

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

MANHATTAN BEACH UNIFIED
SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF
STUDENT.

OAH CASE NO. 2012070159

DECISION

Deborah Myers-Cregar, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), heard this matter on September 10, 11, 12, and 25, 2012, in Manhattan Beach, California.

Student's parents (Parents) represented Student and attended each day of hearing.

Christopher Fernandez, Attorney at Law, represented Manhattan Beach Unified School District (District) on September 10, 11, and 25, 2012. Shiohban Cullen, Attorney at Law, represented District on September 12, 2012. Elyn Schneider, Director of Student Services, appeared on behalf of District and attended each day of hearing.

District filed its due process hearing request (complaint) on July 5, 2012. On July 23, 2012, OAH granted the parties' joint request to continue the due process hearing for good cause shown. On September 25, 2012, at the close of the hearing, the parties were granted permission to file written closing arguments by October 19, 2012. Upon receipt of the written closing arguments, the matter was submitted and the record closed.

ISSUES¹

1. Did District offer Student a free and appropriate public education (FAPE) in the individualized education programs (IEP) dated November 2, 2011 IEP, and June 7, 2012:

- a) when it offered behavior intervention services in the form of a one-to-one teacher support assistant (TSA) for the entire school day, and behavior intervention case management (BICM) supervision four hours monthly by District's BICM and Board Certified Behavior Analyst (BCBA); and
- b) when it did not offer extended school year services (ESY) for the summer of 2012?

FACTUAL FINDINGS

JURISDICTION AND BACKGROUND

1. Student was 12 years old at the time of the hearing. At all relevant times, Student lived within the jurisdictional boundaries of the District and was eligible for special education services under the category of autistic-like behaviors.

PRIOR SETTLEMENT AGREEMENT

2. On November 9, 2010, the parties entered into a settlement agreement which expired on December 31, 2011. The parties agreed that Student would attend general education curriculum classes with resource services at Meadows Elementary

¹ Although the complaint generally sought a determination that a FAPE had been offered in the IEP, the parties stipulated at hearing that a FAPE had been offered with the exception of behavior services and ESY. Thus, the issues were narrowed at hearing.

School for fifth grade, and general education curriculum classes with resource services at Manhattan Beach Middle School (MBMS) for sixth grade for the 2011-2012 school year. Pursuant to that agreement, District would provide Student with behavior intervention in the form of a TSA for the entire school day, behavior supervision by a non-public agency (NPA) BCBA, and a home behavior program. Parents believed that following the expiration of the settlement agreement, the NPA BCBA services and home behavior program should have been part of Student's IEP. Student's current educational placement at MBMS in general education with resource services, and a full time District TSA for behavior intervention goals, is not in dispute.

THE NOVEMBER 2, 2011 IEP

3. District notified Parents of Student's annual and triennial IEP team meeting set for November 2, 2011. District informed Parents that they could invite other individuals who have special knowledge or special expertise about the child. Parents requested copies of all assessment reports as soon as the reports became available. District mailed Parents the assessment reports, teacher reports, and drafted goals to be discussed before the IEP team meeting.

4. On November 2, 2011, Student's IEP team convened to discuss her educational program after the expiration of the settlement agreement. The IEP team members in attendance were special education teacher Marni Notarnicola, administrator Barbara Mendez, behavioral specialist Wendy Cheng, occupational therapist Wendy Zobel, speech pathologist Lauren Webb, school psychologist Emily Allen, general education teacher Debbie Wilson. Additionally, both parents attended along with their preferred BICM providers, NPA Director Janet Yi and NPA supervisor Hillary Taylor.

5. At that IEP meeting, the team developed Student's present levels of

performance. The IEP team reviewed the assessment reports, teacher reports, and drafted goals to address her unique needs, including nine behavioral goals, discussed below. At the end of fifth grade, Student took the Spring 2011 California Standards Test (CST) with accommodations, the California Modified Assessment (CMA). She achieved scores in the 'Proficient' range in Science, and 'Basic' range in English/Language Arts (326), and Math (357). Comparatively, in Spring 2009 at the end of third grade, she achieved scores in the 'Far Below Basic' range in English-Language Arts (245), and 'Basic' range in Math (319).

6. Ms. Allen, the school psychologist, noted Student's cognitive assessment scores fell within the average to high average range. She noted Student's improved scores in the areas of processing speed and auditory working memory. Student's autism rating scales showed more deficits reported at home than at school, due to the support of her TSA. Student's social emotional assessment scores fell within the average range. Student's Theory of Mind assessment showed increased scores to the borderline range, but still impacted her social functioning, and she continued to qualify for services under autistic-like behaviors. On the Wechsler- Individual Achievement Test, Third Edition, (WIAT- III), Student achieved scores in the average (85-115) and above average (116-130) range in all testing areas, with a 95 percent confidence interval. On the Written Expression Composite, Student's score of 127 placed her in the top 96 percent, three points below the superior range. Her Total Reading Composite score was 112, her Basic Reading Composite score was 116, her Reading Comprehension and Fluency Composite was 106, and her Math Composite was 103.

7. With the accommodations of her TSA to help her focus, and additional time on assignments and tests, Student had straight A's in her general education academic classes. The IEP team described her as intelligent, hardworking and motivated. She was continuing to progress socially. She was independently initiating

conversation with adults and peers. Student was showing the ability to better control her frustration and emotional outbursts in the academic setting.

8. Student's special education teacher, Ms. Notarnicola, recommended Student continue to be in the collaborative general education humanities class which she and Ms. Wilson co-taught. Ms. Wilson, the general education teacher, reported Student had difficulty focusing at times. Student was a perfectionist and needed to accept making mistakes. Ms. Wilson wanted Student to visit her during her nutrition break or lunch if she needed help. She also wanted Student to achieve more independence from her aide. The IEP team recommended she be placed in an academic support class for assistance with organization and study skills.

9. The occupational therapist reported Student scored in the average range in all areas, and recommended discontinuation of services. The speech therapist reported Student's expressive and receptive language was within the average range.

10. Parents discussed Student's social issues in middle school, including friends who were no longer associating with her. Parents were concerned with her rate of progress with her homework and schoolwork.

11. Ms. Taylor, the NPA BICM, discussed Student's progress in the area of behavior. Student showed an increased ability to multi-task. Student appeared to be similar to her peers at first glance, showing the ability to blend in socially. She had difficulty focusing in class, requiring direct prompts and assistance from her TSA. Her aide broke down complex skills into smaller, more manageable parts in the classroom. Student benefited from role playing as a means of understanding social situations. She increased her ability to use appropriate language to communicate her feelings, to tolerate frustrating situations, to work in a group collaboratively, and to independently attempt most school assignments. She made good gains in engaging with peers appropriately, learning more subtle social cues, and forming some good

friendships with positive and appropriate peers. Student continued to struggle in the areas of socialization, maintaining eye contact, and interpreting subtle social cues, and some peers bullied and ostracized her. Student was learning how to identify social isolation, teasing, and rejection from peers and how to appropriately respond to it.

12. The IEP team discussed how Student met her prior annual goals in reading, speech, and behavior. She partially met her writing goal and speech pragmatics goals. The IEP team reviewed and discussed proposed goals. The parties agreed on Student's goals, accommodations and modifications.

13. The IEP team developed and wrote five academic goals in the areas of writing-editing, reading comprehension, written expression, organization, and participation. Student needed prompting to edit her work. She needed assistance when answering literal and inferential questions. Student needed help writing a five paragraph essay. She needed help organizing her school papers. Student needed encouragement to raise her hand in class.

14. The IEP team developed and wrote three speech and language goals in the areas of pragmatics, verbal recall/reasoning, and expressive/receptive vocabulary/abstract language. Student needed help identifying facial expressions, body languages, and other clues to infer conversational intent. She needed help to expand her receptive vocabulary and correctly respond to higher level ideas and multi-step directions. Student needed assistance in understanding and using figurative language, multiple meaning words, metaphors and similes appropriate for her grade reading level.

15. The IEP team developed and wrote nine behavioral goals in the areas of behavior and social skills. Ms. Taylor primarily drafted the goals, and Ms. Cheng agreed with them. In Behavior Goal 1, Student would stop what she was doing, listen, and correctly respond to group instruction given by her teacher in four out of

five opportunities in a two week period, as measured by data collection. In Behavior Goal 2, Student would learn to reference her peers without explicit directions to do so, and would imitate the group behavior during class assignments and activities, in four out of five opportunities in a two week period, as measured by data collection. In Behavior Goal 3, Student would independently use appropriate self-organize tools, in four out of five opportunities in a two week period, as measured by data collection. In Behavior Goal 4, Student would learn to write down her off-task comments and questions during class and instead ask them during appropriate breaks, instead of asking her TSA during classroom instruction time, in four out of five opportunities in a two week period, as measured by data collection. In Behavior Goal 5, Student would tolerate self-imperfection and make realistic comments in response to feedback on assignments and in response to her feelings of disappointment, in four out of five opportunities in a two week period, as measured by data collection. In Behavior Goal 6, Student would learn to discriminate when to apologize and say "I'm sorry" only in situations where she made an error, in four out of five opportunities, as measured by data collection. In Behavior Goal 7, Student would refrain from smiling when confronted with an upset peer, in four out of five opportunities across people and setting in a two week period, as measured by data collection. In Behavior Goal 8, Student would learn to identify her peers' social cues and respond appropriately, in four out of five opportunities, across people and setting in a two week period, as measured by data collection. In Behavior Goal 9, Student would maintain eye contact with another person for five seconds before looking away, in four out of five opportunities across people and settings, in a two week period, as measured by data collection.

16. At the IEP, Ms. Cheng, the District BCBA and BICM, believed Student's behavior goals could be implemented in the school setting. She also believed that she could serve as Student's BICM and supervise her TSA for four hours per month,

based upon input from the NPA BICM providing that level of supervision at the time of the IEP. Ms. Cheng believed that social skill instruction could also be provided in the school setting. Parents were concerned that Student's optional extracurricular activity, a drama class, would be negatively impacted without the use of an aide due to her social issues. Ms. Cheng offered to observe Student in that setting, consult with the teacher and recommend successful strategies. Neither Ms. Taylor nor Ms. Yi expressed any concerns about these opinions and recommendations at the IEP

17. District offered Student placement in a general education setting at Manhattan Beach Middle School, with designated instruction and related services, modifications and accommodations. Student would be in general education 95 percent of the time. District offered, for specified periods of time, Specialized Academic Instruction (general group instruction) in English, Specialized Academic Instruction (RSP support) in English; a TSA with 240 hours monthly behavior intervention supervision; and speech and language therapy. Consistent with the occupational therapist's recommendation, OT services were discontinued. The parties agreed to discuss extended school year (ESY) services at a subsequent IEP in spring 2012.

18. At hearing, the parties stipulated that the November 2, 2011 IEP goals, modifications and accommodations were appropriate. At hearing, Parents also stipulated that the District's offer of specialized instruction and services was appropriate, with the exception of behavior intervention services. While District offered its own BCBA to supervise Student's behavior intervention program four hours per month, Parents wanted the continuation of its preferred NPA BICM; and while District offered a full time TSA, Parents also wanted to continue a 'home-behavior program' for an additional six hours per week, with additional NPA BICM supervision hours for the home program.

THE JUNE 7, 2012 IEP

19. District notified Parents an IEP team meeting would be convened on June 7, 2012 to review ESY. District informed the parents that they could invite other individuals who have special knowledge or special expertise about the child.

20. On June 7, 2012, the IEP team convened to discuss ESY services. The IEP team members in attendance were program specialist Barbara Mendez, speech language therapist Lauren Webb, general education teacher Candi Ochoa, special education teacher Marni Notarnicola, both parents, NPA BICM Hillary Taylor and NPA executive director Janet Yi.

21. Parents reported that Student had difficulty socially. She appeared to be higher functioning than she was, and did not read social cues well. While Student got along well with her science lab partner, that partner chose another student to be paired with for the summer science camp. Another girl agreed to be her partner, so she was teamed up with two other girls. Parents also reported that Student had ADD, and she needed a person to sit with her for hours while she completed her homework. When Student was upset with social difficulties, she was unable to complete her homework. She was learning how to text other students, and was improving her ability to community with friends.

22. The general education teacher, Ms. Ochoa, reported Student completed all her assignments and worked well with other students in class. Student received accommodations such as prompts in class, scaffolding lessons, and receiving more time on tests and assignments.

23. Ms. Taylor, the NPA BICM, reported that Student managed to be social at school, but not at home because of the limited social opportunities. Student continued to make progress. She was learning to understand cues in the classroom and understand what was going on in the class if she missed the instruction. Student used a behavior reinforcement system to help her pay attention and focus. She was

trying to be more independent. Her social interactions had improved since she went to a classroom during lunch and nutrition, as she was more comfortable there than the unstructured setting on the playground. She participated in a lunch club.

24. Ms. Notarnicola, the special education teacher reported that Student accessed the curriculum and was a hard worker. Her skills in understanding inferences while reading were becoming stronger. Student completed her homework with the assistance of her TSA. Her TSA also helped Student with understanding social cues and social stories throughout the day.

25. For the Fall quarter 2011, Student earned a 3.86 grade point average (gpa). For the Winter quarter 2011-12, she earned a 3.90 gpa. Although District did not have access to her final Spring 2012 grades at the IEP team meeting, her progress report for that period showed Student earned a 3.91, and her lowest grade was an A- in pre-algebra. By the end of the 2011-2012 school year, Student was ranked among the top 97 students in a class size of 457.

26. District did not offer ESY services. Parents disagreed, and questioned whether Student would regress without it. Ms. Notarnicola did not think Student would have significant regression over the summer without ESY.

EVIDENCE OFFERED TO SUPPORT DISTRICT'S OFFERS OF A FAPE

27. Ms. Cheng testified in support of the appropriateness of District's behavior intervention offer in the November 2, 2011 IEP. Ms. Cheng earned a Bachelor of Arts degree in Psychology, a Master's degree in Applied Behavioral Analysis, and was a BCBA. For five years, she was the clinical director of Autism Behavioral Consultants (ABC), an NPA, before working for the District in January 2011. Additionally, she worked as a behavior consultant for Autism Partnership, an NPA, for 13 years. As a District BICM with a BCBA, her responsibilities included supervising staff, providing ABA training to staff and parents, monitoring student

progress, collaborating with special and general education teachers and other service providers, and supervising school and home programs and after school social skills programs. Ms. Cheng also conducted assessments, made behavioral observations, took data on antecedents, consequences, courses of action and replacement strategies, and conducted functional behavior assessments (FBA's). Ms. Cheng participated in developing IEPs. She worked with the teams to look at current behaviors, to review past behavior, reports and progress, to generate new goals, and to determine what services students needed to achieve their goals.

28. In October 2011, in preparation for the IEP meeting, Ms. Cheng formally observed Student in choir, science, lunch, and a speech therapy session. Ms. Cheng reported those observations to the IEP team. Student's organization was a concern, as she kept a lot of paper and materials on her desk which became crumpled. Student needed the help of her TSA to access her materials and put them away as needed in class. At times, Student appeared anxious keeping up with a lecture while taking notes, she would approach her TSA, and return to her work. Student's TSA transitioned her for lunch, and she was able to be independent. Student would approach peers, and periodically consult with her TSA, and return to the group. During the speech session, Ms. Cheng sat outside and heard questions and answers related to social skills and pragmatics. Ms. Cheng reviewed Ms. Allen's psychoeducational assessment report.

29. Additionally, Ms. Cheng consulted with NPA BICM Hillary Taylor during the development of the behavior goals. She considered the data compiled by Ms. Taylor, and reviewed Student's weekly rate of progress. Ms. Cheng reviewed Ms. Taylor's goals and agreed with them. Student's current level of BICM supervision for school was between two to four hours per month, with a total average of nine hours per month of supervision for both the home and school program combined. Ms. Cheng looked at the goals and the data and determined she could provide BCBA

supervision at school for four hours per month. She based that decision on the current level of supervision Student was receiving in school by the NPA.

30. Ms. Cheng believed all nine behavior goals could be appropriately implemented during the school day at MBMS. Along with the District members of the team, she believed the full-time support of Student's TSA and four hours of supervision was appropriate. Student's key areas of concern were staying on task, keeping up with group instruction, organization, and social skills pragmatics.

31. Ms. Cheng believed she could have appropriately provided the four hours monthly BICM supervision. Even though she worked 40 hours a week and had an active caseload, she was not at full capacity. She used some of her hours for training, and she could have prioritized and shared her assignments and responsibilities. She worked together with the other three District behaviorists. If Student had required additional hours of supervision, she would have provided what was clinically needed. If there was a specific or ongoing need for additional hours, she would have informed Ms. Schneider and even called an IEP meeting.

32. Ms. Cheng did not recommend behavior services in the home. She based her opinion on the review of the data taken at home, talking with Ms. Taylor, and with Student's TSA aide. Student's difficulties were in peer interactions in school and small groups. In Student's prior home program, the majority of interactions were initiated by adults, and she had limited peer access. Student's difficulty was in generalizing and implementing social strategies. The skills that Student needed were direct interaction with peers, which was best implemented at school, not the home setting. None of the nine goals needed to be worked on at home. Student needed to practice her skills at school and to display those skills in the school environment.

33. Student's speech therapist, Lauren Webb, testified in support of the District's June 2012 IEP team determination not to offer ESY. She held a Bachelor's of Science degree in Speech Pathology, a Master's degree in Special Education, a

Master's degree in Speech Language Pathology, and Special Education Teaching Credential, a Clinical Rehabilitative Services Credential, a license to practice speech pathology, and a Clinical Certificate of Competence from the American Speech and Hearing Association (ASHA) and the California Speech, Language and Hearing Association (CSHA). She was a speech language pathologist employed by Los Angeles County Office of Education (LACOE), and was assigned to MBMS since September 2007.

34. Ms. Webb was Student's speech therapist for one year, beginning September 2011. She adopted the goals that the prior speech pathologist used. They worked on pragmatics and social skills in two groups. In the first group, Student was among other students with the same goals. In the second group, Student was paired with a student with common interests, where she could practice her skills without as many prompts. They worked on body language problem solving, reacting, role playing, facial expressions, pictures, and behavior intervention strategies.

35. Ms. Webb did not recommend Student for speech therapy during the 2012 ESY. She opined Student was at a level where she could work on social skills over the summer without school. Student would not regress because she would be able to return to school and socially participate. Student would not require an aide in a small group setting, or summer camp, because Student had always been successful in small group settings without an aide. She thought there were more natural community settings for Student to practice the skills learned in speech therapy, such as at play dates, special interest camps in small groups, or drama camp, where her social deficits might not be apparent.

36. Special education teacher, Ms. Notarnicola testified in support of the appropriateness of District's behavior intervention offer and the District team decision not to offer ESY services. Ms. Notarnicola held a Bachelor of Science degree in Special Education, a Master's degree in Reading, a Special Education Credential, a

Reading Specialist Credential in California, and a General Education Credential in New York. She worked as a general education teacher in New York for 13 years, and as a resource specialist for District for six years.

37. During the 2011-1012 school year, Ms. Notarnicola and Ms. Wilson co-taught Student's three period general education Humanities class, which included English Language Arts and the Ancient World. Student attended Ms. Notarnicola's homework club up to four times weekly. Ms. Notarnicola's classroom became Student's safe haven during nutrition and lunch after she was socially isolated from a group of girls she thought were her friends. Ms. Notarnicola observed that many students with IEPs come to her classroom to get away from the large and noisy comprehensive high school social environment.

38. Student performed in the average to high average level academically. Student was social, friendly and talkative in all settings. She was very comfortable socially in the classroom, during lunch and nutrition, and the homework club. Student's TSA stayed in the background, available for redirection and social skills facilitation. Student often used her TSA to consult with during conversations with peers. Ms. Notarnicola was on leave for three months during the school year, and observed Student's overall social and academic improvement upon her return. Ms. Notarnicola observed Student had become more independent.

39. Ms. Notarnicola did not believe Student needed a home behavior program. She did not believe Student needed ESY to avoid regression for either academics or social skills.

40. General education teacher Deborah Wilson testified in support of the appropriateness of District's behavior intervention offer in the November 2, 2011 IEP and the District's team decision not to offer ESY services in the June 7, 2012 IEP. She held a Master's degree in School Administration, an Administrative Services Credential, a Multiple Subject Credential K-12, an RSP Certificate, and a Certificate to

teach English Language Learners. Ms. Wilson was the general education teacher in Student's three period Humanities class. She and the RSP teacher, Ms. Notarnicola, worked together for two of the three periods. It was a collaboration "push-in class," for students that needed extra instruction. The two teachers were supported by an assistant and two TSAs, to help ensure the students remained on task and paid attention.

41. Academically, Student was one of her strongest pupils, and among the top five in her class. The only accommodation Student needed was more time on tests and assignments. Student had consistent off task behavior, as did the whole class. Student would gaze off once to twice during the three hour block class, and Ms. Wilson would have to touch her book, tap her finger on her desk to get her attention, or ask "are you with me?" Those cues were enough to return Student's attention to the lesson. Student's questions were on topic approximately 75 percent of the time. Student's TSA remained on the periphery, and Student had many exchanges with her. At the beginning of the school year, Student's TSA was instrumental in helping her understand the system in the Humanities class. Student became much better at organizing her class materials and became more independent.

42. Ms. Wilson observed Student having independent peer interactions. She would speak to those around her, and was comfortable talking to a group of girls. At the beginning of the school year, Student did not engage in a lot of interactions. However, by the second and third trimester, Student would say hello to her and they would have reciprocal communication with multiple exchanges. Ms. Wilson observed her TSA assist with peer interactions by organizing Student's instructional pods, or groups and rotating the groups. Ms. Wilson occasionally saw Student have melt-downs, and Student would use a hand gesture, talk with her TSA, and pull it back together. Student was a very positive role model and student. She

had her homework completed, had her book open, took notes, raised her hand to answer questions, and always treated others with respect. Ms. Wilson was in constant direct contact with Parents, and knew their support was strong and led to Student's academic success.

43. Ms. Wilson opined that Student did not require ESY for the summer 2012 because she was at grade level. Student was one of her top students, earning all A's with the support of the teacher and TSA, and was very capable and successful in the academic setting. Ms. Wilson opined that Student did not need a structured program over the summer to address her social and peer skills. In her opinion, it is a benefit for students not to have structured activities, but to enjoy a camp instead. She opined Student was in a good place, and was definitely able to pick back up where she left off, especially with her TSA support.

44. District school psychologist Emily Allen testified in support of the appropriateness of District's behavior intervention offer and its decision to not offer ESY services. She earned a Bachelor of Arts degree in Psychology, a Master's degree in School Psychology, and held a Pupil Personnel Services certificate. She was a Nationally Certified School Psychologist, and a California Licensed Educational Psychologist. She worked for the District for six years.

45. Ms. Allen assessed Student in the Fall of 2011, including four 44 minute testing sessions, two half-hour observations, interviews, and reviewed Student's records. Student completed the testing without the use of her TSA. She had a great attitude and was very friendly and positive. There were no behaviors which impeded her testing. Ms. Allen prepared a report of the test results. She included the results of the WIAT-III administered by Student's teachers.

46. Ms. Allen analyzed the results of the Woodcock-Johnson Tests of Cognitive Abilities, Third Edition (WJ-III). Student's overall cognitive performance was within the average range. Her processing fell in the average to above average range,

meaning her ability to learn and function in an academic setting was in the same range as her typical peers, as normed by the test. Student had three scores in the high average range, Auditory Processing at 88 percent, Working Memory at 90 percent, and Broad Attention at 82 percent. She was able to take in information presented orally, hold it in her memory long enough to manipulate it to her long term memory, and sustain a high degree of attention with selective focus on different aspects of a task and divide her attention between multiple parts. Student's cognitive efficiency and processing speed had greatly improved since her last school based assessments.

47. Ms. Allen reported Student was very functional, based upon the social-emotional interviews from Student, her Parents, and her teachers in a school setting. In the Broad Measures of Social Skills, she fell within the average range. Student reported being happy with the quality and number of friendships she had. Student described peer pressure and conflicts with friends. Ms. Allen reported Student's weakness was how to deal with peer pressure. Ms. Allen opined these were all age appropriate challenges for middle school. Ms. Allen opined that the Parents' adaptive skills rating scale was discrepant on the Social Skills Improvement System (SSIS), the Connors Rating Scale, Third Edition, the Adaptive Behavior Assessment System, Second Edition (ABAS-II) and the Gilliam Autism Rating Scale, Second Edition (GARS-2). The behavior Parents reported placed Student in the very low range, significantly lower than they reported before, and inconsistent with what the teachers had reported. Thus, Ms. Allen evaluated their scores with caution.

48. On the Developmental Neuropsychological Assessment, Second Edition, (NEPSY-II), Student scored in the borderline range at six to 10 percent on Theory of Mind. Ms. Allen compared Student's scores with those obtained by Mary Large in 2010, in which Student scored in the extremely low range, at less than the second percentile. The Theory of Mind subtest tested the ability to understand that

others may perceive things in a different way. Student's score was not unusual for students with Autism, and such scores are not expected to markedly improve. Student had developed compensatory social and communication skills to the point where she was almost indistinguishable from her peers. Student had adequate skills to continue progressing.

49. Overall, Student had some good skills, and some specific weaknesses, such as a low level of engagement with peers. However, she interacted well once the interactions were initiated. Student fell within the skill level of peers her age. Her social emotional weaknesses did not impact her learning any more than typical students her age.

50. Ms. Allen spoke highly of Ms. Cheng's professionalism and knowledge base on behavioral intervention issues. She has worked and consulted with her at several IEPs. Ms. Cheng has always been easily available, responsive, and easy to work with.

51. Ms. Allen opined that Student did not require ESY for academics to avoid regression. Although Ms. Allen did not attend the June IEP, she based her opinion on Student's cognitive function and her information processing skills being in the average to high average range. Additionally, Student's academic skills were within the average range, her progress in her classes was appropriate, and her progress toward her goals was appropriate. Ms. Allen opined that Student did not require ESY for social skills, based upon the assessment of social skills functions provided by parents and teachers, her observations, her records review, and the progress on her goals.

EVIDENCE CRITICAL OF DISTRICT'S OFFER OF A FAPE

52. Janet Yi testified in support of Student's NPA behavior intervention program through JBA. She was the Executive Director of JBA, the NPA which

provided Student's BCBA supervision. Ms. Yi earned a Bachelor of Arts degree in Psychology at UCLA. She worked with Dr. Lovaas and contributed to his Lovaas manual. She held a Master's degree in Applied Behavioral Analysis, and was a BCBA.

53. Ms. Yi assessed Student in 2008, and had recommended 10 to 15 hours per week of home programming per week, but could not recall how much supervision she recommended in her report. Ms. Yi believed the District's TSA for Student was very knowledgeable. Ms. Yi communicated with the TSA by telephone or e-mail. Ms. Yi was not Student's direct supervisor. Instead, Ms. Yi supervised Hilary Taylor, who was JBA's supervisor for Student. Ms. Taylor, communicated with the District personnel more often than with Ms. Yi. Ms. Yi understood that in the JBA home program, JBA was helping Student with homework. Although Ms. Yi believed Student's academics were part of her behavior needs, and that JBA addressed Student's behavior and speech issues during homework time, Ms. Yi acknowledged that the only goals JBA was required to work on under the IEP were for social and behavioral benchmarks, not academics.

54. Ms. Yi opined that socially, Student's year was difficult because of some isolating and teasing incidents. Ms. Taylor attended a lot of Parent meetings. She opined that middle school was hard on students, and that not being part of a group was difficult. Other students picked on Student because of her quirks, and Student questioned herself. This teasing made her feel socially isolated. It impacted her self-esteem, and she doubted her abilities. Student asked her TSA a lot of questions. Ms. Yi admitted that JBA required additional consultation hours because they were supervising Student's TSA, who was not JBA staff.

55. Ms. Taylor testified in support of her BICM supervision of Student. Ms. Taylor held a Bachelor of Arts degree in Psychology, and a Master's degree in Clinical Psychology with an emphasis in Marriage and Family Therapy. She was a licensed Marriage and Family Therapist. Ms. Taylor worked as the clinical director and

program supervisor at JBA.

56. For the last three years, Ms. Taylor supervised Student's behavior intervention program at school and at home. She looked at goals and created new goals. She monitored Student's behavior and analyzed data. Ms. Taylor monitored Student's behavior based on the goals. She directly supervised the TSA and consulted with her to manage behaviors, social difficulties, and various settings in the classroom. She observed Student's behaviors at school and provided supervision to District's TSA. She consulted with Student's teachers as needed. She attended IEP meetings. She attended team meetings with the home staff and the District's TSA monthly. Ms. Taylor supervised Student at school in the classroom and social settings, during instruction, nutrition and lunch. She visited the school at least once per week to work with the TSA or to support Student's musical theatre.

57. Parents used six hours per week from the home program so Student could have direct support in musical theatre. Ms. Taylor provided some direct support in the voluntary after-school drama class, which met three times per week. Student was able to be independent for most of the class, but needed support when she was rehearsing, joining groups, and marking the musical score. Ms. Taylor thought the after school drama teacher was too busy to answer questions or provide prompts. In that after school setting, Student was working on group imitation, and attending to other students. Ms. Taylor provided direct instruction and various strategies, such as asking her to look around her and do what her peers are doing. Ms. Taylor took data in musical theatre based on Student's social and behavioral goals. If Student had difficulty with those skills, they would go home and work on them in a one to one setting. She and the TSA worked on how to improve Student's motivation. They developed a point system for Student to attend to peers and not be so reliant on her TSA.

58. Behavioral goals 1, 2, and 8 were predominantly addressed in the

classroom in the school setting, and the after-school program as a group setting. Behavioral goals 3, 5, 6, 7, and 9 were predominantly addressed in the school setting and at home. Behavioral goal 4 was minimal.

59. Ms. Taylor's data summary showed that Student needed a high level of prompting from her TSA in most of her subjects. Her classroom challenges included missing teacher instructions, needing prompts to catch up, losing focus and difficulty attending, and gazing off in another direction. Student had difficulty taking in too much information at a time. She had difficulty when information was only presented auditorily. Student had difficulty with self- organization. Student's TSA reported to Ms. Taylor that Student needed considerable scaffolding and support, so test directions were explained to her. Student performed better with multiple choice answers than with longer answers, and she needed prompts to process her answers. Ms. Taylor opined that Student would not have achieved such good grades without the support of her TSA.

60. Ms. Taylor opined that Student's transition to middle school was difficult socially. In elementary school, Student's classes were smaller, and she made friends. In middle school, some other students were very savvy, and Student was very sweet and naive with a kind heart. She attempted to integrate with her typical peers, but did not notice their non-verbal cues. When one of Student's good friends from elementary school began to distance herself, Student was upset and worried. She didn't understand why her friend would not want to walk with her or go to science camp together. Student had a handful of friends from elementary school, and those friendships dissipated. Her TSA encouraged Student to join new groups. Student would also perform gymnastics and act silly. She couldn't understand why she was the only one performing cartwheels. Often, her TSA removed her from the classroom to help Student process her feelings. She helped her understand why students are sometimes nicer one day than the next, so they would not take

advantage of her. Student's counselor and assistant principal discussed options with Ms. Taylor, such as removing her from the large group setting to a smaller, more restrictive setting with students similar to her in Ms. Notarnicola's class. Student discovered she was more comfortable in that smaller setting. Those peers all knew her TSA and thought she was another teacher hanging out with them during lunch and nutrition. It was important to have support in place for Student.

61. Ms. Taylor opined Student needed support at home and at school during the 2011-2012 school year because she seemed to be struggling more socially and behaviorally. She opined Student required a home program of six hours per week to reinforce and maintain skills.

62. As to ESY 2012, Ms. Taylor provided her opinion about ESY services to Ms. Cheng prior to the June 2012 IEP. Ms. Taylor opined Student did well in a one-to-one setting, but still needed support in the school environment. Ms. Taylor opined that Student needed social opportunities and social support during the summer ESY. She understood ESY was intended to maintain skills and prevent regression.

63. Student's Neuropsychologist, Mary Large, Ph.D., wrote a report dated August 3, 2012. Dr. Large's report had never been presented at an IEP team meeting and she did not testify at hearing. Therefore, because she did not testify, and her report was generally not otherwise corroborated, the conclusions in her report were given little weight.

64. In her report, Dr. Large recommended that Student remain placed in general education with a full time aide with specific training and experience. She also recommended that Student's home and school behavior intervention program continue to remain supervised by JBA "as there did not appear to be a valid clinical reason to alter the structure of her program at this point." Dr. Large recommended that Student's current aide continue to work with her for the coming year to

minimize the potential for regression. She recommended a range of accommodations. Dr. Large recommended ongoing behavioral and therapeutic intervention outside of the school setting. Dr. Large suggested the Parents explore educational therapy for Student if she struggled.

65. Student's mother testified in support of her concerns that the District did not sufficiently discuss and consider the continuation of the behavior intervention services and ESY services at the levels negotiated in the prior settlement agreement. Mother opined that Student needed social opportunities after school and over the summer to maintain her skills and not regress. The ESY program she and Ms. Taylor envisioned was not academic, but instead, should have been something like the community based 'Camp VIP' Student had attended in the past with an aide. Parents believed that Student needed an aide for social support if she was going to attend a summer camp, specifically support with making friends, joining groups and understanding non-verbal cues from peers.

LEGAL CONCLUSIONS

1. District contends that it offered Student a FAPE in the IEP dated November 2, 2011, which was discussed again on June 7, 2012. The parties have stipulated to the appropriateness of the placement, services, goals, and accommodations and modifications in the IEP except for two areas: 1) the District's offer of a behavior aide in school only, with District supervision (Issue 1(a)); and 2) ESY was not offered for summer of 2012 (Issue 1(b)). Specifically, District contends the offered behavior services of a TSA for the entire school day, and behavior supervision four hours monthly by District's BCBA and BICM were a FAPE; and that Student did not require ESY services to receive a FAPE because Student would not lose skills over the summer break.

2. Parents disagree and contend that Student required a six hour per

week home program with all supervision by an NPA. As to ESY 2012, Parents contend Student required a specially designed ESY for social skills support and to avoid regression. Parents also contend that both IEP team meetings were procedurally flawed because District did not meaningfully considering the NPA BICM opinions and had predetermined the IEP.

APPLICABLE LAW

3. As the petitioning party, District has the burden of proving the essential elements of her respective claims. (See *Schaffer v. Weast* (2005) 546 U.S. 49, 56-57 [126 S.Ct. 528,163 L.Ed.2d 387].)

4. Under the IDEA and state law, children with disabilities have the right to a FAPE. (20 U.S.C. § 1400(a); 34 C.F.R. § 300.101 (2006); Ed. Code, § 56000.) A FAPE means special education and related services that are available to the special needs pupil at no charge to the parents, that meet state educational standards, and that conform to the child's IEP. (20 U.S.C. § 1401(a)(9); 34 C.F.R. § 300.17 (2006); Cal. Code Regs., tit. 5, § 3001, subd. (p).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(a)(29); 34 C.F.R. § 300.39 (2006); Ed. Code, § 56031, subd. (a).) Specially designed instruction includes accommodations that address a child's unique needs and that ensure access to the general curriculum. (34 C.F.R. § 300.39(b)(3) (2006).)

5. "Related services" are developmental, corrective and supportive services which are required to assist a special needs pupil to benefit from special education. Related services include social work services in schools preparing a social or developmental history on the student; group or individual counseling with the child and family; partnering with parents and others on the problems in a child's living situation at home, school and community that affects the student's adjustment in school; mobilizing school and community resources to enable the child to learn

effectively; and assisting in the development of positive behavioral intervention strategies. (20 U.S.C. § 1401(a)(26); 34 C.F.R. § 300.34(a), (c)(14)(i) – (iv), (2006); Ed. Code, § 56363, subd. (a) [In California, related services are called designated instruction and services].)

6. Behavioral intervention includes positive programming for the elimination of maladaptive behaviors. Special education teachers require training in behavior intervention so that adequately trained staff are available to work effectively with the student's behavioral intervention needs. (Ed. Code, § 56520, subds. (a) & (b).) A BCBA may be the BICM, and may conduct behavior assessments and provide behavior intervention services. However, the case manager does not have to be a BCBA. (Ed. Code, § 56525, subds. (a) & (b).) A district shall use non-public agencies to provide a student with special education or designated instruction and services if no appropriate public education program is available. (Ed. Code, § 56365, subd. (a).)

7. In addition to special education instruction and services during the regular school year, ESY services must be provided if the IEP team determines, on an individual basis, that the services are necessary for a child to receive a FAPE. (34 C.F.R. § 300.106 (2006); Ed. Code, § 56345, subd. (b)(3).) California Code of Regulations, Title 5, section 3043, provides that ESY services shall be provided for each individual with unique and exceptional needs who requires special education and related services in excess of the regular academic year. Pupils to whom ESY services must be offered under section 3043 ". . . shall have handicaps which are likely to continue indefinitely or for a prolonged period, and interruption of the pupil's educational programming may cause regression, when coupled with limited recoupment capacity, rendering it impossible or unlikely that the pupil will attain the level of self-sufficiency and independence that would otherwise be expected in view of his or her handicapping condition." (See also 34. C.F.R. § 300.106 (2006); Ed. Code,

§ 56345, subd. (b)(3).)

8. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 200 [102 S.Ct. 3034, 73 L.Ed.2d 690] ("*Rowley*"), the United States Supreme Court addressed the level of instruction and services that must be provided to a pupil with a disability to satisfy the requirements of the IDEA. The Court determined that a student's IEP must be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not require school districts to provide the student with the best education available or to provide instruction or services that maximize a student's abilities. (*Id.* at pp. 198-200.) The Court stated that school districts are required to provide a "basic floor of opportunity" that consists of access to specialized instruction and related services that are individually designed to provide educational benefit to the student. (*Id.* at p. 201; *J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 951, fn.10.)

9. In resolving the question of whether a school district has offered a FAPE, the focus is on the adequacy of the school district's proposed program. (See *Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) Nor must an IEP conform to a parent's wishes in order to be sufficient or appropriate. (*Shaw v. Dist. of Columbia* (D.D.C. 2002) 238 F.Supp.2d 127, 139.) For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, the offer of educational services and placement must be designed to meet the student's unique needs and be reasonably calculated to provide some educational benefit in the least restrictive environment. (*Ibid.*)

10. No one test exists for measuring the adequacy of educational benefits conferred under an IEP. (*Rowley, supra*, 458 U.S. at pp. 202, 203 & fn. 25.) To determine whether a pupil was denied a FAPE, an IEP must be examined in light of

the information available to the IEP team at the time it was developed. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149; *Roland M. v. Concord School Comm.* (1st Cir. 1990) 910 F.2d 983, 992.) "An IEP is a snapshot, not a retrospective." (*Adams, supra*, at p. 1149, citing *Fuhrman v. East Hanover Board. of Education* (3rd Cir. 1993) 93 F.2d 1031, 1041.) The offer of FAPE must be objectively reasonable at the time it was developed, not in hindsight. *Ibid.*)

11. To comply with the procedural requirements of the IDEA and state law in the development of the pupil's IEP, school districts must include parents in the development of the IEP. (20 U.S.C. § 1414 (d)(1)(B)(i); 34 C.F.R. § 300.322 (2006); Ed. Code, §§ 56341, subd. (b)(1), 56342.5; *Winkelman v. Parma City School Dist.* (2007) 550 U.S. 516, 524-525 [127 S.Ct. 1994, 2000-2001; 167 L.Ed. 2d 904]; [parents must be part of any group that makes placement decisions].) 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.)

12. Parents must be given advance notification of the meeting, including the purpose, time, location and who will be in attendance, early enough to ensure an opportunity to attend. The IEP notice must also inform the parents that they may invite other individuals on the IEP team who have special knowledge or special expertise about the child. (34 C.F.R. § 300.322 (2006); Ed. Code, § 56341.5.) Parents must be provided a notice of procedural safeguards. (Ed. Code, § 56500.1.) School district IEP teams are required to include Student's representative or parent; a regular education teacher if a pupil is, or may be, participating in regular education; a special education teacher; a representative of the school district who is qualified to provide or supervise specially designed instruction, is knowledgeable about the general education curriculum and is knowledgeable about the available resources; a

person who can interpret the instructional implication of assessment results; and other individuals, including the person with special needs, where appropriate. (34 C.F.R. §§ 300.321(a)(5),(6) (2006); Ed. Code, § 56341, subd. (b).)

13. School districts cannot predetermine a pupil's placement prior to the IEP team meeting and without parental involvement in developing the IEP. (*Target Range, supra*, 960 F.2d at p. 1481, 1484; *Deal v. Hamilton County Board of Educ.* (6th Cir. 2004) 392 F.3d 840, 857-859; *Board of Educ. of Township High School Dist. No. 211 v. Lindsey Ross* (7th Cir. 2007) 486 F.3d 267, 274-275.) A school district may arrive at an IEP team meeting with a pre-written offer, but may not take a "take it or leave it" position. (*J.G. v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801, fn. 10, citing *Ms. S v. Vashon Island School Dist.* (9th Cir. 2003) 337 F.3d 1115, 1131.) School district staff may meet beforehand to prepare goals and objectives and can provide a written offer before parents have agreed to it. (*Doyle v. Arlington County School Board* (E.D. Va. 1992) 806 F.Supp.1253, 1262.)

14. 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).) The IEP must include a statement of the present performance of the pupil, a statement of measurable annual goals designed to meet the pupil's needs that result from the disability, a description of the manner in which progress of the pupil 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) (2006); Ed. Code, § 56345, subds. (a)(2) & (3).) The IEP also must include a statement of the program modifications or supports

for school personnel that will be provided to the pupil to allow the pupil to advance appropriately toward attaining the annual goals; be involved and make progress in the general education curriculum and to participate in extracurricular activities and other nonacademic activities; and be educated and participate in activities with other children with disabilities and nondisabled children. (34 C.F.R. § 300.320(a)(4)(i), (ii), (iii) (2006); Ed. Code, § 56345, subds. (a)(4)(A), & (B).) Only the information set forth in title 20 United States Code section 1414(d)(1)(A)(i) must be included in the IEP and the required information need only be set forth once. (20 U.S.C. § 1414(d)(1)(A)(ii); 34 C.F.R. § 300.320(d) (2006); Ed. Code, § 56345, subds. (h) & (i).)

15. The IEP team shall consider the parent concerns, assessments, and the student's academic, developmental and functional needs; positive behavioral interventions supports and strategies to address that behavior; and whether the student needs particular services, interventions, accommodations or modifications. (Ed. Code, § 56341.1, subds. (a), (b) & (c).)

16. A District may file a complaint to determine whether its IEP offer was appropriate. (Ed. Code, § 56346, subd. (f).) When a school district seeks to prove that it provided a FAPE to a particular student, it must also show that it complied with the procedural requirements under the IDEA. (*Rowley, supra*, 458 U.S. at pp. 200, 203-204, 206-207.)

Analysis of Issue 1(a) - Behavior Services

17. District met its burden of proving that it conducted a procedurally proper IEP with Parents on November 2, 2011. Parents were given advance notice of the meetings. District's IEP notice ensured parents had an opportunity to attend the IEP, to know the purpose, time and location of the meeting, and to know who would be in attendance. The IEP notice also informed the parents that they could invite other individuals on the IEP team who have special knowledge or special expertise

about the child. (Factual Finding 3; Legal Conclusions 3-4, and 11-12.)

18. All necessary and knowledgeable members were present at the IEP meetings: Parents, Student's preferred direct BICM providers from the NPA, a general education teacher, a special education teacher, the District psychologist, the District speech pathologist, the District occupational therapist, the District behaviorist, and an administrator. The individuals who conducted the assessments were qualified and knowledgeable about assessment procedures and to interpret the results. (Factual Finding 4; Legal Conclusions 3-4, and 11-12.)

19. The IEP document was also procedurally proper. The IEP contained a statement of Student's present levels of performance, measurable annual goals designed to meet her needs, the manner her progress would be measured, the specific services to be provided, all necessary accommodations and modifications, a general statement that the goals would enable Student to participate in general educational programs, and the projected initiation date and frequency and duration of all instruction and services. (Factual Findings 5-17; Legal Conclusions 3-4, and 14.)

20. To the extent Parents contend the IEP was improper because it did not specifically identify Ms. Cheng as the District employee providing behavior intervention supervision or information about her qualifications, this was not required. Moreover, the evidence at hearing showed that at all times Ms. Cheng was identified to Parents as the District behavior supervisor who would be working with Student, and that Ms. Cheng was very well-qualified to do so. (Factual Finding 16; Legal Conclusions 3-4, and 14.)

21. Contrary to Parent's contention that the IEP content was predetermined, District met its burden of establishing it held a meaningful IEP with participation from Parents. District did not predetermine its offer of services on the basis that the team had created draft goals for Parents to review in advance. These preparatory activities and discussions of Student's program were for the purpose of

conducting a full discussion with Parents at the IEP team meeting. Significantly, the draft goals and objectives developed prior to the IEP team meeting were revised at the IEP meeting, based on Ms. Taylor's input. At the meeting, Parents were informed of Student's problems. Parents attended the IEP meeting and at the meeting their preferred provider's assessments and input were used to develop present levels and goals, Parents expressed disagreement regarding the IEP team's conclusions, and Parents requested revisions to that IEP. The IEP notes expressed Parents' concerns and input, the final, typed IEP document was mailed to Parents within a week of the meeting, and District and Parents continued to correspond about Parents' concerns after the meeting. (Factual Findings 3, 5-17; Legal Conclusions 3-4, 11, and 13-15.)

22. Based on the above, the overwhelming weight of the evidence showed that the IEP team relied heavily on Student's NPA BICM to develop her IEP, her goals, and her services, and her placement options. These discussions were comprehensive. The District did not have to utilize an NPA BICM when it has its own qualified BICM available. The IEP team did not have to provide the program preferred by parent in order to demonstrate parental participation and there was no evidence supporting a finding of predetermination. (Factual Findings 3, and 5-17; Legal Conclusions 3-6, 11, and 13-15.)

23. Further, District proved by a preponderance of the evidence that the frequency, duration, and choice of provider of behavior intervention services were appropriate and offered Student a FAPE, as will be discussed below.

24. District's offer of behavioral intervention included positive programming for the elimination of maladaptive behaviors for the entire school day, with a TSA, supervised by a District BCBA four hours monthly. The evidence showed that District's offer of supervision by District personnel was appropriate within the meaning of *Rowley*. District's BCBA, Ms. Cheng, was very well qualified to implement the supervision given her credentials as a BCBA, such that the offer was reasonably

calculated to provide some educational benefit. Ms. Cheng was a credible witness who testified in a forthright and logical manner. She explained the process of collecting and analyzing behavior intervention data, and based her opinions upon the results of the data. She persuasively testified that she was qualified and available to provide BICM services to Student. Finally, at the IEP and at hearing, neither Ms. Taylor nor Ms. Yi, the NPA providers, had any criticism of Ms. Cheng's experience and qualifications to serve as Student's BICM. The District did not have to use JPA, Parents preferred NPA provider, to supervise the behavior services, because District could implement the IEP with its own qualified personnel. (Factual Findings 15-17, and 27-32; Legal Conclusions 3-6, and 8-10.)

25. As to the frequency and duration of behavior services, District met its burden of showing that its offer of behavioral services in the form of a full time aide for the entire school day, with four hours per month of District BICM supervision, was appropriate to meet Student's unique needs and was reasonably calculated to provide some educational benefit. The IEP notes and credible witness testimony of the District witnesses Ms. Cheng, Ms. Allen, Ms. Notarnicola, and Ms. Wilson, convincingly established that Student could work on all nine behavioral goals during the school day with her TSA, based on extensive input from her assessments, the review of data taken by Ms. Taylor, and her progress in the school setting. While Ms. Taylor explained the nine behavioral goals were worked on at school, and that the remaining home program hours were used for homework and during the after-school drama program. Ms. Allen's persuasive testimony established Student's ability to learn and function in the academic setting was in the same range as her peers. Student's weaknesses were in dealing with peer pressure and conflicts with friends, which were age appropriate challenges for middle school. Ms. Cheng established that Student's difficulty was in generalizing and implementing social strategies during interactions with peers. Ms. Cheng convincingly established that none of

Student's nine behavioral goals needed to be worked on at home, as she needed to practice her skills at school, and display them in the school setting. Students' humanities teachers both convincingly attested to Student performing in the average to high average academically, and being social, friendly and talkative in the three period classroom, nutrition, brunch and homework club. Student's off task behavior in the classroom was sufficiently addressed by her TSA and strategic cues. Ms. Cheng's estimate that four hours of behavior supervision was sufficient was based upon input from Ms. Taylor. Additionally, Ms. Cheng convincingly established that if Student required more hours of supervision, she would provide the additional time needed. (Factual Findings 5-8, 10-12, 15-17, 27-32, and 36-51; Legal Conclusions 3-6, 8-10, and 14-16.)

26. Ms. Taylor and Student's mother expressed a preference for the continuation of the terms of the settlement agreement, which provided the additional TSA for voluntary use at an after school drama club and for homework. However, the evidence overwhelmingly established that all nine behavior goals could be successfully achieved in the school setting, during school hours, with the full time support of Student's TSA. To the extent Parents contend that the report from Neuropsychologist Dr. Large demonstrated that the District did not offer a FAPE, their reliance is misplaced. Dr. Large's report was never presented to the IEP team at any time, and was written after the instant due process hearing request was already on file. District cannot be faulted for not factoring information it did not have. Moreover, the contents of the report were not persuasive. Dr. Large did not testify at hearing, and her opinions in her report were uncorroborated hearsay. More importantly, the main opinion, that "there did not appear to be a valid clinical reason to alter the structure of her program at this point" was not established to have been a persuasive opinion about what Student required to obtain a FAPE. (Factual Findings 55-61, and 63-65; Legal Conclusions 3-5, 8-10, and 15-16.)

27. In sum, District met its burden of demonstrating by a preponderance of the evidence that the November 2, 2011 IEP was procedurally proper and offered Student a FAPE.

Analysis of Issue 1(b) – ESY 2012

28. District met its burden of proving that it conducted a procedurally proper IEP addendum meeting with Parents on June 7, 2012. Parents were given advance notice of the meetings. District's IEP notice ensured parents had an opportunity to attend the IEP, to know the purpose, time and location of the meeting, and to know who would be in attendance. The IEP notice also informed the parents that they could invite other individuals on the IEP team who have special knowledge or special expertise about the child. All the necessary and knowledgeable members were present at the IEP meetings: Parents, Student's preferred direct BICM provider from the NPA, a general education teacher, a special education teacher, the District psychologist, the District speech pathologist, and the District behaviorist, and an administrator. (Factual Findings 19-20; Legal Conclusions 3-5, 7, 11-12, and 16)

29. District met its burden of establishing that Parents had an opportunity to, and did, meaningfully participate in the IEP team's consideration of ESY. Parents attended the IEP meeting, their preferred provider provided updated information, they expressed disagreement regarding the IEP team's conclusions, and they requested revisions to that IEP. There was no evidence that the District came in with a take-it-or-leave-it offer, and instead, the evidence showed that Parent input and provider input was considered by the District members of the IEP in coming to their recommendations. The IEP notes expressed Parents concerns, input, and objections. (Factual Findings 20-26; Legal Conclusions 3, 7, 11-13, and 15-16.)

30. District established by the preponderance of the evidence it substantively provided Student a FAPE when it did not offer an appropriate ESY

program for summer 2012. Ms. Notarnicola and Ms. Wilson, Student's special and general education teachers, as well as Ms. Webb, her speech therapist, and Ms. Allen, the school psychologist persuasively testified that Student's academic and social skills would not significantly regress if she did not attend ESY. Ms. Webb did not recommend Student for 2012 ESY because she was at a level where she could work on her speech and socialization goals without school, could return to school and could socially participate. Ms. Webb did not believe Student would require an aide in a small group setting or summer camp, because she was successful in Ms. Webb's social groups without an aide. Both Ms. Notarnicola and Ms. Wilson persuasively established Student was a strong student, was at grade level, and achieving A's with the support of her teachers and TSA aide. Student's gpa of 3.91, and her class standing of 97 among 457 students, was consistent with her standardized assessments and CMA results. Both Ms. Notarnicola and Ms. Wilson established that Student was comfortable socially in their three period humanities class, nutrition, lunch, and homework club. Student had independent peer interactions. Student's TSA provided intermittent social support when needed. Finally, Ms. Allen persuasively established that Student cognitive function and processing skills were in the average to high average range, her academic skills were within the average range, her progress in class was appropriate, and her progress toward her goals was appropriate. Student did not require ESY for social skills, based upon the social skills function assessments provided by parents, teachers, observations, records review, and her progress on her goals. (Factual Findings 24-26, and 33-51; Legal Conclusions 3-5, 7-10, and 16.)

31. Parents and Ms. Taylor testified they wanted District to provide Student with an aide to attend an extracurricular camp, not to attend summer school. Parents conceded Student did not require a traditional ESY program. To the extent Parents and Ms. Taylor believed ESY was necessary solely to provide social

opportunities and to maintain social skills, it was persuasively established that Student's social skills at school were at a level where she would not regress without ESY. District proved by a preponderance of the evidence that an interruption of Student's educational program over the summer of 2012 would not cause regression. (Factual Findings 23-26, 33-51, 55-21, and 65; Legal Conclusions 3-5, 7-10, and 16.)

ORDER

1. District offered Student a FAPE in the IEPs dated November 2, 2011 and June 7, 2012.
2. District may implement the November 2, 2011 and June 7, 2012 IEPs without Parents' consent.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. District prevailed on both issues presented.

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by this Decision. Pursuant to Education Code section 56505, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within 90 days of receipt.

Dated: November 8, 2012

/s/

DEBORAH MYERS-CREGAR
Administrative Law Judge
Office of Administrative Hearings