitive instruction using an

appropriate curriculum in conjunction with an ABA program and research-based methodologies?

- e) Failing to provide Student with ABA services that would allow him to develop appropriate social behavior and language?
- f) Failing to provide Student with direct speech and language therapy?

46. Legal Conclusions 2-9 and 19-21 discuss the requirement that instruction and services meet the unique needs of a student with a disability. Although Student claimed in his closing brief that the District did not provide him with appropriate academic instruction, the evidence did not demonstrate this, as shown by Factual Findings 104-106. As a child with autism, Student benefited from being educated in a program that used ABA methodologies such as DTT. Gossett, Wandler, Campos and Soemali all testified persuasively at length about the instruction and methodologies used in Student's SDC at Liberty. The classroom was geared to meet the social and academic needs of children with autism and mild to moderate mental retardation, and provide them with services to develop appropriate social behavior and language. The instruction was repetitive and was appropriate to meet his academic, social skills and speech and language needs for the 2007-2008 school year.

47. Student claims he required three hours per week of direct speech and language therapy from a speech and language therapist during the 2007-2008 school year, and the District did not provide him with any direct speech and language therapy. However, Factual Finding 107 makes it clear that the entire instructional staff in the SDC was working on Student's articulation, which was why he required speech and language services, and they were successful in addressing the articulation issues in this way. Therefore, Student received speech and language services that met this area of need during the 2007-2008 school year.

ISSUE 8 G): DID THE DISTRICT DENY STUDENT A FAPE FOR THE 2007-2008 SCHOOL YEAR BY FAILING TO EDUCATE STUDENT IN THE LRE WITH REMOVAL FROM GENERAL EDUCATION CLASSES ONLY TO THE EXTENT PERMITTED BY LAW?

48. As demonstrated by Legal Conclusions 23-24, Students must be educated in the LRE. An SDC is a more restrictive placement than a general education classroom. However, as shown by Factual Findings 108-110, Parents did not object to Student's placement in an SDC for the better part of the day, they just wanted a larger portion of his day spent in mainstream education. The evidence showed that Student did not benefit educationally or socially during his 15 minutes per day in the general education classroom taught by Drolshagen. The evidence established that Student's needs would not be met by participating in after school activities or child care. Although Student's participation in regular education was limited to his time in Drolshagen's class, recess and lunch, as well as PE, this appeared to be more than sufficient to meet his needs. Accordingly, the District did educate Student in the LRE for him, and he was not denied a FAPE for the 2007-2008 school year.

ISSUE 8 H): DID THE DISTRICT DENY STUDENT A FAPE FOR THE 2007-2008 SCHOOL YEAR BY FAILING TO ADDRESS STUDENT'S BEHAVIOR THAT IMPEDED HIS ABILITY TO LEARN, SUCH AS UNINTELLIGIBLE VOCALIZATIONS AND REPETITIVE MOVEMENTS, AS WELL AS SELF-INJURIOUS AND AGGRESSIVE BEHAVIORS BECAUSE THE DISTRICT FAILED TO CONDUCT A FUNCTIONAL ANALYSIS ASSESSMENT AND FAILED TO PROVIDE A BIP?

49. A school district must address a student's maladaptive behaviors if they impede his ability to learn, as demonstrated by Legal Conclusion 25. Factual Findings 102-104 establish that Student would go to a self-regulation area when frustrated, and there were only a few isolated aggressive behaviors in school for the 2007-2008 school year. Student did not engage in self-injurious behavior in school. Factual Findings 111-115 show that Student's behavior at school, including his playlalic behavior, increased in

intensity, frequency and duration when Student returned to school in the fall of 2007. However, Wandler was able to formulate an appropriate BSP to address this behavior that was so effective, Mother and the NPA providing Student with in-home ABA services came to the SDC to learn to use the BSP. Student's behavior was very different at home than it was in school. District personnel referred to Student as compliant. Mother was not open in her communication with the School, and this lack of communication did not help Student. Because Mother never observed Student at school, as demonstrated by Factual Finding 67, she apparently believed his behavior was as out-of-control in that setting as it was at home. Mother's resistance to sign releases to allow NPAs that were providing in-home services to communicate with the school, led to Student receiving duplicate and redundant services from both the NPAs and the school. There was no evidence that Student's behaviors in school rose to a level that required an FAA and BIP for the 2006-2007 school year.

ISSUE 8 i): DID THE DISTRICT DENY STUDENT A FAPE FOR THE 2007-2008 SCHOOL YEAR BY FAILING TO PROVIDE STUDENT WITH APPROPRIATE EDUCATIONAL PLACEMENT BY PLACING HIM IN A COMMUNICATIVE DISORDER SDC WITHOUT SUFFICIENT ABA OR OTHER RESEARCH-BASED PROGRAMS?

50. As demonstrated by Legal Conclusions 2-7 and 19-22, a school district must provide a student with an appropriate educational placement. IDEA and California law do not require each and every program used in educating a student with special needs to be research-based, nor is every student with autism required to be placed in an ABA program. As shown by Factual Finding 116, for the 2007-2008 school year, Student was placed in an SDC at Liberty School that was populated by students who also had autism and mild to moderate mental retardation. The SDC was part of a program the District operated for children with autism that utilized a team model of teacher, behaviorist, school psychologist, speech and language therapist and occupational

therapist, to create an environment based primarily on ABA. Student was not denied a FAPE for the 2006-2007 school year because the District provided him with an appropriate educational placement.

ISSUE 8 J): DID THE DISTRICT DENY STUDENT A FAPE FOR THE 2007-2008 SCHOOL YEAR BY FAILING TO PROVIDE HIM WITH AFTER-SCHOOL ABA SERVICES AND PARENTAL ABA TRAINING?

51. As shown in Legal Conclusion 3, a student with an IEP must be provided with services designed to meet his unique needs, which provide him with an educational benefit. As demonstrated by Factual Findings 117-118, there was no evidence that Student required in-home ABA services, and his parents required ABA training for him to be provided with a FAPE. Although Student had extreme out-of-control behavior at home dozens of times a week, he was compliant in the school setting. Student did not establish that he was denied a FAPE because the District did not provide him with in-home ABA services, and did not provide his parents ABA training from the District for the 2007-2008 school year.

9 A) AND B): DID THE DISTRICT FAIL TO OFFER PLACEMENT AND SERVICES TO STUDENT THAT WOULD MEET HIS UNIQUE NEEDS AND PROVIDE HIM WITH A FAPE WHEN IT MADE AN OFFER OF PLACEMENT IN AN SDC AT GRANITE RIDGE MIDDLE SCHOOL ON OCTOBER 1, 2008 BECAUSE THE PLACEMENT:

- a) Failed to provide Student with academic goals to meet his unique needs?
- b) Failed to provide Student with social skills goals to meet his unique needs?
- c) Failed to provide Student with speech and language goals to meet his unique needs?

52. Legal Conclusions 4-9 concern the IEP process and the development of appropriate goals and objectives. When goals are developed, they are based on a student's particular needs at the time they are developed. As demonstrated by Factual

Findings 119-135, the District considered Student's unique needs as a child with autism and mental retardation, and developed academic, social skills, and speech and language goals and objectives accordingly. The IEP of October 1, 2008 contains 17 goals, many of which address academics and social skills, as well as speech and language. In addition, the program in the Granite Ridge SDC will supplement these goals. Accordingly, the evidence established that the District did propose goals in the academic and social skills area following the IEP team meeting on October 1, 2008, that were appropriate based in the information known by the team at that time.

53. The evidence established, based on Factual Findings 127-128, that Student is now ready to begin formal instruction in reading, although Student did not establish that he had reached this stage prior to the IEP meeting of October 1, 2008. Based on Legal Conclusion 7, it will be necessary to create appropriate IEP academic goals in reading for Student. Similarly, based on Factual Finding 129, although Student did not have deficits in his articulation at the time of the IEP meeting of October 1, 2008, that is no longer the case, and Student may now need one or more speech and language goals to address this issue.

9 D) AND E): DID THE DISTRICT FAIL TO OFFER PLACEMENT AND SERVICES TO STUDENT THAT WOULD MEET HIS UNIQUE NEEDS AND PROVIDE HIM WITH A FAPE WHEN IT MADE AN OFFER OF PLACEMENT IN AN SDC AT GRANITE RIDGE MIDDLE SCHOOL ON OCTOBER 1, 2008 BECAUSE THE PLACEMENT:

- d) Failed to provide Student with academic instruction in a manner reasonably calculated to meet his unique needs, such as repetitive instruction using an appropriate curriculum in conjunction with an ABA program using research-based methodologies?
- e) Failed to provide Student with ABA services that would allow him to develop appropriate social behavior and language?

54. Legal Conclusions 2- 9and 19-21 discuss the requirement that instruction and services meet the unique needs of a student with a disability. As a child with autism, Student was previously a student in the Elementary Intensive Autism SDC, part of a program that uses ABA methodologies such as DTT as shown by Factual Finding 136. The Granite Ridge SDC is the secondary level classroom for the Intensive Autism Program, and it also uses ABA methodologies and appropriate curriculum. The classroom is geared to meet the social and academic needs of children with autism and mild to moderate mental retardation. The instruction is repetitive and is appropriate to meet Student's academic, social and speech and language needs.

9 F): DID THE DISTRICT FAIL TO OFFER PLACEMENT AND SERVICES TO STUDENT THAT WOULD MEET HIS UNIQUE NEEDS AND PROVIDE HIM WITH A FAPE WHEN IT MADE AN OFFER OF PLACEMENT IN AN SDC AT GRANITE RIDGE MIDDLE SCHOOL ON OCTOBER 1, 2008 BECAUSE THE PLACEMENT FAILED TO PROVIDE STUDENT WITH DIRECT SPEECH AND LANGUAGE THERAPY?

55. Legal Conclusions 4-9 concern the IEP process and the development of appropriate goals and objectives. When goals are developed, they are based on a student's particular needs at the time they are developed. As demonstrated by Factual Finding 137, the District considered Student's unique needs as a child with autism and mental retardation, and determined what he required in terms of placement and services to be provided with a FAPE. At the time of the IEP meeting of October 1, 2008, District personnel recommended that Student not receive speech therapy, based on what his needs were during the summer of 2008. Accordingly, the evidence established that the District's recommendation that Student not receive direct speech and language therapy was not a denial of FAPE, because the District based its recommendation on the information known by the team at that time.

56. The evidence established, based on Factual Finding 135, that during the due process hearing, Student was assessed to determine his speech and language needs, and was found to have redeveloped problems with articulation. Therefore, he now requires, based on Factual Findings 135 and 137, direct speech and language therapy. Based on Legal conclusion 7 it will be necessary to amend the IEP to provide for direct speech and language therapy. However, this did not deny Student a FAPE during the 2007-2008 school year because this information was not known to the District and IEP at the time it developed Student's IEP.

9 g): DID THE DISTRICT FAIL TO OFFER PLACEMENT AND SERVICES TO STUDENT THAT WOULD MEET HIS UNIQUE NEEDS AND PROVIDE HIM WITH A FAPE WHEN IT MADE AN OFFER OF PLACEMENT IN AN SDC AT GRANITE RIDGE MIDDLE SCHOOL ON OCTOBER 1, 2008 BECAUSE IT FAILED TO EDUCATE STUDENT IN THE LRE WITH REMOVAL FROM GENERAL EDUCATION CLASSES ONLY TO THE EXTENT PERMITTED BY LAW?

57. As demonstrated by Legal Conclusions 23-24, Students must be educated in the LRE. An SDC is a more restrictive placement than a general education classroom. However, as shown by Factual Finding 119, Parents did not object to Student's placement in an SDC for the better part of the day, they just wanted a larger portion of his day spent in mainstream education. The evidence showed that Student did not benefit educationally or socially during his 15 minutes per day in the general education classroom taught by Drolshagen for the 2007-2008 school year. Based on Factual Findings 138-140, the Granite Ridge SDC provides students with many opportunities to have contact with general education students during lunch, and during some of class time when general education students come to the class to interact with the students in the SDC. District witnesses explained that once Student is acclimated to the class, it will be the appropriate time to determine whether he should spend time in a general education class, and if so, which one. Accordingly, it will be appropriate to not

mainstream Student into a general education class as soon as he begins attending Granite Ridge. Therefore, the District's offer of placement and services is the LRE for Student.

9 H): DID THE DISTRICT FAIL TO OFFER PLACEMENT AND SERVICES TO STUDENT THAT WOULD MEET HIS UNIQUE NEEDS AND PROVIDE HIM WITH A FAPE WHEN IT MADE AN OFFER OF PLACEMENT IN AN SDC AT GRANITE RIDGE MIDDLE SCHOOL ON OCTOBER 1, 2008 BECAUSE IT FAILED TO PROVIDE HIM WITH AFTER-SCHOOL ABA SERVICES AND PARENTAL ABA TRAINING?

58. As shown in Legal Conclusion 3, a student with an IEP must be provided with services designed to meet his unique needs, which provide him with an educational benefit. As demonstrated by Factual Findings 141-142, there was no evidence that Student required in-home ABA services, or that his parents required ABA training for him to be provided with a FAPE.

DETERMINATION REGARDING PROPOSED REMEDIES

REIMBURSEMENT

59. Pursuant to Legal Conclusion 27, parents may be entitled to reimbursement for the costs of services they have procured for their child when: (1) the school district has failed to provide a FAPE and (2) the private placement or services are determined to be proper under the IDEA. Based on Factual Finding 143, Parents procured the services of an NPA, PCFA, and private speech and language services from the Center for Communication Skills because they disagreed with the District's offer of placement at Granite Ridge. Based on Factual Findings 52-58, and Legal Conclusions 4-9, 19-21 and 23-24, this offer of placement was one that would have provided Student with a FAPE, in the LRE, based on the information available to the District at the time the

offer was made. Accordingly, Parents are not entitled to reimbursement for the services of PCFA and Center for Communication Skills.

COMPENSATORY EDUCATION

60. Based on Legal Conclusions 28 and 29, Student was denied a FAPE during the 2007-2008 school year due to failure of the District to pursue an assessment of Student to determine why he had difficulty generalizing and maintaining skills, and for guidance on appropriate goals and objectives. Based on Legal Conclusions 44 and 45, the District proposed inadequate academic, social skills and speech and language goals for the 2007-2008 school year, which also denied Student a FAPE. Therefore, Student is entitled to compensatory education. Although the District may argue that Parents' lack of cooperation was the reason why an assessment was not completed, and Factual Findings 6, 20, 22, 36-37, 77, 82, 112-113, and 118, establish a history of lack of cooperation, there was nothing to prevent the District from filing a request for due process to procure the assessment, pursuant to Legal Conclusion 11. In addition, pursuant to Legal Conclusion 7, when parent did not return the packet for CDC in a timely manner, and the District realized that it needed to file for due process, it could have also convened another IEP team meeting to review the existing goals and determine new goals for the remainder of the school year. Accordingly, based on Factual Findings 144 and 146, Student is entitled to compensatory education in academics, social skills and speech and language.

61. As established by factual finding 147, Parents are entitled to 685 hours of compensatory education, to be provided by an NPA of Parents' choice for three years from the date of this order.

62. Due to the District's failure to assess Student, Parents are also entitled to an independent educational evaluation to determine the causes of Student's difficulties in generalizing and maintaining skills, and, if deemed necessary, his playlalia. The

assessor shall meet the District's minimum qualifications, but shall be chosen by Student's Parents.

ORDER

1. The District shall provide Student with 685 hours of compensatory education in the areas of reading, math, social skills and speech and language, focusing on pragmatic language, to be utilized within three years from the date of this order for failure to assess Student during the 2007-2008 school year, and failure to provide Student with adequate academic, social skills and speech and language goals and objectives for the 2007-2008 school year, which denied him a FAPE.

2. The District shall provide funding for an independent assessment by a psychologist of Parents' choosing to determine the cause of his difficulty generalizing and maintaining skills, and if deemed necessary, his playlalia. The assessor shall meet the District's minimum qualifications.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that the hearing decision indicate the extent to which each party has prevailed on each issue heard and decided. Student prevailed on Issues 1 and 8 (a), (b) and (c). The District prevailed on all remaining issues.⁴²

⁴² In the introduction of its closing argument, the District requested the ALJ make findings that Student engaged in frivolous and unnecessary litigation pursuant to section 1415(i), of title 20 of the United States Code, subdivisions (3)(B)(II) and (III), but no formal motion was filed in this regard. Therefore no finding will be made in this regard.

RIGHT TO APPEAL

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: June 4, 2009

/s/

REBECCA P. FREIE

Administrative Law Judge

Office of Administrative Hearings