

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

NEWPORT-MESA UNIFIED SCHOOL
DISTRICT.

OAH Case No. 2012050785

DECISION

Parents on behalf of Student (collectively referred to here as Student) filed a due process hearing request (complaint) with the Office of Administrative Hearings (OAH), State of California, on May 17, 2012, naming the Newport-Mesa Unified School District (District). On May 9, 2013, the parties filed a stipulated motion to amend Student's complaint. On May 9, 2013, OAH granted the motion to amend and granted for good cause the parties' motion to continue the hearing to specific dates they requested.

Administrative Law Judge (ALJ) Darrell Lepkowsky heard this matter in Costa Mesa, California, on October 15-17, and 21-24, 2013.

Kathleen M. Loyer, Attorney at Law, represented Student and his parents. Student's mother and father were present for every day of the hearing. Student was present for one afternoon.

Alefia Mithaiwala, Attorney at Law, represented the District. Maureen Cottrell, the District's Director of Special Education, attended the hearing every day on behalf of the District.

One of two interpreters was present every day of the hearing to interpret from English to Brazilian Portuguese and Brazilian Portuguese to English for Mother.

The ALJ granted a continuance for the parties to file written closing briefs and the record remained open until November 18, 2013. Upon timely receipt of the written closing briefs, the ALJ closed the record and the matter was submitted for decision.¹

¹ On December 9, 2013, the District filed a motion to strike a portion of Student's brief because it cited to an article that the ALJ had declined to admit into evidence. The District simultaneously filed a motion for sanctions against Student. Student filed an opposition to the motions on December 13, 2013. The District filed a reply on December 16, 2013. Because the article was not admitted into evidence, the District's motion to strike is granted.

The District's motion for sanctions is denied. The District has failed to show that Student's action in referencing the article was for the sole purpose of harassing the District or delaying the procedures in this case.

ISSUES²

² Student's amended complaint included an additional issue: whether the District denied Student a FAPE by failing to include Parents in developing the District's 2013 functional behavior assessment, sensory diet development, and evaluation to determine Student's need for an in-class aide. However, Student did not include this issue in his pre-hearing conference statement. The issue was not discussed at the prehearing conference held on October 11, 2013, and the ALJ did not include the issue in her prehearing conference order issued on October 11, 2013. On October 14, 2013, Student filed two motions to correct the prehearing conference order. Both motions addressed only requests to include additional IEP meetings that had been referenced in Student's amended complaint as issues for hearing. Neither motion referenced any issue involving lack of parent involvement in the District's 2013 assessments. The ALJ amended her prehearing conference order, and, at the beginning of the hearing, clarified all the IEP dates at issue in this case. Student at no time clarified that he still intended to raise separate allegations concerning Parents' alleged lack of involvement in the assessment process. For these reasons, this Decision does not address as a separate issue whether the District failed to include Parents in the development of its 2013 assessments.

Additionally, although Student sought to include his April 15, 2010 IEP addendum as an issue for hearing, that IEP was not referenced in his original or amended complaints, which specifically define the issues as occurring on or after May 16, 2010. Nor did Student allege any issues regarding his April 15, 2010 IEP in his prehearing conference statement. Additionally, the April 15, 2010 IEP is outside of the applicable statute of limitations in this case. Both federal and state laws contain a two year statute of limitations for special education administrative actions. (20 U.S.C. § 1415(b)(6)(B); 34 C.F.R. § 300.507(a)(2)(2006); Ed. Code, § 56505, subd. (l).) Special education law does not

1. Since May 16, 2010, did the District deprive Student of a free appropriate public education (FAPE) when it failed to appropriately assess Student in all areas of suspected disability, specifically in the areas of cognitive ability, functional communications, assistive technology, social integration, and behavioral analysis?

2. Did the District fail to provide Student a FAPE at the individualized education program (IEP) meetings of May 21, 2010; June 21, 2010; November 23, 2010; February 4, 2011, March 8, 2011, April 19, 2011, February 29, 2012, January 23, 2013, and May 2, 2013, by:

- a. Failing to address all of Student's unique needs;
- b. Failing to adopt appropriate goals; and
- c. Failing to provide appropriate placement and services in the areas of behavioral support, speech and language, parental training, occupational therapy, and assistive technology?

3. Since May 16, 2010, did the District deprive Student of a FAPE when it failed to have "highly qualified" staff to assess and provide services to Student in the areas of behavior intervention, inclusion, assistive technology, and individual aide support?

4. Did the District fail to conduct an appropriate Functional Behavior Analysis (FBA) and Sensory Diet Development Evaluation in May 2013 to determine Student's need for aide assistance, which resulted in the IEP team adopting a less than adequate Behavior Support Plan, Behavior Intervention Plan, and inappropriate aide support?

recognize the doctrine of continuing violations as an exception to the two year statute of limitations. (*J.L. v. Ambridge Area School Dist.* (W.D.Pa. 2008) 622 F.Supp.2d 257, 268-269; 71 Fed.Reg. 46697 (Aug. 13, 2006).) This Decision will therefore not address the merits of any IEP developed before May 17, 2010.

SUMMARY OF DECISION

Student in this case is a child with autism who also suffers cognitive and communication delays. As of the hearing in this matter, Student was mostly non-verbal. He communicates through a picture exchange communication system, signs, gestures, his eyes, and pulling people toward what he wants. Student recently has started learning to use a small electronic tablet called an iTouch to communicate.

The crux of this case is whether Student's acknowledged slow progress is due to his disabilities that do not permit him to progress at a more rapid rate, or due to failures by the District to adequately assess Student and address all of Student's unique needs. Student contends that the District has failed timely to assess him in all areas of suspected disability and that those assessments³ that were finally done were either improperly developed or failed to address all of Student's deficits. Student also contends that the IEP's at issue in this case, which cover approximately three years, failed to contain appropriate goals, provide him with an appropriate placement, or offer him the intensive related services Student needs in order to benefit from his education. Student believes that his progress would have been more significant had the District not failed in these areas.

The District responds that it timely and appropriately assessed Student in all areas of suspected disability. The District acknowledges that Student demonstrates significant challenges which have resulted in him only being capable of making very slow progress. The District argues that Student's progress is the result of his inherent deficits and that his capacity to progress was not hampered by lack of appropriate assessments, placement, or services. The District contends that all IEP's it offered

³ The term "assessment" is used in California law. Federal law uses the term "evaluation." The parties use the terms interchangeably. This Decision does likewise.

Student were reasonably calculated to provide Student with meaningful educational benefit based on the information known to it at the time. Therefore, the District provided Student with a FAPEat all times relevant to this case.

This Decision finds that Student has failed to meet his burden of proof that the goals, placement, and most services in his IEP's were legally inadequate. This Decision also finds that Student has failed to show that the District's assessments were improper or that District staff was not appropriately trained to provide him with instruction or services. This Decision further finds that the District did not fail to appropriately assess or address Student's needs in the area of functional behavior. However, this Decision does find that Student has demonstrated by a preponderance of the evidence that the District should have assessed him earlier than spring 2013 in the area of assistive technology⁴ and should have provided him with an electronic assistive technology device and assistive technology services approximately a year before it first did so. Therefore, this Decision orders certain remedies, described below, to compensate Student for this.

FACTUAL FINDINGS

JURISDICTION AND BACKGROUND INFORMATION

1. Student is a little boy who is presently seven-and-a-half years old. He has attended school within the District since preschool. Student and his parents live within the boundaries of the District. He is a loving and sweet child who presently qualifies for special education and related services under the eligibility categories of autistic-like behaviors, speech and language impairment, and intellectual disability.

⁴ The terms "augmentative communication" and "assistive technology" were used interchangeably by the parties. The terms are also used interchangeably in this Decision.

2. Student is mostly non-verbal. He can presently only vocalize a few sounds that do not amount to words or parts of words. Until recently, Student communicated primarily through a picture exchange system; a few hand signs, which are not necessarily recognized from a formal system of sign language; through gestures and eye contact; and through guiding someone by hand to what Student wants or needs. Since late 2011 or early 2012, Student has been learning to use an electronic tablet. He first began using an iPad at home. Later, he used it at school as a positive reinforcer for completing required tasks. In mid-2013, the District implemented with Student the use of a smaller electronic tablet called an iTouch as an assistive technology device for augmentative communication. As discussed below, Student has slowly begun to use this device for functional communication.

3. Student also has been diagnosed with an intellectual disability. Student's cognitive deficits, combined with his autism, and his challenges in communication, have gravely impacted Student's ability to progress academically. Student either cannot retain information or does not find retention of information to be meaningful to him. This has resulted in Student's inability to repeat correctly tasks and responses, sometimes from week to week, sometimes from day to day, and sometimes even within the same instructional time frame. Student has only made a month to a few months of progress each school year.

4. Yet, Student is aware of his surroundings and the people around him. He is generally compliant and often responds not only to his name, but also to specific directives to do things or to move to other activities. He does not leave the instructional setting or run away even if he does not prefer a task. Student can sit for upwards of 15 minutes at a time. In spite of his communication issues, Student does not presently have aggressive behaviors that impair his functioning. He enjoys playing with toys and with his iPad. Although Student can become frustrated and lose his calm, he does not

engage in behaviors that are harmful to him or others or that impedes the ability of his peers to access their education.

5. Student has received in-home applied behavioral analysis (ABA) therapy from private providers since age two. Student has consistently received at least 10 hours of services a week. The therapy was funded initially by the local Regional Center. Student has had two or three different private providers. A non-public agency, called ACES, provided therapy for several years. In June 2012, the Regional Center ceased funding the therapy, directing instead that Parents use their medical insurance as the funding source. Parents' insurance company has funded Student's therapy since then, but Parents are required to pay significant co-pays and deductibles. The present non-public agency serving Student is Nyansa. None of the people who have provided or now provide in-home services to Student testified at the hearing in this matter. There is no evidence about the progress Student may have made in the programs or where he had his greatest deficits or challenges.

6. The District developed its first IEP for Student in February 2009, just before Student turned three-years-old. At the time, Student's eligibility for special education was under the category of autistic-like characteristics. Student's developmental level at the time was in the six to nine month range.

7. The statutory period covering this case begins on or about May 17, 2010, two years prior to the date Student filed his original complaint. Student's operative IEP at the time was dated February 9, 2010. Student was ending his first year of preschool at the District's Harper Preschool. This IEP included placement in a special day class with an embedded ABA focus. The class lasted five hours and 15 minutes a day. Student also received two, 30-minute group based speech and language therapy sessions per week, one, 45-minute group occupational therapy session a week, and one, 30-minute session

per week of individual occupational therapy. Student was also offered two sessions of extended school year instruction.

8. The February 9, 2010 IEP included several goals. These consisted of two goals in the area of academic readiness; two goals for self-help to address Student's toileting issues; three behavior goals; two goals to address Student's social/emotional needs; four speech and language goals; two fine motor goals; and two sensory processing goals. Each goal described Student's progress toward his prior goals, determined Student's present levels of performance, and Student's need for the goal. Each goal is measurable. Each goal addressed Student's known needs at the time.

MAY 21, 2010 IEP

9. On May 21, 2010, the District convened an IEP meeting at Parents' request to discuss Student's speech and occupational therapy needs. Parents believed Student required more individual therapy and more coordination between the school and the in-home ABA providers then funded by the Regional Center. In addition to Father, the IEP team participants were Maureen Cottrell, who was then the Principal at Harper Preschool and is now the District's Director of Special Education; occupational therapist Jennie Ni; speech and language pathologists Lucinda Bottorf and Melissa Wiley; and Student's special education teacher Donna Manea.

10. Ms. Ni testified at the hearing. As of the hearing, she had worked with Student for over three years. She was involved in many of his prior IEP's. Ms. Ni has a master's degree in occupational therapy, has national board certification, and has been working in her profession for over 12 years. She worked first for private agencies before joining the District. She has worked with school districts since 2005. Up to 70 percent of her work is with children on the autism spectrum. Ms. Ni has worked with preschool-aged and elementary school-aged children her entire career.

11. Based upon Parents' concerns that Student was not progressing in his occupational therapy goals, Ms. Ni made several suggestions to the IEP team. She suggested modifying Student's pre-writing goal to include different materials to use in helping him write letters because the initial goal was proving too difficult for him. She also agreed with Parents that it would be beneficial to increase Student's occupational therapy. The team ultimately added an additional 10 minutes a week of therapy, for a total of 40 minutes. Because of Student's short attention span, Ms. Ni suggested breaking the therapy into two, 20-minute sessions. Ms. Ni did not believe that more than 10 minutes additional therapy was warranted because focus on fine motor skills was embedded in Student's preschool program. The IEP team, including Parents, agreed to these modifications.

12. Parents were disappointed by Student's failure to develop verbal communication skills. Their main concern was, and consistently has been, that Student learns to speak. To address Parents' concerns, the IEP team reviewed Student's speech goals and discussed the foundational skills that underlie speech. Ms. Wiley and Ms. Bottorf, the speech therapists at the meeting, discussed that the goal was to establish communicative intent for Student. Ms. Bottorf testified at the hearing. She informed that Ms. Wiley suggested changing one of Student's 30-minute group speech therapy sessions to two, 15-minute individual sessions per week. The shorter sessions were to address Student's short attention span. The individualized sessions were to see if Student would show greater progress working in a one-on-one setting. The therapists believed that additional sessions were not warranted because Student's speech goals were targeted throughout his day in his special day class. Additionally, the classroom was designed to be a language-rich environment to address the needs of the entire class, all of whom were on the autism spectrum.

13. The District team members did not consider any augmentative communication devices at this time because Student already was using gestures, pointing, and picture symbols. The District believed that Student was not yet demonstrating the foundational skills necessary to use higher level technology to communicate.

14. Other than his parents, the only non-District witnesses who testified on Student's behalf were Dr. Elizabeth Hughes and Cynthia Cottier. Dr. Hughes is a psychologist who was part of a team that conducted an independent educational evaluation of Student, funded by his parents, in the area of functional behavior. Dr. Hughes does not have training or experience as an occupational therapist or speech pathologist. Her team's report briefly addressed speech and occupational issues but only in a cursory fashion. Nor did Dr. Hughes's testimony at hearing specifically address any of the District's offers of speech or occupational therapy in the IEP's at issue in this case. Dr. Hughes therefore offered no evidence to support Student's contention that goals and services the District offered Student in speech or occupational therapy during the years at issue in this case were inappropriate or inadequate.

15. Ms. Cottier is a speech and language pathologist who has a master's degree in speech pathology as well as a second master's degree in special education. She has practiced as a speech pathologist since 1980. She initially worked for a public school district as a speech pathologist and as the coordinator of an assistive technology program. Since 1993, Ms. Cottier has been in private practice and heads a non-public agency. Her private practice focuses on augmentative communication and assistive technology for special education students. Ms. Cottier testified at hearing on behalf of Student. Based on her experience, training, and clear and unequivocal answers to questions at hearing, Ms. Cottier was a persuasive witness.

16. However, Ms. Cottier only administered an augmentative communication evaluation to Student. She was not asked to administer any standardized speech assessments to him. She did not review any of Student's prior speech assessments. Although Ms. Cottier has significant expertise in the area of speech pathology, during the hearing, Student did not ask her to address any of Student's speech goals or the type and/or frequency of speech therapy the District provided to him over the last three years.

17. Student therefore provided no evidence to contradict the testimony of Ms. Ni and Ms. Bottorf that the District modification of occupational therapy and speech therapy services to Student at the May 21, 2010 IEP meeting were sufficient to meet his needs based on the information known to the District at the time. Student provided no evidence to contradict the testimony of all District witnesses that the goals and services provided for Student in each IEP at issue in this case were appropriate and met Student's needs.

18. Donna Manea was Student's preschool teacher during the 2009-2010 school year when Student attended the Harper Preschool. Her classroom was a moderate to severe special day class. Ms. Manea has a master's degree in education. She is credentialed to teach autistic children. Prior to becoming a teacher, she was an ABA therapist for a different school district. After being hired by the District, Ms. Manea received an eight-week training from a non-public ABA agency under contract with the District. Her training included how to take data, classroom management, parent communication, lesson planning, and specifically how to teach autistic children. It is the same training the District provides to its entire staff who work with autistic children. All staff also receives on-going training in ABA methodology, social skills, and behavior strategies.

19. Ms. Manea was concerned that Student was not retaining information. She and the other District IEP team members also were concerned that Student had difficulty transitioning back to school after breaks. He also was demonstrating an unwillingness to join in group lessons. Ms. Manea and the other District IEP team members therefore recommended increasing Student's attendance in the August extended school year program from two to four days a week. The District believed that Student would show less regression if he had the additional time in school during the summer. Parents agreed to the modifications in this IEP.

JUNE 21, 2010 IEP MEETING

20. The District presented an addendum IEP to Parents on June 21, 2010 for the purpose of indicating that Student's school location was going to change for the 2010-2011 school year. The Harper Preschool was closing and the students there were being assigned to other school sites. Student was assigned to the Mariner's Elementary School. Parents requested that the District assign him to teacher Leah Steinman's⁵ class. Ms. Steinman had run a volunteer sports league for special needs children in which Student participated, although Ms. Steinman had not been his direct coach. Parents had heard that she was an excellent teacher who worked well with children on the autism spectrum. The District agreed to their request. Student began his second year of preschool at Mariner's in early September 2010 in Ms. Steinman's class.

MS. STEINMAN'S CLASSROOM

21. Ms. Steinman has taught preschool for about eight years. Before becoming a teacher, she was an independence facilitator and worked in an autism-specific preschool and kindergarten classroom. She received full training in ABA

⁵ Ms. Steinman's last name is now DeNisi .

principles through the non-public agency with which the District contracts. After approximately two months of direct training, the agency observed her for many weeks as she taught a class. An agency trainer would take notes and help her with modifications to the curriculum and with data collection. The agency would model strategies and Ms. Steinman would model them back. Her training included how to develop goals and behavior support plans as well as how to determine the function of behavior. The aides assigned to Ms. Steinman's classroom received the same training from the non-public agency as did she.

22. One of the District's ABA programs for autistic preschool children is called the Little Seahorse program. The District developed the program in 2006 to improve services for preschool children on the autism spectrum. The teaching and support staff were all trained in positive behavioral strategies. Regular collaboration between teachers, aides, and related service providers was an integral part of the program. The purpose of the program was to maximize outcomes for children with autism by using research-based practices, focusing on a rich social curriculum and focusing on academic readiness. The program was also designed to maximize success in communication for the students, no matter the modality of communication the student was at or chose to use. Play was an important element of the program. By teaching the children to play together, the program hoped to prepare the children for a successful transition to kindergarten.

23. Ms. Steinman's classroom was run similarly to the other preschool classes that were part of the program. The school day lasted five hours and 15 minutes. There were generally eight special education students in the classroom. Three typically developing children were part of a reverse inclusion program; they attended Ms. Steinman's class three days a week, four hours a day. In addition to Ms. Steinman, two adult aides trained in ABA were assigned to the classroom. Ms. Steinman collaborated

with Ms. Manea, Student's previous teacher, before Student began the 2010-2011 school year so that she would know his particular needs and habits and learn how to best address them in her classroom.

24. Ms. Steinman and speech pathologist Dr. Kathleen Murphy conducted an in-home observation of Student early in the school year to make certain the District and private ABA providers were working consistently with Student. They did not observe Student using any verbal language. His work with his ABA provider was based on discrete trial training. It was not focused on functional language. Dr. Murphy and Ms. Steinman shared strategies and expectations for Student with the in-home providers.

25. The schedule in Ms. Steinman's class was dependent on the individual needs of the students each year. However, the school day generally consisted of circle time and center rotations to address each child's goals in the areas of fine motor, sensory needs, art, games, academics, and gross motor skills. The day included time spent teaching the children self-help skills and included exploratory activities and a snack time. Throughout the day, an occupational therapist and a speech therapist came into the class to consult with Ms. Steinman and provide services.

26. The classroom also integrated significant visual supports for the students. There was a daily schedule posted. General interest visuals, such as a picture of the bathroom and one for snacks, were placed throughout the classroom. Other visuals were developed that were specific to meet the needs of a particular child. Ms. Steinman had specialized visuals for Student as well. For example, since toileting was a significant area of need for him, she had broken down the bathroom routine through the use of four pictures showing a urinal, a sink, a paper dispenser, and a trash can.

27. Sensory supports were also embedded in Ms. Steinman's classroom. She worked in conjunction with an occupational therapist to create a sensory rich program throughout the school day. The classroom included a sensory table, a sensory ball,

spinning devices, and stress balls. There was also an outside obstacle course that was used each day.

28. Ms. Steinman's classroom also included a "break tent." The majority of the special needs students were on a token economy board system, which was used as positive reinforcement. For example, if a child completed a task, he or she would get a token. Once the child had earned five tokens, the child could use the tokens to choose an activity to do in the break tent.

29. Student was generally happy in Ms. Steinman's class. He did well in the structured environment of the classroom. However, Student was very prompt-dependent. Student did not want to work independently. Rather, he would look to staff to help him through each step of the skill or activity on which he was working. To motivate Student, Ms. Steinman used the token board with him. Once he earned his five tokens, Student would be able to choose the reward of his choice. Every week, Ms. Steinman or one of her aides would do a reinforcement assessment to see if Student was still responding to the same reinforcers.

30. Student had a slow rate of learning and required a lot of maintenance to retain skills. Student communicated using eye contact with staff as well as gestures and signs. The signs were not based on American Sign Language. Rather, they were idiosyncratic to Student. The signs Student has used throughout the time frame of this case have never been based on American Sign Language. Therefore, only people familiar with Student could really understand the signs. If Student really wanted something at school, he would take an adult by the hand and lead them to what he wanted. Student also used a picture exchange system to communicate, although the repertoire of pictures that he understood was fairly small. His repertoire of pictures never expanded in great detail. He did not use the picture exchange system to any extent across environments. Student's communication was therefore a mix of modalities.

NOVEMBER 23, 2010 IEP MEETING

31. The District noted progress on Student's goals every three months during the school year. Progress on Student's 16 goals from his February 2010 IEP was updated on November 17, 2010. As of that date, Student had met his goal for making eye contact with a communication partner and his goal for using loop scissors. Student was making consistent progress and was anticipated to meet his goals in completing puzzles, hand washing, responding to his name, throwing and swinging (to address visual attention and motor planning), and in imitating motor actions. Student had either regressed or failed to make much progress in his goals addressing his toileting routine, using calming strategies, looking at a speaker when his name was called, handing peers objects when directed to do so, understanding familiar objects in a field of three, increasing his use of picture symbols to communicate, combining two picture symbols to make requests, communicating by initiating acts, and tracing lines and circles.

32. Student's most significant regression was in his use of picture symbols. In March 2010, Student had met his goal of using picture symbols to identify seven toys, three people, and three action words. By November 17, 2010, Student had lost his ability to meet this goal. Student was only using picture symbols to identify favorite objects when presented with choices. The picture exchange system was not proving very functional for Student.

33. The District convened an IEP meeting on November 23, 2010, in order to address Student's lack of progress and regression on many of his goals. The IEP team participants were Parents, Ms. Steinman, Ms. Ni, and Dr. Murphy.

34. Ms. Steinman explained that Student had been engaging in avoidance behaviors, such as screaming and collapsing on the floor, when demands were made of him. However, she had lately noted a decrease in the frequency and duration of the

behaviors. Because Student had not demonstrated any relative progress in his calming strategies, Ms. Steinman proposed a revision to the goal.

35. Parents discussed behaviors Student engaged in at home that concerned them, such as the fact Student sometimes would tear paper into small pieces or tear leaves apart on bushes. Although the District did not observe these habits at school, District staff made suggestions to Parents on how to address the behaviors at home. In particular, the District recommended adding routines even to Student's non-structured time. District staff also discussed strategies that Parents could implement at home to address Student's goals. The intent was to teach Student how to implement his goals across environments outside of school.

36. Ms. Ni reviewed Student's progress on his occupational therapy goals. Student had met his goal of learning to cut with loop scissors and cutting with scissors had become a preferred activity for him. However, Student was having difficulty meeting his tracing goal. Ms. Ni noted that Student had difficulty attending to tasks, which was interfering with his progress on many of his goals. Parents acknowledged that Student did not seek to do fine motor drawing tasks at home in spite of the availability of writing tools. Ms. Ni therefore recommended deleting his writing goal because it had become apparent the goal was too advanced for him. She proposed replacing it with a goal targeting visual attention to art projects in order to work more on the foundational skill of visual attention. Ms. Ni noted that in spite of Student's failure to progress on some of his goals, he had made significant gains with motor planning and motor imitation skills.

37. Dr. Murphy then reviewed Student's progress on his speech goals. Dr. Murphy, who testified at hearing, is a speech pathologist with the District. In 1997 she received her doctorate degree in speech and language science. In addition to her work providing direct speech therapy to children and adults, Dr. Murphy has taught speech at the university level, has been a researcher in in the area of speech pathology, and has

conducted investigations in the area of integrating services for the treatment of speech disorders in the classroom. In 2012, Dr. Murphy also obtained a certification as a Board Certified Behavior Analyst at the doctoral level. This required her to first complete education and training in the area of advanced studies of applied behavioral analysis and then to pass a test for the certification. Dr. Murphy is thus qualified doubly as a speech pathologist and a behaviorist, a unique combination.

38. Dr. Murphy was also a facilitator for the District's Little Seahorse program in 2008 and 2009. She worked with District autism specialist Dr. Elizabeth DePizza, with preschool teachers Donna Manea and Leah Steinman, with other related service providers, as well as with Ms. Cottrell, who was the coordinator for the program. Dr. Murphy provided direct speech services to Student from September 2010 to June 2012.

39. Dr. Murphy reviewed Student's limited progress on two of his speech goals and his lack of progress on the other two. She expressed concern that Student was not demonstrating strong foundational skills that were necessary to make continued progress on the goals. Dr. Murphy proposed deleting the goals targeting the use of the picture exchange system. She proposed replacing those with two others. The first would target the functional and consistent use of five communication gestures for the concepts of "more," "want," "eat," "my turn," and pointing. The second goal would target the use and matching of two-dimensional photographs and three-dimensional objects. Dr. Murphy did not believe that Student was ready for any type of electronic assistive technology because he really did not understand the basic concepts of language.

40. Parents agreed to all District suggestions for deleting and modifying Student's goals.

41. Due to Student's limited progress, the District team members also recommended conducting an early triennial assessment of Student before his next annual IEP meeting in February 2011. Parents agreed to the assessment.

DISTRICT'S FEBRUARY 4, 2011 MULTIDISCIPLINARY TRIENNIAL ASSESSMENT

42. The District conducted Student's early triennial assessment over seven days in January 2011. The assessment team consisted of school psychologist Eby Kent; special education teacher Ms. Steinman; speech pathologist Dr. Murphy; school nurse Denise Ellis; and occupational therapist Ms. Ni, who was assisted by an occupational therapy student. The assessment report is dated February 4, 2011. The assessment covered the areas of psycho-educational, cognition, behavior, speech, and occupational therapy. The assessment was thorough and followed all mandatory assessment procedures. The resulting assessment report, which is almost 50 pages long, is equally detailed and comprehensive.

43. The assessment team followed best practice assessment procedures. The assessors reviewed Student's school records, including IEP's and prior assessments. They reviewed his health and developmental records and history. Ms. Kent interviewed Mother and the school nurse interviewed both parents. Ms. Kent interviewed Student's present teacher, Ms. Steinman. Ms. Kent observed Student in class and on the playground. Ms. Steinman conducted a formal observation of Student in her own class as well. Ms. Ni also completed a clinical observation of Student.

44. Eby Kent testified at the hearing. She has a master's degree in psychology and specific training in applied behavioral analysis. She has worked with the District as a school psychologist since 2006. Ms. Kent conducted the cognitive and adaptive behavior portion of Student's triennial assessment. Ms. Kent observed Student when she tested him. He transitioned easily to the testing room with her. Ms. Kent used Student's token board during the assessment. Student responded well to physical and tangible reinforcers but displayed inconsistent eye contact with Ms. Kent and with the testing materials. Student attempted all tasks, but did not always understand the tasks presented. He was compliant and responded to directives. Ms. Kent also observed

Student at school. She first observed him in Ms. Steinman's classroom. Ms. Kent noted that the class was extremely well-structured. The staff used verbal and tangible reinforcements and class expectations were clear and understood by the students.

45. Student had his own token board and appeared to understand its purpose and use. He was compliant when asked to imitate something or when a visual cue was given. Student generally needed a visual, gestural, or physical prompt for auditory requests, although Ms. Kent observed staff trying to get Student to show a skill without the prompting. At one point, Student became frustrated and had to be taken to a separate area of the classroom to calm down.

46. Ms. Kent also observed Student during recess. Student was able to maneuver easily around playground equipment. He could climb stairs, hang from bars, dropped easily to the ground, and was able to balance. Student appeared to enjoy playing but did not show any interest in the children playing near him. When Student became fixated on some wood chips, an adult easily re-directed him to something else. Student transitioned fairly easily from playing when recess was over.

47. Ms. Kent used two testing instruments to assess Student's cognition. Student's standard score on the first was 49, which is in the very low range of functioning. Student's visual and receptive language skills were in the range of a 16 to 17-month-old child. His expressive language skills were at the five month range. On the fine motor subtests, Student's highest score was in the range for a 26-month-old child. Student's scores indicated significant delays in all areas tested. Ms. Kent administered a second cognitive test to get an accurate picture of Student's cognitive functioning. His overall standard score on the second test was less than 50, commensurate with his score on the first test. Student's standard scores on both cognitive assessments were lower than the scores he received when last assessed in 2009.

48. Ms. Kent assessed Student's adaptive behavior skills using a rating scale questionnaire completed by Mother. Like his scores on the cognitive assessments, Student's scores for adaptive behavior were all in the extremely low range and had decreased from his 2009 assessment. Ms. Kent was not surprised that the cognition and adaptive behavior scores were so similar because it indicated that Student's adaptive skills were commensurate with his cognition.

49. The objective of the last assessment tool Ms. Kent used was to determine the extent of Student's autism. The test was based on observations and input from Parents and Student's teacher. Student's overall score of 46 indicated to Ms. Kent that Student demonstrated severe symptoms of autism spectrum disorder.

50. Student's 2009 assessment had not made a final recommendation for finding Student to be intellectually disabled. The assessors had indicated that Student's development needed to be monitored. Ms. Kent explained that when a child is young and has not been exposed to formal teaching, professionals do not want to make hasty decisions about whether the child is intellectually disabled. They want first to see the results of educational interventions. In Student's case, the results of Ms. Kent's assessment indicated that Student not only demonstrated severe autistic-like behaviors, but that he also was intellectually disabled. The assessments indicated significant deficits in all areas of cognitive and adaptive functioning.

51. Student presented no evidence that Ms. Kent's testing was inappropriate or that her assessment results and recommendations were improper. Dr. Hughes did not address Ms. Kent's assessment or any portion of the multidisciplinary triennial assessment during her testimony. Dr. Hughes did not conduct any cognitive or adaptive behavior assessments of Student. Student has not obtained any assessment results that contradict Ms. Kent's assessment or call into question the validity of her results.

52. Ms. Steinman tested Student's pre-academic readiness. She used an assessment appropriately used with both typically developing children and children who are exhibiting developmental delays. The assessment addressed cognition, language, gross motor, fine motor, social abilities, and self-help abilities. The results of Ms. Steinman's assessment indicated that while Student had emerging skills and abilities in the 27 to 36 month range, the majority of Student's abilities and skills were in the nine to 24 month range. Student's scores were lowest in areas of cognition and receptive language, with some low scores in social interaction and play. The results of Ms. Steinman's testing were similar to the results Ms. Kent obtained on her assessments.

53. Dr. Murphy completed the speech and language portion of Student's triennial assessment to determine Student's current levels of language functioning. She administered, or attempted to administer, both formal and informal tests. During Dr. Murphy's testing, Student was cooperative. He attempted all tasks, although he needed prompting or modeling to do so. Student was more attentive when the tests included concrete objects and familiar reinforcers.

54. Dr. Murphy first assessed Student's speech and articulation. She was not able to use formal tests because Student had limited speech. Her testing was therefore informal, based on her observations of Student. Student only produced a limited range of sounds, generally single consonants or vowels. The only consonant-vowel sounds he made consistently were "mo" and "ma," although Student would often string the latter sounds together ("ma-ma-ma-ma"). Dr. Murphy was unable to assess Student's voice and fluency because of his lack of verbalization.

55. Dr. Murphy used another assessment tool to measure Student's communicative competence by looking at his eye gaze, gestures, words, sounds, understanding, and play. The test uses preferred activities and fun trials to elicit a response. Using this test, Dr. Murphy conducted 12 trials with Student. He appropriately

looked to the adult and either vocalized or gestured with a reach, by pointing, giving an object to the adult, or other acceptable indicating behaviors in seven of the 12 trials. Early communicative behaviors have three primary goals: behavior regulation, social interaction, and joint attention. Dr. Murphy found that Student only used communication for the purpose of regulating the behavior of others to obtain preferred items. Student sustained eye gaze, engaged in play activities, expressed delight in some of the activities, and produced a high rate of communicative behaviors with accompanying gaze to his communication partner when presented with crackers, his preferred treat. Student reached for the jar of crackers, used a hand sign indicating he wanted "more" and vocalized the "ma-ma-ma-ma" sound.

56. Student was beginning to use some symbolic augmentative communication through the use of photographic images. Student was beginning to be able to search through a few photographs and recognize preferred items. However, at the time, Student still was not consistent in being able to distinguish preferred and non-preferred items or identify photographs for juice or water.

57. Dr. Murphy used a test to assess Student's play skills. During this test, Student engaged in purposeful exploration of toys provided to him and also attempted to discover how the toys operated. Student did not consistently engage in more advanced play activities such as pretending to drink from a cup or trying to find hidden toys. Student's results on this test indicated that his play skills were at the level of a child aged 13 to 17 months.

58. Dr. Murphy also assessed Student's expressive and receptive language skills. The test permits the use of clinical observation, reports, and/or elicitation of responses to determine the child's specific early language skills. This language test is composed of two subtests: one addresses auditory comprehension. The other addresses expressive communication. Student's standard scores on both subtests placed him in

the first percentile of language abilities for a child his age. Student's age equivalency was that of a typically developing child aged approximately one year and one month old. Student's test results indicated that he had severely delayed language skills.

59. Based on the totality of her testing, Dr. Murphy concluded that Student's overall communication abilities were that of a child aged 12 to 15 months . She concluded that Student used functional communication such as eye gaze, signs, gestures, vocalizations, and other indicating behaviors (such as pointing) to direct others to meet his needs. Student rarely demonstrated communicative behaviors for purposes other than getting others to meet his needs. Student did not communicate for things such as socializing with peers. He was particularly successful in requesting choices and indicating his preferred items, and was beginning to be able to match photographs with objects.

60. Student presented no documentary evidence or testimony at hearing that questioned the validity, propriety, or results of Dr. Murphy's assessments, or contradicted Dr. Murphy's findings, observations, and recommendations. Student's parents privately funded speech therapy for Student for a year and a half by a speech pathologist named Natalie Neal. However, Ms. Neal did not testify at this hearing and no formal assessment from her was offered as evidence. Although Ms. Cottier did testify at the hearing about her augmentative communication assessment, Student never questioned her about Dr. Murphy's speech assessment or any speech goals developed for Student by the District in any of its IEP's. There is thus no evidence that controverts the appropriateness of Dr. Murphy's assessment or any speech goals she developed for Student in any of his IEP's.

61. Jennie Ni administered an occupational therapy assessment to Student as part of his triennial. Ms. Ni observed Student and spoke with his teacher as part of her assessment process. Student was able to participate in both gross motor and fine motor

activities at school. However, he could be inconsistent if he was having a bad day. If so, he might cry and resist participating even in preferred activities such as using the swings or the obstacle course. Although Student's level of alertness had improved since starting preschool, he continued sometimes to demonstrate a lowered level of alertness. To address this, his teacher offered him alerting activities throughout the school day, such as jumping on a trampoline and using playground equipment.

62. Student did not have gross motor needs. He was able to access all the equipment in the occupational therapy room and on the playground, and was able to maneuver through the classroom. Student's parents agreed that one of his strengths was his ability to use playground equipment.

63. Since Student did not demonstrate any gross motor needs, Ms. Ni administered only the fine motor subtests of the assessments she used. One included tasks for cutting, building, lacing, grasping, and copying. This test, in conjunction with observations of Student, established his present level of fine motor skill development. Student had a difficult time with visual motor integration skills on the test. In general, his visual attention for tasks was short. Student sometimes did not understand a task or the directions for it. His overall grasping score was poor, but in class, Student had the hand skills to participate in most of the preschool fine motor activities. His visual attention in class for fine motor tasks was four to five seconds. Student could trace letters, but only with prompts. Student's scores on the fine motor assessments indicated that his fine motor skills were at the level of a child aged 20 to 28 months .

64. Sensory processing refers to the handling of sensory information through vestibular (pertaining to balance and spatial orientation), proprioceptive (perception of things around you), tactile, auditory, visual, olfactory (pertaining to smell), or gustatory

(pertaining to taste) means.⁶ Ms. Ni assessed Student's sensory processing by having his teacher, Ms. Steinman complete a sensorimotor questionnaire that is designed to obtain information about how the teacher views a child's sensory processing in the classroom. Ms. Ni also observed Student in the occupational therapy clinic room. The test indicated that Student's sensory processing in the areas of self-regulation, touch, and over-reactive processing of movement, were in the normal range. Student participated appropriately in those areas at school.

65. However, Student scored at-risk in the area of under-reactive sensory processing of movement. Student preferred fast-moving, spinning equipment, and seemed less dizzy than other children after spinning. Student especially liked movements such as bouncing, using a rocking chair, being turned in a swivel chair, and being upside down. Student also scored at risk in the area of motor planning and coordination. Student did not always use two hands for tasks that required it; he had difficulty dressing himself; he had difficulty with large muscle activities such as jumping on two feet; he ate in a sloppy manner; and did not spontaneously choose activities involving the use of tools.

66. Ms. Steinman and Parents completed another rating scale that measures social participation; vision; hearing; touch; body awareness; balance and motion; and planning and ideas. Student had more difficulty in the classroom than he did at home. Ms. Steinman's scores indicated Student had definite dysfunction in all areas other than body awareness, where Ms. Steinman's score indicated only some problems. Parents' scores indicated definite dysfunction only in the areas of touch, and planning and ideas.

67. Based upon the results of all these assessments, Ms. Ni found that Student was functioning below age level in his visual-motor skills. However, he demonstrated

⁶ Definitions found at www.dictionary.com

good hand strength and manipulation skills and thus was able to satisfactorily participate in fine motor activities in the classroom. Student continued to have difficulty maintaining an optimal arousal level in class, which was demonstrated by his low level of alertness at school.

68. Student presented no evidence to dispute the validity, appropriateness, or accuracy of Ms. Ni's assessment. The only occupational therapists who testified at the hearing were Ms. Ni and, as discussed below, another District occupational therapist named Tim Chia Chen, who did a sensory diet profile of Student in 2013. Both Ms. Ni and Mr. Chen testified to the appropriateness and validity of their respective reports of Student. Dr. Hughes did not review or testify about any of the District's occupational therapy assessments and, in any case, is not an occupational therapist and has no training in the field. Ms. Cottier mentioned Student's possible sensory needs, but she is a speech pathologist and is not trained as an occupational therapist. There is no evidence in the record that indicates that Ms. Ni's testing did not accurately assess Student or did not accurately reflect Student's present abilities and needs in the area of occupational therapy.

69. Ms. Kent, Ms. Steinman, Dr. Murphy, and Ms. Ni all opined at hearing that the assessments they administered were thorough, were administered in Student's primary language, and used appropriate multiple assessment tools that were validated to produce accurate, relevant, and reliable results. All four assessors stated that the assessment tools they used were not racially, culturally, or sexually discriminatory. They all indicated that each standardized or normed assessment was administered pursuant to the publisher's instructions, and they were respectively qualified to administer them. All four assessors used assessment tools that were nationally recognized, were appropriate for Student's age and cognitive levels, and which elicited scores that were an accurate and reliable measure of Student's abilities at the time he was tested.

Student presented absolutely no evidence that contradicted the testimony of Ms. Kent, Ms. Steinman, Dr. Murphy, or Ms. Ni, as to the validity of their respective assessment processes or the reliability of their results.

70. Based on the results of the entire battery of assessments administered to Student, the recommendation of the multidisciplinary assessment team was that Student was eligible for special education and related services under the categories of intellectual disability and speech and language impairment, in addition to his then current eligibility under autistic-like characteristics. Student presented no evidence that contradicted these findings.

FEBRUARY 4, 2011 IEP MEETING

71. Student's IEP team met on February 4, 2011, for his annual IEP meeting and to review the District's triennial assessment. Parents, Ms. Steinman, Ms. Kent, Dr. Murphy, Ms. Ni and an occupational therapy student, and a District administrator were the IEP team members who attended the meeting. Those team members who had assessed Student discussed the results of their testing. The team then discussed Student's progress on his goals from the prior year. Based upon the results of the assessment and Student's progress or lack of progress on current goals, the IEP team developed new, yearly goals for him.

72. Student had met his readiness goal in the area of putting together three-piece puzzles. The team therefore developed two new readiness goals. One goal was for Student to be able to identify parts of his body when requested by pointing or touching the body part. The second goal addressed motor imitation. The goal required Student to imitate four out of six two-step, non-verbal actions without prompts.

73. Student had two previous self-help goals. He had met the goal for learning a hand washing routine. He had progressed toward meeting a goal for using a toilet for urination. In response, the team developed two new goals that also addressed toileting.

The goals broke down toileting into two separate acts: one upon entering the bathroom and one upon getting ready to leave. Based upon Student's needs, the team developed an additional self-help goal to use utensils to eat instead of using his hands.

74. Student met his behavior goals in safety awareness and responding to his name. Student had only met 20 percent of his goal in calming strategies, but he had significantly reduced the duration and severity of his screaming and whining behaviors. Although Student was not compliant when he was engaging in the behaviors, he was not aggressive toward staff or his peers. To address his continuing behavioral needs, the IEP team developed two new behavior goals. The first goal sought to decrease the amount of time necessary for Student to comply with directives, such as to sit down. The second goal addressed Student's need to stay with the group of other students when transitioning from one activity to another.

75. Student's February 2010 IEP had contained two social/emotional goals. Student had met the goal addressing eye contact with whoever was communicating with him. He was progressing on his goal to hand objects to a peer when verbally requested to do so. The IEP team developed two new goals to address Student's continuing social/emotional needs. The first goal was in functional play. It required Student to use a toy or item of play for its intended purpose. The second goal addressed Student's unwillingness to stay in a group. It required him to stay in the group, such as at circle time, for at least four minutes.

76. Student had had four speech goals. He had made 50 to 66 percent progress on his goals in the areas of functional communication, matching objects to photographs of the objects, and rate of communication. Student had only made 10 percent progress on his goal in receptive vocabulary. In response, the IEP team re-evaluated the goals based on Dr. Murphy's speech assessment and Student's lack of progress. The team developed four different speech goals for Student. The aim of the

first goal was for Student to identify himself doing different actions, such as eating, using photographs of him engaging in the action. The second goal was for matching objects to photographs of the objects. It was similar to Student's prior goal, but increased the amount of objects Student would be expected to match. The aim of the third speech goal was for Student to learn how to shake his head "no" if he did not want something. The fourth goal addressed following instructions. The IEP team still did not believe that Student was ready to try electronic assistive technology because Student was still having difficulty with receptive and expressive language concepts.

77. Student had met his fine motor goal of using loop scissors. He was progressing toward his goal of visually paying attention to tasks. Student was only able to visually attend to his fine motor tasks, such as drawing lines, for three to five seconds. The IEP team re-wrote this goal, with the aim of Student being able to be visually focused for eight seconds at a time.

78. Student had met his goal of motor planning in the area of sensory processing. He had almost met his goal in visual attention, a goal related to his fine motor goals. Because Student had basically met the goals, and because Student's sensory processing needs were met within his preschool curriculum, the IEP team did not develop any new sensory processing goals for Student.

79. The team then discussed Student's occupational therapy needs. Parents expressed concern that 15- minute sessions of occupational therapy was too little for Student to make progress. The District IEP team members explained that because Student had such a short attention span, longer therapy sessions were not productive. Ultimately, the District team members acceded to Parents' concerns and offered one, 30-minute small group session of occupational therapy per week. Ms. Ni suggested adding a 30-minute per month consultation between the occupational therapist and Student's teacher as a component of Student's occupational therapy services rather than

direct individual services. She felt the consultation would help ensure that Student's alertness in the classroom was at an appropriate level and would allow an ongoing opportunity for the occupational therapist to share ideas with other members of Student's team. Ms. Ni felt this would be more beneficial to Student than direct individual services. Parents agreed to the proposed occupational therapy goals and services.

80. Based upon her assessment of Student, including the input from Parents, Student's teacher, and the other assessors, Dr. Murphy recommended that Student receive two, 15-minute individual speech therapy sessions a week and one, 30-minute session of speech therapy in a small group.

81. Although Parents ultimately consented to this IEP, including the speech therapy services and goals, they indicated on the IEP document that they did not believe one hour a week of speech therapy was sufficient or that the speech goals were adequate. They were concerned that Student was not making progress in his communication skills. They were concerned that the window of opportunity for learning functional communication - in particular verbal speech - was going to close on Student and he would be unable to learn to communicate in the real world.

82. Parents requested that the District triple the amount of speech therapy to three hours a week. However, Parents did not give a concrete reason why they believed three hours specifically was what Student required to make progress in communicating. Neither parent has training or experience in speech therapy. Student presented no evidence that a speech pathologist or other speech professional specifically recommended three hours a week.

83. Dr. Murphy disagreed that it would be beneficial for Student to receive three hours a week of services. She believed that the collaborative model used in the Little Seahorse program provided embedded speech services to Student throughout his

school day in a functional environment. The school staff were targeting Student's goals to generalize his skills across different people and across different settings. Pulling a child out of class for services did not help to generalize skills. Additionally, Student's short attention span was not conducive to large amounts of pull-out services. During the short 15-minute speech sessions, the therapists were able to keep Student engaged and did not have to give him a break. Student presented no evidence to contradict Dr. Murphy's opinion that the speech therapy services and goals she recommended met Student's needs.

84. Student was scheduled to transition to kindergarten after the 2010-2011 school year ended in June 2011. Parents did not want Student placed in a general education kindergarten. The IEP team, including Parents, agreed that Student would continue his preschool placement in Ms. Steinman's special day class, with its reverse mainstream component, until the end of the school year. The team agreed to convene another meeting before the end of the school year to address Student's transition to kindergarten.

MARCH 8, 2011 IEP MEETING

85. The District sent a letter to Parents on February 16, 2011, detailing the specifics of its IEP offer and reiterating why it did not adopt Parents' request for three hours a week of individual speech therapy or additional speech goals. However, the District representative who wrote the letter inadvertently stated that the District's offer of individual speech services was two, 30-minute sessions a week rather than that the two, 15-minute individual sessions written on the IEP document.

86. On March 8, 2011, the District convened an addendum IEP meeting to again discuss Parents' request for additional speech therapy and speech goals. The District staff explained in more detail how Ms. Steinman's classroom was a language-rich environment that embedded language and communication skills into the everyday

curriculum. Dr. Murphy explained how she collaborated daily with Ms. Steinman and the rest of the Little Seahorse staff and service providers to address the language needs of Student and his peers. At the hearing, Dr. Murphy explained that embedding language in the class day was best practice for creating a naturalistic setting to learn language and to generalize language across environments.

87. Dr. Murphy did not believe that Student required more than an hour a week of pull-out speech services. However, because the letter from the District representative had stated the District was offering two, 30-minute individual speech therapy sessions, the District honored the offer and agreed to increase Student's speech services. Parents still believed Student required three hours of speech therapy a week. For reasons never explained during this IEP meeting and never explained at hearing, Parents did not agree to the District's offer to increase Student's individual therapy to two, 30-minute sessions a week. Their reticence was illogical; although the District did not adopt Parents' requested increase to three hours a week of services, any increase should have been of benefit to Student if Parents were correct that the original amount of therapy offered by the District was inadequate.

APRIL 19, 2011 KINDERGARTEN TRANSITION IEP MEETING

88. Student's IEP team met on April 19, 2011, to plan his transition to kindergarten in September 2011. Present at this meeting were Parents; Ms. Steinman; special education teacher Katherine Burns; Dr. Murphy; a general education teacher; a school psychologist; and a District administrative representative.

89. All team members agreed that Student should be placed in an ABA special day class kindergarten program. The District kindergarten program is six hours and 50 minutes a day, a bit over an hour and a half longer than its preschool program. Ms. Burns, the kindergarten teacher at Eastbluff Elementary School, taught one of the kindergarten classes. Ms. Burns has a bachelor's degree in psychology. She obtained an

Education Specialist credential in 2010. Ms. Burns received training in ABA through a non-public agency prior to being hired by the District. Once hired by the District, Ms. Burns received the intensive ABA training provided by the District through its contract with a non-public agency to all staff working with autistic children. Ms. Burns was initially hired by the District as an ABA facilitator who provided direct services to autistic children in the classroom. She became a special education teacher for the District in 2009.

90. Ms. Burns described her classroom and the curriculum she used to the IEP team. Student was in her classroom for kindergarten during the 2011-2012 school year and for first grade during the 2012-2013 school year. There were six children in her class Student's first year with her. In addition to Ms. Burns, there was adult support from two aides. The second year, there were seven or eight children in her class and five adults, including Ms. Burns.

91. Ms. Burns's classroom was based on ABA methodology. She and her support staff targeted behaviors of the children that were interfering with their learning. There were visuals throughout the classroom. She developed a positive reinforcement system, based on a token economy, which was individualized for each child. The classroom was a structured environment. At the beginning of the day, the children were taken to the restroom. They then had a movement break by running around the playground to address sensory needs and "get the wiggles out" and prepare them for the school day. Ms. Burns reviewed the calendar for the day right after class started. She then had the children sing some songs. After the singing, Ms. Burns gave basic instruction in English language arts. The children then moved through rotations at three centers. There was a center for working on fine motor skills such as cutting, another for working on math skills, and another to work on pre-reading skills such as learning letters.

92. The children had a snack time before recess. The speech pathologist ran the snack break twice a week as an opportunity to address language skills. After recess, the children returned to do center rotations. After the rotations, Ms. Burns worked with the class as a group. She worked on skills such as colors, shapes, and numbers. The children then went to lunch and recess. After recess, they had some quiet time where they could look at books, work on puzzles, or work on the computers. When quiet time was over, Ms. Burns worked on teaching calming strategies with the children as a group. The children then went to a developmental center in the classroom where they worked in small groups on different activities each day. Those activities included fine motor art projects, games for social skills, and basic cooking principles. The activity changed daily. The children then cleaned up, had an afternoon snack and recess, and prepared to go home.

93. Ms. Burns used visuals throughout the classroom. The children had to match pictures of colors to the center rotations to which they were going. The children were taught to follow a schedule. Each child had an individualized token economy system that addressed the child's individual behavior needs. Sensory needs were also specifically addressed in Ms. Burns's classroom. In addition to the outdoor playground activities available to the students such as swings, her classroom had bouncy balls, therabands, weighted vests and weighted blankets, a trampoline, an implement resembling a rocking horse, squishy balls, a mat to lie on for soft pressure, and occupational therapy pressure socks.

94. The IEP team also discussed how much speech therapy was appropriate for Student. Although the kindergarten ABA program had similarities with the Little Seahorse preschool program in that it was based on the use of ABA in a naturalistic environment, there were some differences in the program. Kindergarten had more focus on academics than on play. There was less unstructured time in the classroom. For these

reasons, Dr. Murphy recommended increasing Student's group speech therapy sessions from one, 30-minute session a week to two, 30-minute sessions a week. Dr. Murphy recommended that Student have two, 15-minute individual sessions a week, as she had originally recommended at Student's February 4, 2011 IEP meeting. Group therapy was more of more benefit to Student because he had such a need to learn to acknowledge and relate to his peers.

95. The IEP team retained Student's amount, duration, and frequency of occupational therapy. No one on the team suggested deleting, adding, or modifying Student's goals. The IEP team recommended Ms. Burns's class for Student. Parents did not object to Student's placement there.

96. The District IEP team members also recommended that Student attend extended school year classes for four weeks during the month of July 2011, five days a week, for four hours a day. The team offered occupational therapy and speech therapy during the regular extended school year as well. The team further recommended Student attend the supplemental ABA extended school year program for two weeks in August 2011, for two days a week. The District team members believed that Student's low rate of retention and high rate of regression warranted these two extended school year sessions. This program is designed for preschool-aged children. Student ultimately did not attend either of the extended school year sessions because his family travelled out of the country for the entire summer of 2011.

97. Although Parents still disputed the level of speech and language and occupational therapy services, they consented to this transition IEP.

FEBRUARY 29, 2012 IEP MEETING

98. Student's IEP team met on February 29, 2012, for his annual IEP meeting. In addition to Parents, the team members consisted of Ms. Burns, Dr. Murphy, a general

education teacher, an occupational therapist, and a District administrative representative.

99. Parents indicated to the team that Student seemed to understand what they said to him. They saw his primary challenges as being the need to be potty-trained and his inability to communicate. Student still did not have a functional communication system. The IEP team noted that Student did best in a small instructional environment. He understood a behavior token system and responded well to it. Student would independently enter the classroom and begin to work on a puzzle. If he was attending to tasks, he was able to match pictures of items that were the same.

100. Ms. Burns reviewed Student's progress on his goals and the team developed new goals for him. Student had met his readiness goal of motor imitation. He had progressed on his goal of identifying body parts. The team developed a more advanced goal addressing Student's ability to identify body parts. The new goal required Student to match body parts through pictures, starting with pictures of his own body parts. Student had had three self-help goals. He had met his two bathroom goals and progressed 55 percent on his goal to use utensils for eating. The team developed a more advanced goal to address Student's bathroom needs. The purpose of the goal was to have Student independently request to use the bathroom.

101. Student had met his two behavior goals of following instructions without exhibiting maladaptive behaviors and transitioning from locations without leaving the group. The team developed three new, more advanced behavior goals for Student. The objective of the first goal was for Student to attend to an activity for two minutes. The second goal required Student to independently navigate throughout his school day using a visual schedule. The objective of the third behavior goal was for Student to imitate three non-verbal actions.

102. Student had met his social/emotional goal of remaining in a group for a minimum of four minutes. He had progressed toward meeting his goal of using toys for their intended purpose. Student's IEP team developed three new social/emotional goals for him. The first was for Student to learn to identify emotional states of people, such as sadness, in a photograph. The second goal focused on Student learning to independently complete his morning school arrival and afternoon school departure routines. The third goal focused on teaching Student not to grab food from his peers.

103. Student had met all four of his speech and language goals by the February 29, 2012 IEP meeting. His IEP team therefore developed four new goals for him. The objective of the first goal was for Student to learn to use a picture card to indicate the beginning of the time to take a break to go play. The objective of the second goal was for Student to perform a particular action, such as lining up, when he was shown a picture card at the same time a verbal directive was given to him. The third goal focused on Student learning to identify photographs of familiar adult staff and family members. The fourth goal focused on teaching Student to complete out-of-seat directives, such as putting away objects, when shown a picture card of the action requested. However, although Student met his goals, his use of the picture exchange system was not extending across environments. Additionally, Student's communication continued to be a mixture of modalities. He still primarily used gestures, eye gaze, and idiosyncratic signs outside of the classroom.

104. At this meeting, Parents indicated to the District for the first time that Student had learned to use an iPad and was using it for entertainment purposes at home. They also indicated that they had placed an application on the iPad that supported identifying people's names and faces. Parents indicated that Student could navigate independently through the iPad. As a goal for the next year, Parents wanted the District to use the iPad to teach Student to read and write. Although it was now

aware that Student was responding positively to the use of an electronic device, the District did not discuss whether Student's use of the iPad might suggest he was ready to use some sort of electronic device for the purpose of developing a more functional means of communicating. The District did not suggest assessing Student in the area of assistive technology.

105. The four speech goals indicated that Student would address the goals through the use either of "PECS" (picture exchange communication system or picture cards) or "AAC" (alternative augmentative communication). Dr. Murphy testified that the "AAC" referred to Student's iPad. However, the use of the iPad is not specifically identified in any of the four goals or anywhere on this IEP document. There is no reference to what type of alternative communication Student would be using with the goals if he was not using the picture cards. There is no indication that the IEP team specifically discussed having Student use the iPad for educational purposes or how he would learn to do that. There is no reference to training Student to use the iPad for communication purposes at school. Neither Dr. Murphy nor any other District IEP team member suggested assessing Student in the area of augmentative communication to determine if the iPad or any other electronic device would help him increase his ability to communicate. Augmentative communication does not only refer to communication through electronic devices. Picture cards and sign language are types of augmentative communication tools.

106. Student had met his fine motor goal. His IEP team developed two new fine motor goals for him. The objective of the first was for Student to copy lines and circles. The second goal focused on teaching Student to use scissors with more accuracy.

107. Student's IEP team also developed academic goals for him for the first time. The team developed a goal to have Student identify numbers one to five. The team also developed a goal for Student to identify letters "A" through "E."

108. The District offered Student direct occupational therapy services and speech therapy services similar to those in his previous IEP. However, the District also proposed adding 30 minutes a month of formal speech consultation between the speech pathologist and classroom staff to discuss Student's progress and the development of new in-class communication strategies. The District also offered Student extended school year class for four weeks, along with speech and language and occupational therapy services during the summer. Although Parents continued to advocate for more speech and language services, they consented to this IEP.

109. Soon after this meeting, Ms. Burns permitted Student to bring his iPad to school. She began using the iPad as a reinforcer for Student when he had reached enough tokens to choose an activity as a reward for completing tasks or behaving appropriately. The iPad was a preferred activity for Student. He would play with it in the break tent in his classroom. Student was able to navigate the iPad at least for purposes of play. There is no evidence that Ms. Burns or any of Student's service providers utilized the iPad with Student to work on any of his goals or for purposes of communication.

PRIVATE SPEECH THERAPY SERVICES AND THE INDEPENDENT AUGMENTATIVE COMMUNICATION EVALUATION BY CYNTHIA COTTIER

110. Parents were concerned about what they saw as Student's slow progress in learning communication skills. They wanted Student to learn to speak. Parents therefore contracted with a speech pathologist named Natalie Neal for private speech therapy sessions for Student. Ms. Neal provided two or three sessions a week to Student, generally for 60 minutes a session. She charged \$125.00 an hour. Ms. Neal began providing therapy to Student in March 2011. She ceased providing services in August 2012.

111. Student did not call Ms. Neal as a witness at hearing. There is no evidence therefore about what type of instruction she used. There is no evidence about how Student responded to the therapy or what type of progress he made.

112. However, there is evidence in the record of this case that Ms. Neal discharged Student as a client in August 2012 because he was not making any progress and that her services therefore were not beneficial. At Student's annual IEP meeting on January 23, 2013, Father informed the IEP team that the private speech services obtained by Parents that focused on verbal language did not "pay off." Father told the team that Parents had discontinued the services with Ms. Neal. Parents also informed Dr. Hughes that Student was discharged from private speech therapy due to lack of progress. Dr. Hughes referenced this fact in her FBA report. Father tried to downplay this fact at the hearing. But the evidence is persuasive that after almost a year and a half of private individual speech services for two to three hours a week, Student made such little progress in learning how to speak or communicate better that his private therapist discharged him because she was unable to help. Instead, she suggested that Parents obtain an augmentative communication assessment for Student.

113. Ms. Cottier assessed Student on July 18, 2012. Her assessment lasted 90 minutes. The purpose of her assessment was to determine if Student's current means of communication was appropriate, if modifications or adaptations were appropriate, or if any augmentative communication system should be implemented. Ms. Cottier did not conduct any observations of Student at school as part of her assessment.

114. Student was able to participate during the entire 90 minute assessment. Ms. Cottier did notice sensory seeking behaviors in Student, such as his habit of repeatedly tapping things with his hands or fingers. He also wanted deep pressure stimuli like hugs. Ms. Cottier was used to such behaviors and was able to manage them with behavior intervention techniques such as verbal and gestural prompts for Student

to stop tapping. Father, who was present during the assessment, informed Ms. Cottier that a sensory diet was used with Student.

115. Student indicated an intent to communicate throughout the assessment. He would tap Ms. Cottier to gain her attention. He used non-standardized signs and gestures. He would nod his head "yes" or "no." Student also occasionally was able to use the picture exchange system icons that used both photographs and picture representations that Ms. Cottier had in her office. Student was essentially non-verbal and could only produce some simple sound vocalizations. He was able to follow simple directions and was motivated to do so. Student's receptive language abilities were higher than his expressive language abilities.

116. Since Ms. Cottier was aware that Student was familiar with using a picture exchange system, she utilized picture and photograph icons first with Student. Although Student recognized some symbols and pictures, he did not want to use them and often selected an incorrect picture. Student demonstrated the least visual attention and poorest accuracy when using the picture system than of any other communication method Ms. Cottier presented during her assessment. The use of the picture exchange system appeared to be too much of an effort for Student.

117. Ms. Cottier then tried using voice output devices with Student. Although he responded somewhat to the device that had a digitized voice output and backlit display screen, Student was not able to navigate between the dynamic displays of the device without becoming frustrated and losing interest. In any case, at hearing Ms. Cottier explained that these type of devices are exceedingly more expensive than new electronic devices such as tablets.

118. Ms. Cottier then presented an iPad to Student. The applications for the iPad also run on iPhones and on the iTouch, which is just a bit larger than the iPhone. Ms. Cottier opted to use the iPad with Student rather than the much smaller and more

portable iTouch because Student did not demonstrate the sustained visual attention she though necessary to successfully use it. Ms. Cottier believed that the increased visual scanning demands would increase Student's frustration and therefore decrease the likelihood he would be successful using it. Also, Student had already been successful using an iPad for entertainment purposes.

119. Student demonstrated he was able to navigate the iPad independently for favorite activities. It was easy for him to use the touch display system of the device. Student at first only wanted to use the iPad to play games and kept pressing the home button to access the games rather than trying to use the communication programs Ms. Cottier was presenting. She finally covered the home button so that he could not access it. Student then began to utilize the iPad communication applications. He was able to make appropriate selections in a consistent fashion. Student's visual discrimination and discrete choice making abilities were very high using the iPad. They were lowest using the picture exchange system.

120. Student was highly motivated to use the iPad. Ms. Cottier explained that the motivation and desire to use a communication mode is as important as the effort to use it. Student was not using the picture exchange system effectively and his other means of communicating by gestures and idiosyncratic signs was equally limited.

121. Ms. Cottier recommended that Student be provided with a separate iPad for communication and educational purposes to distinguish it from the iPad he used for entertainment. She recommended that he have three to four individual speech therapy sessions a week for 20 to 30 minutes each to focus on teaching him to effectively use the iPad. At hearing, Ms. Cottier clarified that her recommendation was for the total amount of individual speech therapy Student required, not for individual therapy in addition to the individual therapy he was already receiving through his IEP. Ms. Cottier

also recommended that Student's parents and his staff at school receive one to two hours of training on the iPad with the functions that would be used with Student.

122. Ms. Cottier was not surprised at Student's ability to use the iPad to communicate. She has assessed non-verbal children as young as three and four-years-old who have become adept at using such a device. She advocates starting children as early as possible with an electronic device so that they can develop communication skills that will cross environments. The earlier it is used, the more the child sees the device as a legitimate form of his or her own communication. For Student, no other communication method had proven to be reliable. He was not verbal. He was not using the picture symbols much. The signs he used were all adaptive and therefore would not be understood even by people who knew sign language. Additionally, a device such as an iPad was easily taken into the community where people were familiar with it. It therefore could be used across environments.

123. The District argued that Ms. Cottier's assessment was not reliable for several reasons. First, Ms. Cottier had not done any classroom observations of Student. However, as discussed below, Lila Seldin, the District speech pathologist who later assessed Student, did no observations of Student either and relied fully on reports from staff as to Student's classroom communication, as did Ms. Cottier. The District also questioned Ms. Cottier's finding that a picture communications system was not appropriate with Student because she used picture icons instead of the photographs used in Student's class. However, Ms. Cottier testified she used both icons and photographs during her assessment, although they were not the same ones Student was using in his classroom. Additionally, Ms. Seldin found, based on her conversations with staff working with Student, that he had limited success using any type of picture exchange system, other than for requesting food.

124. The District's criticisms of Ms. Cottier's assessment are therefore not well-taken because the only real difference between her recommendations and those of Ms. Seldin was that she recommended the larger iPad instead of the smaller, more portable iTouch. As discussed below, because Student proved he was able to use the iTouch, in that regard, Ms. Seldin's recommendation proved to be appropriate and workable with Student.

125. Ms. Cottier's assessment confirmed what the District should have realized after Parents informed Student's IEP team that Student was using an iPad successfully: Student showed an interest in electronic devices and was able to use one. Had the District assessed Student after his February 29, 2012 IEP meeting, it would have found, as did Ms. Cottier and as later did Ms. Seldin, that the use of an electronic device was an appropriate means of functional communication for Student that would enable him to benefit from his education where the picture exchange system had not. After Ms. Seldin recommended the use of an iTouch for Student, the District temporarily offered him speech services commensurate with Ms. Cottier's recommendations so that Student would learn to use the device for communication. As Ms. Cottier pointed out, developing Student's use of the iTouch would substitute for the speech services he previously received that focused on trying to teach him to speak. Student is therefore entitled to compensatory speech services based on the District's delay in assessing him in the area of assistive technology.

DISTRICT'S AUGMENTATIVE AND ALTERNATIVE COMMUNICATION CONSULTATION REPORT

126. After the District received Ms. Cottier's report, it decided to administer its own augmentative communication assessment to Student. The test was administered by District speech and language pathologist Lila Seldin, who reviewed Ms. Cottier's report in preparation for her own assessment.

127. Ms. Seldin's education and experience are very similar to that of Ms. Cottier. Ms. Seldin also has a master's degree in speech pathology and also has approximately 30 years of experience in her profession. Ms. Seldin is also certified in assistive technology. Like Ms. Cottier, she was a knowledgeable witness who evidenced a sound expertise in her profession.

128. Ms. Seldin noted that Student communicated through vocalizations, eye gaze, proximity, gestures, walking an adult to what he wanted, sign language and some picture and photograph cards. She noted that Student's symbolic communication, such as using pictures for things like foods and indicating he wanted more of something, was emerging.

129. Like Ms. Cottier, Ms. Seldin assessed Student using a variety of communication modes. She used an iTouch, employing two different programs; an iPad; and sign language. Those portions of Ms. Seldin's assessment addressing Student's use of a picture exchange system and a portable photo board were based entirely on staff reports of Student's use of those communication systems. Staff working with Student reported that he used the picture exchange systems with limited success across settings. He was more successful using it when requesting food. Ms. Seldin did not specifically observe Student in his classroom or on the playground.

130. Staff told Ms. Seldin that Student was able to imitate a few sign language words. The signs were approximations and were not easily understood by a communication partner unfamiliar with Student. Ms. Seldin did not recommend that sign language be used as Student's only means of communication. However, she found that it should be used to support Student's communication when augmentative communication was not available.

131. Student was very successful during Ms. Seldin's assessment using the iTouch loaded with a program called Proloquo2go. He was able to activate buttons

when the device was set to very large button size. He was able to independently request items 47 percent of the time. Student was able to scroll through four to six or seven photographs to make choices. He was able to navigate from an "eat" to "play" folder on the iTouch to the specific items for requests 10 times when given gestural prompts. Student was more independent when requesting food items.

132. Ms. Seldin found that the iTouch with the Proloquo2go program would meet Student's communication needs, including the use of pictures for communication, with auditory feedback. She found that the iTouch would provide Student with an easily portable communication system that could be available to him in the classroom and across other settings. Ms. Seldin also assessed Student using an iPad. Staff had reported to her that Student used the iPad at home for entertainment and at school as a reinforcer. They had reported that Student resisted using it for dedicated communication. While using the iPad with Ms. Seldin, Student kept tapping on it, something he had not done when using the iTouch.

133. Ms. Seldin recommended that Student continue to use multiple means of communication, including picture cards and signs, with staff modeling the pictures in the classroom to reinforce them. She also recommended that Student have a four to six week trial using the iTouch to support his communication needs. Use of the iTouch would ensure Student's ability to communicate across environments, particularly into the community. Ms. Seldin described exactly how the pictures on the iTouch should be set up and how it should be customized for Student. She emphasized that the device should only be used for communication and never for entertainment purposes. Ms. Seldin recommended that since Student required modeling from an adult to navigate between pages and to activate the sentence bar, staff would need to be trained on the iTouch. Finally, if the trial was successful, Ms. Seldin recommended that Student have access to the iTouch for all communication purposes. Ms. Seldin did not recommend the

iPad because of Student's use of it for entertainment, because of the sensory issues he had with it shown by his tapping, and because the iTouch was easier to transport.

134. The District implemented the trial of the iTouch after Student's annual IEP meeting on January 23, 2013. The trial was successful. Although the iTouch has a much smaller screen than the iPad, Student has been able to use it successfully. He has learned to navigate through several pages to find different folders. Dr. Hughes acknowledged Student's successful use of the iPad in her September 2013 FBA report.

PARTIES' INTERIM SETTLEMENT AGREEMENT AND JANUARY 23, 2013 IEP MEETING

135. Student filed his original complaint in this case on May 17, 2012. On November 29, 2012, the parties entered into an interim settlement agreement in which the District agreed to contract with Dr. Lauren Franke to do a review of Student's records and make recommendations based on the review. Although the agreement permitted Dr. Franke to conduct observations of Student at her discretion, she chose not to. Dr. Franke did not write a report about her findings and recommendations concerning Student. Neither Student nor the District called Dr. Franke as a witness at the hearing.

136. Student's IEP team met on January 23, 2013, for his annual review and to discuss Dr. Franke's findings. In addition to Parents and their attorney, the IEP members included Ms. Cottrell, Ms. Seldin, Ms. Burns, Mr. Chen, two other District administrative representatives, another speech and language pathologist, District school psychologist Karrie Anderson, a general education teacher, an attorney for the District, and Dr. Franke. This is the only IEP meeting Dr. Franke attended.

137. Based on her review of Student's records, Dr. Franke informed the IEP team that a functional analysis assessment of Student should have been done and that assistive technology should have been used with Student. She disagreed that there were any pre-requisites to the use of assistive technology with him, agreeing with Dr. Cottier's

findings that assistive technology was appropriate for Student. Ms. Seldin reviewed her assessment. Dr. Franke and the IEP team discussed the need for adults to model several times any device used with Student before offering it to him.

138. The team then reviewed Student's progress on his goals. Student had met his readiness goal in body parts and no longer needed a goal in that area. Student had not met his bathroom goal and continued to need assistance in toileting. Student had met his behavior goals of attending and daily routines and had partially met his motor imitation goal. The team developed three new behavior goals for Student: one to follow choral instructions, such as "line up;" one in self-regulation; and one in stimulatory reduction, the purpose of which was to decrease Student's stimulatory habit of tapping.

139. Student had met his social/emotional goals in the areas of learning to identify emotions and being able to complete his morning and afternoon routines. He had partially met his goal of waiting and not taking food from other students. The IEP team developed three new goals in this area. The purpose of the first goal was teaching Student to make simple choices of preferred items using some sort of augmentative communication. The second goal was for Student to identify his written name. The third goal was to teach Student to match pictures of his peers to the actual child.

140. Student had met all four of his speech goals. His IEP team therefore developed four new goals. The first was focused on having Student use augmentative communication to indicate when he was "all done" with an activity. The second goal was for Student to use augmentative communication to indicate that he did not want a non-preferred activity or object. The third goal was to teach Student to request items or things he wanted to do. The fourth goal was similar to the third, except that the purpose was for Student to use augmentative communication when requesting items or activities.

141. Student had met his fine motor goal in using scissors and was progressing toward his goal in copying shapes. His IEP team developed two new fine motor goals for him. One goal was for Student to learn to trace the letters of his name. The second goal was for Student to develop more advanced skills with scissors.

142. In academics, Student was progressing toward his math goal. His IEP team developed a new goal in identifying concepts of quantifying, such as full versus empty. Student was progressing in his letter identification goal. The IEP team developed two new language arts goals for him. The objective of one goal was for Student to match a sentence describing an action to a picture of the action. The objective of the second goal was to teach Student to separate pictures of familiar items into categories.

143. The form used by the District to review and describe a student's present levels of performance on goals and to describe new goals, is a model of clarity. The form indicates the student's area of need. It identifies the prior goal by name, describes what the object of the goal was, whether the goal had been met, and, if not, the percentage of progress made on the goal. The form has a space for indicating the student's strengths and needs. It has a space to indicate if a goal in the area is needed. The form then includes an area to describe the student's baseline performance in the area, a space to describe the new annual goal, along with benchmarks and objectives as necessary, how the goal will be evaluated, and the persons responsible for implementing the goal.

144. In this case, the forms for Student's goals used in every one of his IEP's contained all information necessary to describe Student's present abilities, his need for each of the goals, a description of the goals' objectives, how the goal would be evaluated, and who would be responsible for implementing the goal.

145. All of the goals developed for Student at each of his IEP's were based on his then present levels of performance, including, where appropriate, his most recent

assessments. Each goal had appropriate baselines indicating Student's current abilities in each area. Each goal was measurable. Each goal addressed deficits that Student had and each goal was needed to address those deficits. Each goal was appropriate for Student based on his assessed needs, his skills, his cognitive level, and his expected ability to be able to meet the goal. Ms. Ni, Ms. Kent, Ms. Steinman, Dr. Murphy, and Ms. Burns, all persuasively testified that the goals were properly developed, properly written, and were appropriate for Student.

146. In their testimony at hearing, Parents did not specifically address why any of the goals in Student's IEP's were inappropriate or failed to be clear or measurable. There is no indication in the IEP notes that Parents requested goals that the District refused to consider or adopt and Parents never testified at hearing that such was the case. Other than Parents, Student presented the testimony of only two non-District witnesses: Ms. Cottier and Dr. Hughes. Neither witness was asked to review the goals in Student's IEP's. Their assessment reports do not reference Student's goals. At hearing, neither witness was asked to critique the goals or offered any testimony questioning the validity, appropriateness, or format of the goals. Student therefore presented no documentary or testimonial evidence that disputed the appropriateness or validity of any of the goals contained in the IEP's at issue in this case.

147. Based upon input from Dr. Franke, Parents, and the District IEP team members, the team decided to administer two additional assessments to Student: an FBA and an assessment to determine if Student needed a one-on-one aide (also known as an "independence facilitator" at the District). The team also determined that a District occupational therapist would review Student's need for a sensory diet. The IEP team, including Parents, agreed that Student would begin use of the iTouch. The District agreed to provide training to Student's staff and Parents. The District also agreed to invite Student's in-home ABA providers to the training.

148. The IEP team also discussed the frequency of Student's speech services. The District offered Student one, 30 minute per week group session; one, 30-minute per week individual session; and one, 30-minute per week individual consultation session. In response to a request from Student's attorney, the District agreed to provide Student with three additional 20-minute individual sessions a week on a short-term basis to address the introduction to Student of the iTouch. The District also offered 30 minutes per week of assistive technology consultation in Student's classroom on a short-term basis. Ms. Seldin would also be available as needed for training on the iTouch and support for Student and his team. The IEP team agreed that Ms. Seldin would provide four hours of training on the iTouch to staff supporting Student in the classroom.

REQUEST FOR A ONE-ON-ONE AIDE

Injury on February 1, 2012

149. On two separate occasions, Parents have formally requested the District to assign a one-on-one aide to Student. The first time was in early 2012. On February 1, 2012, Student had an accident at school while on the playground. When the adult playground supervisor who normally was in charge of watching out for Student and one other child briefly turned away from him, Student walked into the path of a child on a swing. The other child crashed into Student. Student received cuts and scrapes, some non-permanent teeth became loose, and Student suffered some type of concussion that caused him to have small seizures for about two weeks. However, in spite of these injuries, Student returned to school the day after the injury.

150. Student did not suffer any permanent injury from the accident. However, Parents reacted, as would most parents, by being concerned about Student's continued safety at school. Although they did not broach the incident at Student's February 29,

2012 IEP meeting, they wrote to the District on April 5, 2012, requesting that the District provide a one-on-one aide to Student during class and on the playground.

151. Ms. Cottrell responded on behalf of the District by letter dated April 17, 2012. Among other things, she addressed Parents' request for the aide. She noted that Student had met most of his prior goals and was continuing to make educational progress. Ms. Cottrell also noted that there was a very high ratio of adults to children in Student's class. At the time, Ms. Burns's class had one adult for every two children. The District did not believe that an aide was necessary to address Student's needs.

152. After the accident, school staff discussed strategies to keep Student safe on the playground. Ms. Burns initially moved Student to a different playground for recess that did not have swings. She returned Student to his original playground when he indicated he wanted to go back. However, to keep him safe, the District assigned an adult to specifically watch Student on the playground and ensure that no further accidents happened. Other than a few cuts and scrapes, Student had never been injured at school before this incident. Between the time he was injured in February 2012, and the hearing in this matter, Student did not suffer any injuries other than a few scratches attributable to interaction with other children. The District attempted to obtain Student's medical records from Parents to determine if Student had suffered any long-term effects of the accident, but Parents declined to provide the records or access to Student's doctor. For these reasons, the District did not believe Student required a dedicated aide. Student's doctor did not testify at the hearing.

Ms. Anderson's Independence Facilitator Assessment

153. The second time Parents formally requested an aide for Student was when they asked the District to conduct an assessment to see if an aide was warranted. The District asked Karrie Anderson to perform the assessment. Ms. Anderson has been a District school psychologist since 2005. She has a master's degree in school psychology.

She is presently working on her certification as a Board Certified Behavioral Analyst. Ms. Anderson helped facilitate the programming in Ms. Burns's classroom during the 2012-2013 school year.

154. Ms. Anderson observed Student six times over a three-week period in April 2013. She observed him in class, during recess and in physical education. Some of the observations were while Student received small group instructions. During other observations he received individual instruction.

155. Student was in first grade at the time. As with kindergarten, Ms. Burns was his teacher. There were then eight children in his class. In addition to Ms. Burns, there were two classroom aides and two aides assigned to specific children whose IEP's required one-on-one assistance. Ms. Anderson noted that the class was an autism-specific ABA classroom that had a highly structured environment where a daily schedule was posted and followed. The staff used visual and auditory cues to aid communication and learning. There was a high rate of reinforcement used in the class as a whole and with individual children. Student's positive behaviors were reinforced consistently. Student was always in close proximity to an adult.

156. Student participated appropriately in the classroom activities. He responded to positive reinforcement. He was able to easily transition to new activities. He was able to complete puzzles. Overall, Student was compliant and followed directions most of the time. When he was in one of the center rotation activities, he would visually check in with the aide. During one activity, he calmly waited his turn. Student also was able to use his iTouch to select what he wanted to eat during a break. Student demonstrated interest during lessons. He did not require more than two prompts to follow directions. He was calm at all times observed. Staff reinforced him verbally and with his token board for staying calm and engaging in activities.

157. On the playground, Student was always in the company of an adult. Student played safely on the swings, pushed by the aide, and played safely and independently on playground equipment. Student did not interact with the aide or the other children but seemed aware of them as he would walk around other children to access equipment. During Ms. Anderson's observation of Student in his physical education class, Student participated in kicking a soccer ball back and forth. He smiled while kicking it and took initiative to kick it. Student was aware of his environment because he watched others, moved around other children when they were in his way, and responded to noises.

158. Based upon her observations of Student's behavior in class and on the playground, in the context of the structured classroom he attended and the high adult to student ratio, Ms. Anderson determined that Student did not require a one-on-one aide in order to access his education or to be safe on the playground.

159. Other than Parents, the only witness who testified that Student required an aide, either in 2012 or at the time of the hearing, was Dr. Elizabeth Hughes, the psychologist who headed the private assessment team that conducted an FBA for Student in September 2013. Dr. Hughes has a doctorate degree in clinical psychology. She studied under ABA expert Dr. Ivar Lovaas. Dr. Hughes has written several articles and given several trainings on positive behavior practices. Her experience has been primarily in the supervision of programs providing behavior intervention services to children. Since 2011, she has been the Director of the Institute for Applied Behavior Analysis (IABA), a non-public agency.

160. Dr. Hughes found that Student was not progressing sufficiently in class and that an aide would assist him to focus and pay more attention to tasks. Dr. Hughes also believed that the one incident of Student being injured when he walked in front of a child on a swing was sufficient indication that Student was unaware of his

surroundings and needed to have a dedicated staff person watching his every movement on the playground.

161. Dr. Hughes's recommendation for a one-on-one aide is not persuasive. As discussed below, IABA staff made recommendations based on one in-class observation of Student in which no data was taken. Contrary to IABA's conclusions, Student was generally making good progress in school, as evidenced by the testimony of his teachers and Ms. Anderson. He had consistently met most of his goals and had made progress on those he had not met. He was able to access the instruction in the classroom. Ms. Anderson conducted three in-class observations of Student. He functioned appropriately during all three. He was not overly inattentive. When he was, staff was able to re-direct him. Dr. Hughes too lightly disregarded the progress Student was making in class, the progress he made on most of his goals over the last two years, and the fact that all District assessments and IEP's reference the fact that Student was too prompt-dependent in the first place.

162. Student's teacher at the time, Ms. Burns, was in the best position to determine if Student needed an in-class aide because she was with him every day. Ms. Burns noted that Student was making progress on his goals, that there was already a ratio of one adult for every two students in her class, and that Student needed to become more independent rather than more prompt-dependent. Student's IEP goals consistently focused on making him more independent. There were children in Ms. Burns's class who did have a one-on-one aide. She has recommended dedicated aides in the past when appropriate. If Ms. Burns had believed that Student also required one, she would have recommended it.

163. With regard to the issue of Student's safety on the playground, which had prompted Parents' request for the aide in April 2012, the District persuasively demonstrated that it quickly and appropriately responded to Student's injury. A staff

person had been assigned to watch Student at all times. Student had not suffered another injury. Dr. Hughes's reliance on one incident, which occurred a year and a half before her assessment, to make a determination that Student required an aide is therefore not persuasive.

SENSORY DIET RECOMMENDATIONS

164. Based upon Parents' request that the District review Student's need for a sensory diet, District occupational therapist Tim Chen spoke with Ms. Burns to determine Student's sensory needs. Mr. Chen has a master's degree in occupational therapy. He has worked as an occupational therapist for the District since 2008.

165. A sensory diet is a way of facilitating a child's self-regulation skills using sensory activities incorporated into the child's daily activities. A child's behaviors may not be based solely on sensory issues, however. Sensory strategies often must be used with language and behavioral strategies.

166. Mr. Chen suggested that Student engage in some type of heavy work every 20 to 30 minutes. "Heavy work" refers to activities that provide resistance against gravity. This type of activity is calming to people who have sensory needs. Mr. Chen found that Student might also need a "sensory break" after long periods of sitting or concentration. Student required the breaks before he engaged in negative or inappropriate behaviors, not as a response to it. Mr. Chen suggested a variety of activities for Student, along with a suggested schedule of when Student should engage in one of the activities.

167. However, Mr. Chen was not concerned that Student had not had a specific written sensory diet previously because sensory strategies were fully embedded in the curriculum of the District's ABA autism specific classrooms. Mr. Chen was familiar with Ms. Burns's classroom. There was a trampoline in the classroom as well as therapy balls, baskets of manipulatives, and other things, like baskets of beans, into which the children

could put their hands. The classroom also had a calming corner. There was an obstacle course available to the children. The class also had items like weighted vests to apply light pressure to a child who needed it. Ms. Burns started each day with physical activity to help regulate the children and prepare them for the school day. The class day had several recess breaks to allow the children to engage in physical activity as well. Although Student had not had a written sensory diet prior to the one Mr. Chen prepared, Student presented no persuasive evidence that his sensory needs were not met in his classroom.

DISTRICT'S FUNCTIONAL BEHAVIOR ASSESSMENT

168. The District conducted an FBA at Parents' request. The assessment was done by Ms. Burns and Dr. Elizabeth DelPizzo, a District autism specialist. Dr. DelPizzo did not testify at the hearing.

169. Based on IEP team discussions at the January 23, 2013 IEP meeting, the FBA focused on three of Student's behaviors at school: pushing his palm or someone else's palm to his chin; tapping his fingers for three or four counts; and squeezing and/or twisting another person's wrist or hand in a way that might be considered aggressive.

170. Ms. Burns provided information concerning the onset of each of the behaviors. The assessors also took data to determine what the antecedents or triggers were for each behavior, and the frequency and duration of the behaviors. The data also addressed the severity of the behaviors, when and if staff addressed the behavior, and Student's response to any interventions by staff. Finally, the assessors used the data they obtained to determine if any of the three behaviors was interfering with the ability of Student or his peers to access their education, or was causing physical harm to Student or to others.

171. The data indicated that none of the behaviors had any marked impact on Student's education or that of his fellow students. If Student pushed his chin to his palm, staff would re-direct him and Student would comply. Student did not suffer any physical injury from the behavior.

172. Student's tapping behavior occurred most often when he had some type of hard object to manipulate or when he was walking near a hard surface. The data indicated that the behavior did not interfere with Student's ability to learn and did not interfere with social interactions. When staff noticed Student engaging in the behavior, Student was prompted to stop it. Student received tokens when he did not engage in tapping.

173. Student's manner of grabbing or twisting another person's hand or wrist occurred when he was asked to do something he did not want to do or when he was in close proximity to an adult. The behavior was never directed at another child. The assessors believed that this behavior was the result of Student's frustrations with not being able to understand what others were trying to tell him or direct him to do. The assessors believed that it was Student's frustration at not being able to communicate that caused the behavior. In any case, the behavior was not interfering with Student's ability to access his education, was not affecting his peers, and was not causing injury to him or to the adults in the classroom.

174. The assessors determined that the three behaviors were triggered when Student was waiting to do something, was presented with instructional demands, or needed to communicate. Overall, the purpose of the behaviors was to escape or avoid tasks or demands, for self-stimulation, or because of frustrations with communication. The assessors recommended that the District continue to emphasize teaching Student functional communication with the iTouch, with verbal directions, and with his picture cards, which would ease his frustrations with not being able to communicate effectively.

They recommended that the District continue to assess the type of reinforcers that were effective with Student and continue to expand Student's play skills. The assessors further recommended that the District continue to teach Student calming strategies and continue to use the token system to teach him not to engage in the aggressive behaviors. Finally, the assessors recommended that the District continue to offer Student verbal guidance and redirection.

175. None of the three targeted behaviors were interfering with Student's progress toward his goals, were interfering with the education of his peers, or were physically harming Student or anyone else in his classroom. All of the many recommendations that the assessors had to address the behaviors were already being implemented for Student. The assessors therefore did not recommend that the District develop a behavior support plan or behavior intervention plan for Student.

MAY 2, 2013 IEP MEETING

176. Student's IEP team met on May 2, 2013, to review the results of the District's assessments. The District assessors informed Parents at this meeting that the results of the assessments indicated Student did not require a one-on-one aide or a behavior support plan. The IEP team agreed that the sensory diet would be formally implemented as part of Student's IEP.

177. By the time of this meeting, Student had been using the iTouch for approximately three months. He was using it in school and at home with appropriate prompting. Student was functionally using the iTouch. Importantly, Student was responding to questions about personal needs and wants, and to location questions about where he was. The District had provided training on using, programming, and customizing Student's iTouch to Ms. Burns, Father, Student's in-home ABA supervisor, the speech therapist, and Mother. Ms. Seldin had also provided weekly assistive technology consultations in Student's classroom with Student, Ms. Burns, and the

speech therapist. Although the consultation was supposed to have ended in March, 2013, the District had continued to provide it weekly through mid-April. At this IEP meeting, the District agreed to provide 30-minute monthly assistive technology consultations through the remainder of the time covered by Student's January 23, 2013 IEP.

FUNCTIONAL ANALYSIS ASSESSMENT BY IABA

178. Parents were not satisfied with the District's FBA. They therefore privately funded an FBA through the IABA, of which Dr. Hughes is the present Director. For unknown reasons, IABA assigned eight people to be part of the team conducting this assessment. Three of the eight had doctorate degrees and three had master's degrees. IABA conducted its assessment between May 30 and September 17, 2013. The IABA assessors reviewed Student's records, did observations of Student at school and at in his ABA program at home, reviewed video recordings of Student's ABA sessions and prior speech private speech sessions, and interviewed Student's family, his ABA provider, and his staff at school.

179. The IABA assessment focused on what the report called "inconsistent responding behaviors." These consisted of Student doing the following: failing to respond to stimuli to which he had previously responded; requiring prompts for skills which he had previously demonstrated independently; responding incorrectly to a skill that Student had demonstrated correctly within the same trial set or learning session; and responding with a behavior that was the target response for a previously targeted skill, rather than the skill currently being targeted. IABA concluded that it was these behaviors that were interfering with Student's ability to access his education. IABA concluded that neither the District staff nor Student's in-home ABA providers were correctly responding to or addressing Student's behaviors. IABA additionally concluded that neither the District staff nor Student's in-home ABA providers were correctly

practicing ABA principles with Student. IABA concluded that this was another reason why Student was failing to progress.

180. There are many flaws in the IABA report. It is almost impossible to determine from the report whether observations relate to the home or to the school environment. For example, the report states that Student did not always have access to his augmentative communication device (referring to the iTouch). The report fails to state whether this was at home, in school, or both. This is a consistent problem throughout the report. There is no specific description of Student's behaviors in his classroom. There is no indication of the specific data collected either in the home or at school. Significantly, the IABA report does not discuss the many advances that Student had made throughout the years on meeting the majority of his goals and progressing substantially on the few he did not meet.

181. Bonnie Hinton is an autism specialist for the District. She has a master's degree in special education, a special education teaching credential, and is a Board Certified Behavior Analyst. She testified at hearing as an expert for the District. Ms. Hinton explained that what IABA termed "inconsistent responding behavior" was just a description of Student's inattentive behavior. Inattention is part of the inherent component of autism and can be addressed through prompting, IEP goals, reinforcement, and consequence strategies. All of these had been used with Student.

182. IABA made several recommendations to address the concerns it had about Student's education. All of them were already being addressed in one manner or another in Student's school program. Prompt hierarchies were being implemented in his class. The District had not written a specific goal for this because it was an inherent part of the teaching strategy used in the classroom. The District also included collaboration between the staff members working with Student because it was an inherent part of the District's autism specific classroom programs and was implemented on a daily basis.

Collaboration between specific service providers and Student's teachers were part of the related services offered to Student in most of his IEP's. Student's latest IEP specified collaboration between the assistive technology specialist and Student's team at school. Likewise, the District had incorporated the concept of relevant and functional stimuli into goals for Student. For example, one of his earlier goals had been to identify body parts. The District had also developed functional goals addressing, inter alia, Student's daily routines, his toileting, his ability to identify people and objects, his ability to make choices, and his need for pre-academic skills such as tracing letters.

183. IABA recommended that Student have full access to his iTouch. The District had developed goals using the device, had provided therapy sessions for Student to learn to use it, and had provided training to his teacher and staff, his parents, and his in-home providers. The District had confirmed at Student's May 2, 2013 IEP meeting that Student was using the iTouch throughout his school day.

184. The District was addressing Student's need to access his peers by developing goals for him to learn what emotions are and to identify his peers. The District was also already providing visual supports in Student's classroom through visual schedules, the token boards, and picture cards used as aids to represent different parts of Student's school day.

185. Ms. Hinton's opinion that IABA's assessment failed to define issues not already being addressed by the District was therefore ultimately more persuasive than Dr. Hughes's criticism of the District's program. IABA's failure to follow best practice data collection criteria, its failure to identify whether its observations referred to Student's home program or to his school program, its failure to recognize the gains Student had made on his goals through the years, and its failure to acknowledge the emphasis placed by the District on addressing Student's inattention at school through

programming, services and goals, all weakened its finding that the District was not addressing Student's needs at school.

LEGAL CONCLUSIONS

INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA⁷

1. This hearing was held under the Individuals with Disabilities Education Act (IDEA), its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et. seq.; 34 C.F.R. § 300.1 (2006) et seq.,⁸ Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; 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(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, §

⁷ Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

⁸ All references to the Code of Federal Regulations are to the 2006 edition.

56363, subd. (a) [In California, related services are also called designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d); Ed. Code, § 56032.)

3. In *Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] ("*Rowley*"), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. *Rowley* expressly rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.) Instead, *Rowley* interpreted the FAPE requirement of the IDEA as being met when a child receives access to an education that is reasonably calculated to "confer some educational benefit" upon the child. (*Id.* at pp. 200, 203-204.) The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, Congress has not changed the definition of a FAPE articulated by the Supreme Court in that case. (*J.L. v. Mercer Island School Dist.* (9th Cir. 2010) 592 F.3d 938, 950 [In enacting the IDEA 1997, Congress was presumed to be aware of the *Rowley* standard and could have expressly changed it if it desired to do so.]) Although sometimes described in Ninth Circuit cases as "educational benefit," "some educational benefit," or "meaningful educational benefit," all of these

phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 950, fn. 10.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6); 34 C.F.R. 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56505, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].)

ISSUES 1 AND 4: FAILURE TO APPROPRIATELY ASSESS STUDENT IN ALL AREAS OF SUSPECTED DISABILITY SINCE MAY 16, 2010

5. Student makes two contentions regarding the District's duty to assess him. First, he contends that the District assessments were not appropriate. Second, he contends that the District failed to timely assess him in all areas of suspected need. Student contends that the District should have assessed him earlier than it did in the areas of assistive technology and functional behavior. He further contends that when the District finally administered the assessments, they were not appropriate. Finally, Student contends that the District has not appropriately assessed his sensory processing needs.

6. The District contends that all assessments it administered meet applicable legal standards. It also contends that its assessments were timely and that it assessed all of Student's suspected areas of need.

7. As stated above in Legal Conclusion 7, "related services" are developmental, corrective, and supportive services as may be required to assist the child in benefiting from special education, and include OT, PT, health and nursing services, assistive technology and speech and language pathology. A FAPE means special education and related services that are available to the child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. The basic floor of opportunity provided by the IDEA consists of access to specialized instruction and related services which are individually designed to provide educational benefit to a child with special needs.

8. A state or local educational agency must conduct a full and individual initial assessment before the initial provision of special education and related services to a child with a disability. (20 U.S.C. § 1414 (a); 34 C.F.R. § 300.301; Ed. Code, § 56320). After a child has been deemed eligible for special education, reassessments must be performed if warranted by the child's educational or related service's needs. (20 U.S.C. § 1414 (a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1)). However, absent an agreement to the contrary between a school district and a student's parents, reassessments must not occur more than once a year, or more than three years apart. (20 U.S.C. § 1414 (a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).)

9. A local educational agency must assess a special education student in all areas of suspected disability, including if appropriate, health and development, vision, hearing, motor abilities, language function, general intelligence, academic performance, communicative status, self-help, orientation and mobility skills, career and vocational abilities and interests, and social/emotional status. (20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. §

300.304 (c)(4); Ed. Code, § 56320, subd. (f).) A local educational agency must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information. (20 U.S.C. § 1414(b)(2)(A)). No single measure or assessment shall be the sole criterion for determining whether a child is a child with a disability. (20 U.S.C. § 1414(b)(2)(B); 34 C.F.R. § 300.304(b)(2); Ed. Code, § 56320, subd. (e)).

Assessments must be sufficiently comprehensive to identify all of the child's special education and related service needs, whether or not commonly linked to the disability category of the child. (34 C.F.R. § 300.304 (c)(6).) The local educational agency must use technically sound testing instruments that demonstrate the effect that cognitive, behavioral, physical, and developmental factors have on the functioning of the student. (20 U.S.C. § 1414(b)(2)(C); 34 C.F.R. § 300.304 (b)(3).) The IEP team must consider the assessments in determining the child's educational program. (34 C.F.R. § 300.324(a)(1)(iii)).

10. The District administered an early triennial multidisciplinary assessment to Student in January and February 2011. The District assessed Student in the areas of cognition, academic achievement and ability, speech and language, and occupational therapy. In November and December 2012, the District administered an assistive technology assessment to Student. Each of the assessors used a variety of assessment tools that were appropriate for the purpose of each assessment, and correctly administered them. All of the assessors were very experienced in conducting assessments, and qualified to conduct them. The assessments were not discriminatory in any way, and were administered in English, Student's primary language. Student presented no evidence that the assessments did not meet all legal requirements.

11. Student presented the testimony of Dr. Hughes and Ms. Cottier, two experienced professionals who would have been qualified to critique the District's assessments, Dr. Hughes in the area of psycho-educational and Ms. Cottier in the area

of speech and assistive technology. Yet, neither of these witnesses were questioned about the District assessments that they were respectively qualified to address. Student has failed to meet his burden of proof that any section of the District's triennial assessment was inappropriate or that Ms. Seldin's assistive technology assessment was inappropriate.

12. Student alleged that the District failed to assess him in the area of social integration. However, Student failed to provide any evidence whatsoever that a specific assessment in this area should have been administered or that the District's triennial assessment did not address that area of need. The triennial assessment specifically assessed Student's social/emotional development. No one at hearing testified that the assessment was not appropriate or that it failed to address Student's social or emotional needs. Student has failed to meet his burden of proof in this regard.

13. In May 2013, the District administered an assessment to determine whether Student required the assistance of a one-on-one aide, known in the District as an independence facilitator. As discussed below, Dr. Hughes disputes the District's findings that Student does not require an aide. However, she did not address the appropriateness of the assessment administered by Ms. Anderson. Student has therefore failed to prove that the District's independence facilitator assessment was not done appropriately.

District's FBA

14. The District conducted an FBA of Student in May 2013. Student contends the assessment was flawed because it did not identify the behaviors that were impeding his ability to progress in his education. Student also asserts that the District should have done a formal behavior assessment of him earlier than it did. The District contends that the FBA was appropriate. It also contends that since none of Student's behaviors were

interfering with his access to his education, there was no reason to have assessed Student's behaviors before it did.

15. When a child's behavior impedes the child's learning or that of others, the IEP team must consider strategies and supports, including positive behavioral interventions, to address that behavior. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i), (b); Ed. Code, § 56341.1, subd. (b)(1).) Federal law does not contain a specific definition of "behavioral intervention" and does not impose any specific requirements for how to conduct or implement a behavior assessment or behavior intervention plan. (*Alex R. v. Forrestville Valley Community Unit School Dist., # 221* (7th Cir. 2004) 375 F.3d 603, 615.) In California, a behavior intervention is "the systematic implementation of procedures that result in lasting positive changes in the individual's behavior." (Cal. Code Regs., tit. 5, § 3001, subd. (d).) It includes the design, evaluation, implementation, and modification of the student's individual or group instruction or environment, including behavioral instruction, to produce significant improvement in the student's behavior through skill acquisition and the reduction of problematic behavior. (*Ibid.*)

16. Student's teachers during the time period covered by this case were Ms. Manea, Ms. Steinman, and Ms. Burns. None of them believed that Student had any behaviors that were interfering with his learning or that of his classmates that they were not addressing in their classrooms as part of Student's curriculum and as part of their classroom management. Each of their classrooms was autism-specific, used ABA methodology, and was designed to meet the needs of children on the autism spectrum. Inattention is often inherent in children with autism. The District autism-specific classrooms were all designed to address inattention in children and respond to and address the behavior needs of all children in the class. Ms. Manea, Ms. Steinman, Ms.

Burns, and their staff, successfully did that with Student. They did not believe that an FBA was therefore needed for Student.

17. The District conducted the FBA in May 2013 based upon the recommendation of Dr. Franke, who reviewed Student's records as part of a settlement agreement between the parties. It is unknown why she believed an FBA was necessary because she did not write a report and did not testify at the hearing.

18. Ms. Burns and Dr. DelPizzo conducted the District's FBA. They focused on the three possible behaviors that might have been interfering with Student's progress: his pressing of his chin to the palm of his hand or the palm of adults; his self-stimulatory tapping behavior; and his habit of grabbing the wrist or hand of adults and twisting them. The District's FBA determined that none of these behaviors was interfering with the access of Student or other children to their education. Nor were the behaviors injuring Student or anyone else in the classroom.

19. Dr. Hughes was highly critical of the District's FBA. She believed that Student's behaviors were, in fact, impeding his progress. The difficulty, according to Dr. Hughes, was that the District did not focus on the behaviors that were actually affecting Student at school. She felt that Student's "inconsistent responding behaviors" were the root of his failure to progress.

20. Dr. Hughes's opinion on this matter is not persuasive. First, Dr. Franke was the impetus behind the District's decision to conduct its FBA. She was present during the discussions and part of the team that made the decision about what the FBA would address. It is unlikely that Dr. Franke, who had reviewed Student's records, and was part of the in-depth discussion of Student's possible behavior challenges, would not have voiced her opinion that the District's focus for the FBA was misguided. There is no evidence that Dr. Franke did so.

21. Dr.. Hughes's criticism of the District's FBA is unpersuasive also because the behaviors she described as inhibiting Student's education were basically inattention. All of those behaviors were being addressed in Student's classroom as part of his curriculum and through his many goals. Additionally, the District had already developed goals for, and was already implementing them in, Student's ABA focused classroom the majority of the strategies Dr. Hughes recommended in the IABA's report.

22. The final point undermining the persuasiveness of IABA's critique of the District's FBA was its opinion that Student had never received appropriate ABA therapy and that he required more intensive ABA services than what he was then receiving. The evidence contradicts IABA's criticism of the District's program, which IABA based on a mere hour and a half observation. Ms. Burns, Ms. Steinman, and Ms. Hinton all testified to the intense ABA training they received from an outside agency, as does all District staff working with autistic children. IABA's opinion that Student had failed to receive adequate ABA intervention is not plausible because it indicts not only the District, but the three private non-public agencies that have provided ABA services to Student for over five years, as well as the non-public agency that provides intensive training in ABA procedures to District staff.

23. The District's FBA was appropriate as was its finding that Student did not engage in behaviors which interfered with his education or the education of others. Student has therefore failed to prove by a preponderance of the evidence that the District's FBA should have been done earlier or that the FBA was inappropriate.

Independence Facilitator Assessment / District's FBA

24. Student also contends that the District's FBA was inappropriate because it failed to determine that Student required the services of a one-on-one aide, also called an independence facilitator by the District. The District contends that it properly determined that Student did not require a dedicated aide.

25. As discussed above, the District focused on three behaviors that might have been interfering with Student's progress at school. As determined above, the District's FBA was appropriately administered. It correctly found that the behaviors were not interfering with the ability of Student or his peers to access their education. It correctly found that the behaviors were not harmful to Student or others in his classroom. Since the behaviors were appropriately addressed by Student's teacher and her staff, there was no need to assign a one-on-one aide to Student.

26. At Parents' request, the District also conducted a separate assessment to determine if Student required a one-on-one aide. This assessment was completed by school psychologist Karrie Anderson. Parents believed that Student required the aide because he had been injured at school on February 1, 2012, when he walked in front of child on a swing. Student suffered some type of concussion that caused him to have slight seizures for a week. He suffered some cuts and bruises, and some of his non-permanent teeth became loose. Student returned to school the day after the incident. He did not suffer any long-term injuries from the accident.

27. Ms. Anderson reviewed Student's records and conducted six observations of Student. She determined from her observations that Student was sufficiently supported in class and on the playground and therefore did not need the services of a one-on-one aide.

28. Although Dr. Hughes was of the opinion that Student required the aide, she did not address the appropriateness of the District's independence facilitator assessment. Student presented no evidence that the manner in which Ms. Anderson conducted her assessment was improper or that there were other methods she should have used as part of the assessment. Student has therefore failed to meet his burden that the District's FBA or independence facilitator assessment were procedurally flawed

with regard to the issue of whether Student needed a dedicated aide. The substantive issue of whether Student required an aide will be addressed below.

Sensory Diet Evaluation

29. Student contends that the District did not conduct a proper sensory diet development evaluation in May 2013 to determine Student's need for aide assistance. Student contends that this resulted in Student's IEP team adopting less than adequate behavior support plans for Student and providing him with inappropriate aide support. The District contends that its sensory diet evaluation was appropriate.

30. It is unclear why Student connects the sensory diet evaluation to Student's need for an aide. The purpose of the evaluation was to determine if Student required a sensory diet, and, if so, what would comprise it and how would it be implemented. As discussed above, the District did a separate assessment to determine if Student required an aide.

31. To the extent that Student is contending that the District's sensory diet evaluation was not properly conducted, Student has failed to provide any evidence to support his position. Mr. Chen, the District occupational therapist who completed the evaluation, has the appropriate training and experience to make the recommendations he did concerning Student's sensory needs. He spoke with Ms. Burns and determined Student's needs based on her description of Student's sensory seeking behaviors. Student presented no evidence that the recommendations Mr. Chen made were inappropriate for Student or would fail to benefit him.

32. To the extent that Student is arguing that the District should have formally assessed Student's sensory needs, Student has also failed to prove his contention. Mr. Chen and Ms. Ni testified that Student was appropriately assessed. Ms. Ni used comprehensive and appropriate occupational therapy assessment tools when she tested Student as part of his triennial in early 2011. Mr. Chen addressed all of Student's sensory

needs in his report. The only witness at hearing who criticized to any extent the District's treatment of Student's sensory needs was Dr. Hughes. But Dr. Hughes is a psychologist and not an occupational therapist. Although there are some psychological tests that address sensory processing issues, Dr. Hughes did not administer any such assessments to Student. In any case, sensory integration and sensory diets are issues properly addressed by an occupational therapist, not a psychologist. Student has therefore failed to meet his burden of proof that the District should have formally assessed his sensory needs.

Assistive Technology / Functional Communication Assessment

33. Student contends that the District should have conducted an assessment to determine if he required assistive technology in order to benefit from his education long before Ms. Seldin assessed Student in November, 2012. The District contends that Student did not demonstrate the communication abilities necessary to benefit from assistive technology before the date it assessed him.

34. A school district is required to provide any assistive technology device that is needed to provide a FAPE to a child with a disability. (20 U.S.C. § 1412(a)(12)(B)(i); 34 C.F.R. § 300.105; Ed. Code, § 56341.1, subd. (b)(5).) An IEP team must consider whether a child requires assistive technology devices or services. (20 U.S.C. § 1414(d)(3)(B)(v); 34 C.F.R. § 300.324 (a)(2)(v); Ed. Code, § 56341.1, subd. (b)(5).) An assistive technology device is any item that is used to increase, maintain, or improve the functional capabilities of a child with a disability. (20 U.S.C. § 1401(1); Ed. Code, § 56020.5.)

35. In this case, Student met his burden of proof that the District should have been assessed his assistive technology needs before it did. First, Dr. Cottier persuasively testified that the earlier a child is provided with assistive technology, the earlier he or she will be able to use it for purposes of communication. Dr. Cottier generally assesses children when they are three or four-years-old. Their lack of present communication

capabilities does not impact the ability of young children with communication deficits to successfully be able to use different types of assistive technology, particularly electronic devices. Dr. Franke concurred that there were no prerequisites for conducting an assistive technology assessment.

36. The most compelling evidence Student presented is the fact that he began to use an iPad successfully by the time of his February 29, 2012 IEP meeting, albeit for entertainment purposes. The use of the iPad was such a reinforcer for him that the District permitted Student to bring it to school and allowed him to use it as a reward for completing tasks and engaging in appropriate behaviors. Given Student's interest in using the iPad and his success with it, the District should have at least assessed Student right after discovering his ability to use the iPad.

37. The District argues that it was already providing assistive technology to Student through the use of a picture exchange system, which is a form of assistive technology, and that it was not required to maximize Student's communication abilities or potential. The District is correct. For example, in the case of *R.P. v. Alamo Heights Ind. School Dist.* (5th Cir. 2012) 703 F.3d 801, 814 (*Alamo Heights*), the court found that the school district did not violate a student's right to a FAPE by not providing her with a voice output device. Instead, the District used a picture exchange system with her. However, the facts in *Alamo Heights* are distinguishable from Student's case. There, the student was independently using the picture exchange system to successfully communicate across environments. She was steadily increasing her communication abilities using it. In this case, Student had very limited success using any type of picture exchange system. This fact was substantiated by Ms. Cottier, Student's teachers, and Ms. Seldin when she assessed Student. Student's use of signs was not functional because they were idiosyncratic to him and therefore could not be understood by people not familiar with him. Student's other means of communication, such as eye gaze and

pointing, were also not functional means of communication. Student has thus met his burden of proof that the District should have administered an assistive technology assessment to him no later than subsequent to his February 29, 2012 IEP meeting.

38. However, the inquiry does not end with this finding. A failure to assess a child in a suspected area of need is a procedural violation. 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); 34 C.F.R. § 300.513(a)(2); Ed. Code, § 56505, subd. (f)(2); see also, *W.G. v. Board of Trustees of Target Range School Dist.* (9th Cir. 1992) 960 F.2d 1479, 1483-1484.) The decision of a due process hearing officer shall be made on substantive grounds based on a determination of whether the child received a FAPE. (20 U.S.C. § 1415(f)(3)(E); Ed. Code, § 56505, subd.(f)(1).) The hearing officer "shall not base a decision solely on nonsubstantive procedural errors, unless the hearing officer finds that the nonsubstantive procedural errors resulted in the loss of an educational opportunity to the pupil or interfered with the opportunity of the parent or guardian to participate in the formulation process of the individualized education program." (Ed. Code, § 56505, subd. (j).) In matters alleging a procedural violation, a due process hearing officer may find that a child did not receive a FAPE only if the procedural violation did any of the following: impeded the right of the child to a FAPE; significantly impeded the opportunity of the parents to participate in the decision-making process regarding the provision of a FAPE to the child ; or caused a deprivation of educational benefits. (20 U.S.C. § 1415 (f)(3)(E); Ed. Code, § 56505, subds. (f)(2).)

39. Here, Student has persuasively demonstrated that he was deprived of an educational benefit by the District's failure to timely assess him for assistive technology. Ms. Seldin's assessment confirmed Ms. Cottier's findings that Student did not use a

picture exchange system consistently or reliably. The evidence shows that Student's lack of functional communication was underscoring his inattention and frustration in class. When finally provided with an iTouch sometime after his January 23, 2013 IEP meeting, Student adapted to it rapidly. Although Ms. Cottier had been concerned that the iTouch was too small for Student and was too difficult for him to use because he was required to navigate through different pages on the device to access what he needed to communicate, her concerns were unfounded. As of the Student's May 2, 2013 IEP meeting, Student was learning to use the iTouch and was using it across environments to communicate. Where his communication with the picture exchange system had been extremely limited, Student's communication abilities with the iTouch expanded consistently. There is no evidence in the record that Student would not have been able to advance as well with the iTouch had he been assessed the year before and provided with the device at that time. As discussed below in Legal Conclusions 68 through 71, Student has persuasively demonstrated that he required some type of electronic assistive technology device in order to develop functional communication. The failure to assess him in assistive technology was a procedural violation that resulted in a substantive denial of FAPE to Student.

ISSUE 2: FAILURE TO PROVIDE STUDENT WITH A FAPE SINCE MAY 16, 2010

40. Student contends that the District did not provide him with a FAPE because it failed to adopt appropriate goals for him, failed to address all of Student's unique needs, and failed to provide appropriate placement and services in the areas of behavioral support, speech and language, parental training, occupational therapy, and assistive technology.

Lack of Appropriate Goals

41. Student contends that the District failed to develop appropriate goals for him in the IEP's at issue in this case. The District contends that its goals were all designed to meet Student's unique needs.

42. Federal and state special education law require generally that the IEP developed for a child with special needs contain the present levels of the child's educational performance and measurable annual goals, including benchmarks or short-term objectives, related to the child's needs. (20 U.S.C. § 1414 (d)(1)(A)(ii); Ed. Code, § 56345, subd. (a).) The purpose of goals and measurable objectives is to permit the IEP team to determine whether the pupil is making progress in an area of need. (Ed. Code, § 56345.) 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 team also must consider special factors, such as whether the child needs assistive technology devices and services. (20 U.S.C. § 1414(d)(3)(B); 34 C.F.R. § 300.324(a)(2); Ed. Code, § 56341.1, subd. (b).) 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.)

43. There is no one test for measuring the adequacy of educational benefits conferred under an IEP. (*Rowley, supra*, 458 U.S. at pp. 202, 203, fn. 25.) A student may derive educational benefit under *Rowley* if some of his goals and objectives are not fully met, or if he makes no progress toward some of them, as long as he makes progress toward others. A student's failure to perform at grade level is not necessarily indicative of a denial of a FAPE, as long as the student is making progress commensurate with his

abilities. (*Walczak v. Florida Union Free School Dist.* (2d Cir. 1998) 142 F.3d 119; *E.S. v. Indep. School Dist., No. 196* (8th Cir. 1998) 135 F.3d 566, 569; *In re Conklin* (4th Cir. 1991) 946 F.2d 306, 313; *M.H. v. Monroe-Woodbury Central School Dist.* (S.D.N.Y. March 20, 2006, No. 04-CV-3029-CLB) 2006 WL 728483, p. 4; *Houston Indep. School Dist. v. Caius R.* (S.D.Tex. March 23, 1998, No. H-97-1641) 30 IDELR 578; *El Paso Indep. School Dist. v. Robert W.* (W.D.Tex. 1995) 898 F.Supp. 442, 449-450.) A child's academic progress must be viewed in light of the limitations imposed by his or her disability and must be gauged in relation to the child's potential. (*Mrs. B. v. Milford Board of Education* (2d Cir. 1997) 103 F.3d 1114, 1121.) The issue is whether the IEP was appropriately designed and implemented and is reasonably calculated to provide a student with a meaningful benefit. (*Rowley, supra*, 458 U.S. at p. 192; *Adams, supra*, 195 F.3d at p. 149; *J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 461.)

44. Student's contentions that the District's goals were inadequate is simply not supported by the record. In each of Student's IEP's, the District reviewed his present levels of performance and determined whether Student had met his prior goals. If Student had not met the goal, the District staff reviewed Student's progress and in-class performance to determine why the goal had not been met. The District then either revised the goal or developed additional goals to address the area in which Student was not progressing. The goals each had specific baselines, the objectives of the goals were clearly defined, and the goals were measurable. The IEP documents indicated how the goals would be evaluated, and indicated who would be responsible for implementing the goals.

45. In every IEP at issue in this case, the District developed goals to meet Student's unique needs at the time. As he matured and met his goal, the District devised goals in new areas. For example, in its last IEP, the District developed specific goals for

Student in the areas of mathematics and language arts, areas that had not been addressed when Student was in preschool or kindergarten.

46. Student failed to elicit testimony from any witness that his goals were improper or that additional goals should have been developed for him. Neither Ms. Cottier nor Dr. Hughes addressed the adequacy of Student's goals. The only basis for Student's argument that the goals were improper is the fact that he did not meet all of them. As stated above, where Student failed to meet his goals, the District evaluated the cause and revised the goal or developed new ones to meet Student's needs. In any case, Student's emphasis on his failure to meet his goals is misplaced. For the majority of the IEP periods, Student met the majority of his goals. Even where he did not meet a goal, Student demonstrated progress on it. Student has therefore failed to meet his burden that the District did not develop adequate goals.

Failure to Address Student's Unique Needs / Failure to Provide
Appropriate Placement and Services

BEHAVIORAL SUPPORT AND SERVICES

47. Student contends that the District failed to provide appropriate placement and services in the areas of behavioral support, speech and language, occupational therapy, assistive technology, and parent training. Student also contends that he needs a one-on-one aide to address his behaviors in the classroom and to ensure his safety on the playground. The District contends that it appropriately and adequately met all of Student's unique needs in the areas at issue.

48. The basis for Student's contention that he has not received a FAPE is that he has made little or no educational progress. Student is a child who is very impacted by his autism. He has only made a few months of progress at school each year. However, his slow rate of progress does not by itself prove that his progress has been "de minimus" or that the District has denied him a FAPE. Student's rate of progress is limited

by his disabilities. Where a child has significant deficits such as Student's, the law accepts that the child's progress in school may be slow, and that he may need to repeat certain goals. (*R.P. v. Prescott Unified School Dist.* (9th Cir. 2011) 631 F.3d 1117, 1122-1123; *K.S. v. Fremont Unified School Dist.* (N.D.Cal. 2009) 679 F.Supp.2d 1046, 1057-1058 (*Fremont*)). A child's academic progress must be viewed in light of the limitations imposed by his or her disability and must be gauged in relation to the child's potential. (*Mrs. B. v. Milford Board of Education* (2d Cir. 1997) 103 F.3d 1114, 1121.) In considering the substance of an educational plan, "(T)he test is whether the IEP, *taken in its entirety*, is reasonably calculated to enable the particular child to garner educational benefits." (*Lessard v. Wilton-Lyndeborough Cooperative School Dist.* (1st Cir. 2008) 518 F.3d 18, 30 (italics added) (*Lessard*); see also *T.Y. v. New York City Dept. of Educ.* (2nd Cir. 2009) 584 F.3d 412, 419 [judging the "IEP as a whole"].)

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

50. Student contends that the District failed to provide him with sufficient behavioral support. To the extent that Student's contention addresses behavioral supports at school, the allegation has already been discussed extensively throughout the Factual Findings and Legal Conclusions and will not be reiterated here. Legal Conclusions 15 through 28 are incorporated herein by reference. Student has failed to

prove by a preponderance of the evidence that the District failed to address his behavioral needs at school or to provide him with adequate behavioral support.

51. Student also contends that the District should have provided him with ABA therapy outside of the classroom. The District contends that the program it provided in its autism-specific classrooms was sufficient to meet Student's needs.

52. Student's argument is not persuasive for several reasons. First, the District has demonstrated that the preschool, kindergarten, and elementary school programs Student attended were sufficiently designed to meet his needs. Each classroom was modeled on ABA principles, which were embedded in the curriculum. The classrooms had highly structured curriculum. The teaching and support staff were all trained in positive behavioral strategies. Regular collaboration between teachers, aides, and related service providers was an integral part of the programs. The purpose of the programs was to maximize outcomes for children with autism by using research-based practices, focusing on a rich social curriculum and focusing on academic readiness. The programs were also designed to maximize success in communication for the students, no matter the modality of communication the student was at or chose to use. Center rotations were used to address the children's goals in the areas of fine motor, sensory needs, art, games, academics, and gross motor skills. The school day included time spent teaching the children self-help skills and included exploratory activities and a snack time. Throughout the day, an occupational therapist and a speech therapist came into the class to consult with the teachers and provide services.

53. The classrooms also integrated significant visual supports for the students. There was a daily schedule posted. General interest visuals, such as a picture of the bathroom and one for snacks, were placed throughout the classroom. Other visuals were developed that were specific to meet the needs of a particular child. For example, Ms. Steinman had specialized visuals for designed to help him with his toileting needs.

54. Sensory supports were also embedded in the classrooms. The classroom teachers worked in conjunction with an occupational therapist to create a sensory rich program throughout the school day. The classrooms included items such as a sensory table, a sensory ball, spinning devices, weighted vests, and stress balls.

55. Each child's behavior needs were addressed through positive reinforcers that were appropriate for that child.

56. In Student's case, the District identified his needs and developed behavior-based goals to address those needs. During preschool, Student received over 25 hours a week of ABA based instruction at school. In kindergarten and first grade, that increased to over 30 hours a week. There is no compelling evidence that this was not a sufficient amount of ABA based instruction to meet Student's needs.

57. Student's contention that the District should have provided him with in-home ABA also is unpersuasive because Student has failed to prove that additional ABA therapy has been or would be necessary in order for him to benefit from his education. To the contrary, the evidence shows that despite 10 hours a week of in-home ABA therapy by at least two different private non-public agencies, Student's progress at school continued at the same slow but steady pace. Student provided no evidence that an increase in his in-home ABA would have any significant impact on his rate of progress in his education.

58. Student has therefore failed to demonstrate by a preponderance of the evidence that the District denied him a FAPE by not providing him with in-home ABA therapy.

SPEECH THERAPY

59. Student contends that the amount of speech therapy provided in his IEP's was not sufficient. He believes that he required at least three hours a week of direct services in order to make strides in his ability to communicate. The District responds that

the amount of speech services it provided was sufficient to implement Student's speech goals.

60. Speech services in relation to assistive technology is discussed separately below.

61. There are two key flaws in Student's argument. First, he provided absolutely no evidence at hearing to support the contention that he requires three hours a week of services. It is unclear from where Student determined he needs that level of service. Other than Dr. Murphy, the only speech pathologist to assess Student was Ms. Cottier. Her recommendation was for three to four sessions of individual speech therapy a week, for 20 to 30 minutes a session. She did not recommend three hours a week of services. Student's private provider, Natalie Neal, did not testify at hearing. Student therefore has not presented any evidence that supports his contention that the District's provision of speech services in any of his IEP's was inadequate. District speech pathologist Dr. Murphy testified extensively to the basis for each speech goal developed by the District and for each level of services offered. Student provided no evidence that contradicted Dr. Murphy's testimony.

62. The second flaw in Student's argument is that there is no evidence that three hours a week of services would have even been of any benefit to him. To the contrary, the evidence shows that Student did not make advances in communication even though his parents privately funded two to three hours a week of speech therapy for a year and a half. Student's failure to progress in functional communication was the reason Ms. Neal discharged him as a client. Her services were not assisting Student. Father admitted this to Student's IEP team and to Dr. Hughes.

63. Student has not met his burden of proof that the District's provision of speech services failed to meet his needs.

OCCUPATIONAL THERAPY

64. Student contends that the District failed to meet his fine motor and sensory needs. The District responds that the goals and services it provided through Student's IEP's met his occupational therapy needs.

65. Legal Conclusions 29 through 32 are incorporated herein by reference. This Decision has already found that the District appropriately addressed Student's sensory needs in his classroom. That discussion will not be repeated here.

66. Other than the brief reference by IABA in its assessment report that Student has sensory needs, Student failed to present any evidence in support of his contention that the occupational goals and services provided by the District were inadequate. IABA did not administer an occupational therapy assessment to Student. It only observed Student at school for a short amount of time. Dr. Hughes did not reference Student's occupational therapy goals or the extent of his occupational therapy services during her testimony. Although Ms. Cottier's report noted that Student had sensory needs, she also noted that Father confirmed Student was receiving a sensory diet. Ms. Cottier did not observe Student at school. She was not asked about his occupational therapy goals or services during her testimony. In any case, Ms. Cottier is a speech pathologist and not an occupational therapist. She does not have specific training or expertise in occupational therapy.

67. Occupational therapist Jennie Ni testified extensively at the hearing regarding the basis for each occupational therapy goal the District developed for Student. She addressed how she reviewed his progress on goals and how she modified his goals when appropriate. Ms. Ni testified that she initially focused on Student's visual attention issues. As Student's skills developed, she increased the level of skill needed to meet each goal. Although Student argues that his occupational goals and services were not sufficient, he presented no evidence to support his contentions. Student therefore

failed to meet his burden of persuasion that the District failed to address his occupational therapy needs.

ASSISTIVE TECHNOLOGY

68. Student contends that the District timely failed to provide him with access to assistive technology and the services he needed in order to support his use of the technology. The District asserts that it was already providing Student with assistive technology through the use of a picture exchange system. It further contends that Student did not require more advance technology in order to communicate functionally or to progress in his speech goals.

69. Legal Conclusions 33 through 39 are incorporated herein by reference.

70. This Decision has already found that the District should have assessed Student upon learning at his February 29, 2012 IEP meeting that he was successfully using an iPad. Student has shown by a preponderance of the evidence that had he been assessed at that time, the District would have recommended the use of the iTouch as assistive technology to enable Student to develop a functional means of communication. The iTouch and the services to support its use are related services that Student required to benefit from his education. The purpose behind the IDEA is, inter alia, to prepare children with disabilities for further education, employment, and, significantly, for independent living. (20 U.S.C. § 1400(d)(1)(A).) Student has persuasively shown that the picture exchange system did not provide him with functional communication. While Student had made progress on his speech goals, because the District did not assess Student in assistive technology until November 2012, and did not provide Student with assistive technology services, Student's progress in functional communication was delayed. In order to have any expectation of independence in the future, Student requires a mode of functional communication. Until the District introduced the use of the iTouch, with speech therapy sessions to support Student's use

of it, Student's communication was an amalgamation of modalities. He used gazes, pointing, leading someone by the hand, a few unintelligible sounds, and a few picture symbols, to communicate. He was not engaging in functional communication that would serve him across environments. The lack of functional communication deprived Student of an educational benefit, resulting in a substantive violation of FAPE.

71. Ms. Seldin agreed with the conclusions of Dr. Franke and Ms. Cottier that Student should be provided with an electronic assistive technology device in order to develop functional communication. The District adopted her recommendations at Student's January 23, 2013 IEP meeting. In order to implement the use of the iTouch, which was the device Ms. Seldin recommended, the District offered to temporarily provide Student with three, 20-minute sessions of individual speech therapy for the sole purpose of working with Student on how to use the iTouch to communicate. This was the level of service recommended by Ms. Cottier. The District ultimately provided this level of individual services for several months. Had the District assessed Student the prior year, he would have received the services a year earlier. Student is therefore entitled to compensatory education for the District's delay in providing him access to a functional communication modality.

ONE-ON-ONE AIDE

72. Student contends that the District should have assigned him a dedicated aide in the classroom to address his behavioral needs and an aide on the playground because of safety concerns. The District responds that Student did not require an aide because it provided Student with sufficient adult support in class and on the playground.

73. Legal Conclusions 24 through 28 are incorporated herein by reference.

74. Parents first requested an aide for Student after he was injured on the playground when he walked in front of a child on a swing. Although Student was

injured, his injuries were not permanent. Student returned to school the day after the incident. The District appropriately responded to Parents' concerns for Student's safety by first moving Student to another playground that did not have swings. After returning Student to his original playground, the District assigned an adult to watch Student on the playground. Student has not had any similar accidents since this happened on February 1, 2012. Parents, however, continued to be concerned that Student's inattention would result in another accident.

75. Student also believed he needed a dedicated aide in the classroom to help him focus and to work on being more consistent in his responses. However, the evidence from Student's teacher, Ms. Burns, and District autism specialist Bonnie Hinton, supports the conclusion that Student's needs were being met in the classroom. The first year Student was in Ms. Burns's class, there was a ratio of two adults for each child in the class. The second year, there were five adults for the eight students in the class. There was no evidence that this very high adult to student ratio did not meet Student's needs.

76. Dr. Hughes agreed with Parents that an aide was a necessity to help Student stay safe on the playground and access his curriculum in class. However, her recommendation for a one-on-one aide is not persuasive. She did not personally observe Student in class; the observations of Student referenced in her agency's FBA assessment report were done by other assessors. The IABA report is extremely unclear as to whether specified observed behaviors occurred in school or in Student's home. IABA staff observed Student's classroom only once and took no data on what they observed. The results of one observation, where the most significant commentary is that Student was whiney and non-compliant, does not support a finding that a District should have assigned a dedicated aide to a child in a class that already had a ratio of less than two children per adult.

77. Student's contention that he required a dedicated aide on the playground is equally unpersuasive. Although Student experienced mild seizures after the accident, they lasted for a very short time. Although the District specifically requested medical confirmation of any adverse effects Student suffered from the accident, Parents declined to provide any supporting medical records. Student did not call his doctor to testify at the hearing. Parents declined to give consent for the District to speak with Student's doctor. Since the accident, Student has not had any seizures or demonstrated any ongoing injury. There have been no further accidents at school. Student has suffered nothing more than minor scratches and scrapes since then. Ms. Anderson observed Student on the playground twice in April 2013. Student played appropriately, responded to noise, was aware of his surroundings and people around him, and had an adult watching him at all times. The testimony of District witnesses that Student does not require a dedicated one-on-one aide on the playground because it has placed appropriate adult supervision there to ensure Student's safety, is therefore more compelling than the testimony of Dr. Hughes.

78. Student has therefore not met his burden of proof that he requires a one-on-one aide in order to benefit from his education.

Parent Training

79. Student contends that the District failed to provide his parents with sufficient training to support the generalization across environments of what he was being taught at school. However, the evidence demonstrates that the District was responsive to Parents, discussed with them the methods they were using at school, and made suggestions to Parents of what they could do at home to assist Student. The District specifically developed training sessions with Parents, as well as with Student's in-home ABA provider, in how to use, program, and customize the iTouch that Student was

utilizing for communication. Student has failed to meet his burden of proof on this issue.

ISSUE 3: FAILURE TO PROVIDE HIGHLY QUALIFIED STAFF TO ASSESS STUDENT AND PROVIDE SERVICES IN THE AREAS OF BEHAVIOR INTERVENTION, INCLUSION, ASSISTIVE TECHNOLOGY, AND INDIVIDUAL AIDE SUPPORT

80. Student contends that his District teachers and staff were not qualified to instruct him or provide him with appropriate related services. The District contends that all of its staff is highly trained and effective in meeting the needs of autistic children.

81. To the extent Student contends that his teachers and service providers did not meet the "highly qualified" requirements of the No Child Left Behind Act, that issue is not the proper subject of a due process hearing. (34 C.F.R. §§ 300.18(f), 300.156(e).) To the extent that Student contends that he was denied a FAPE because his teachers or services providers were either not trained to meet his needs or were ineffective in meeting his needs, Student has failed to meet his burden of proof on that issue.

82. With regard to the qualifications of a one-on-one aide, as discussed above, Student has not demonstrated that he required a dedicated aide. Since no such aide was assigned to Student, there is no basis for arguing that this nonexistent person is not qualified.

83. Student did not address the issue of inclusion at all during the hearing. There was no discussion, no testimony, and no documentary evidence addressing the issue of whether Student was or was not provided with appropriate opportunities for inclusion or whether District staff had the proper training to know when or how to provide inclusion opportunities for Student. Student therefore has not prevailed on this issue.

84. Student's contention that District staff was not sufficiently trained to provide him with assistive technology is meritless. Student presented absolutely no

evidence that Ms. Seldin does not have the training or experience to provide assistive technology services to Student or to effectively train him or others in the use of the technology. The only witness to testify at the hearing with the expertise to have opined regarding Ms. Seldin's qualifications was Ms. Cottier. Student did not ask Ms. Cottier to review Ms. Seldin's assessment and did not question Ms. Cottier at hearing about any of the assistive technology services Student received pursuant to Ms. Seldin's assessment. Ms. Seldin has a master's degree in speech pathology. She has 30 years of experience in the field. She is separately certified in assistive technology. The evidence definitively indicates that Ms. Seldin more than sufficient experience and training to meet Student's assistive technology needs. Student's contentions to the contrary have no support in the record.

85. Student also contends that his teachers and other support staff were not qualified or trained to address his behavioral needs. The evidence is to the contrary. All District teachers and staff working in the District's autism-specific classrooms receive in-depth training in ABA methodology and best practices. The District contracts with a non-public agency to provide initial and on-going training for staff. The initial training is for approximately eight weeks. The training includes data collection, ABA methodologies, social skills, behavior strategies, prompt hierarchies, and discrete trial training. After a staff member receives the training, either a trainer from the non-public agency or a trained District autism specialist observes and critiques the staff member in the classroom. Each of Student's three teachers received education in teaching special needs children. Each either had previous experience teaching autistic children or had experience as an ABA aide prior to receiving a teaching degree.

86. To the extent that Student is arguing that his teachers and classroom staff were not effective in providing behavioral intervention, there is no compelling evidence to support that position. The only basis for Student's condemnation of District staff is

the IABA report which determined that District staff were not using proper ABA principles in the classroom. The IABA conclusion is not persuasive for a variety of reasons. First, it was based on one short observation of Student's classroom. Second, the training given to District staff contradicts the criticism in the report. Finally, the persuasiveness of the IABA findings is undermined by the fact that IABA also criticized the teaching methods of Student's in-home ABA provider. The IABA report is an indictment of the District staff's abilities, of the abilities of the non-public agency with which it contracts, and of all the non-public agencies which have provided ABA home services to Student over more than five years. IABA's conclusions therefore just do not ring true.

87. Student's teachers all testified to the methods they used in class to address Student's needs as a child on autism spectrum. They testified to the methodologies used, to the way they manage their classroom, to the schedules they follow, and to the goals they implemented for Student. All were non-evasive in their testimony. All presented as dedicated teachers who felt a calling to teach special needs children. Student has therefore failed to meet his burden of persuasion that District staff did not have sufficient training to meet his needs at school.

REMEDY FOR THE DISTRICT'S DELAY IN PROVIDING STUDENT WITH ASSISTIVE TECHNOLOGY

88. School districts may be ordered to provide compensatory education or additional services to a pupil who has been denied a FAPE. (*Student W. v. Puyallup School Dist.* (9th Cir.1994) 31 F.3d 1489, 1496. (*Puyallup*) 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.*)

89. Once a significant denial of a FAPE has been established, it is a rare case in which an award of compensatory education is not appropriate. (*Puyallup, supra*, 31 F.3d at p. 1497.) The court is given broad discretion in fashioning a remedy, as long as the relief is appropriate in light of the purpose of special education law. (*Burlington, supra*, 471 U.S. at p. 369.) The authority to order such relief extends to hearing officers. (*Forest Grove School Dist. v. T.A.* (2009) 557 U.S. 230, [129 S.Ct. 2484, 2494, fn. 11, 174 L.Ed.2d 168].)

90. Here, Student has demonstrated that he should have been provided with assistive technology and corresponding speech services to support his use of the technology almost a year before the District implemented its use. However, Student failed to present specific evidence in support of his request for additional speech therapy sessions as compensatory education. The one witness of Student’s who had the expertise to give an opinion on the amount of compensatory speech sessions warranted by the District’s delay in providing him with assistive technology services, was Ms. Cottier. Student did not, however, ask her any questions related to compensatory education. The question therefore is how to devise a remedy given Student’s failure to provide a concrete basis for one. The ALJ has reviewed the testimony of the witnesses and the documentary evidence presented at hearing. Had the District assessed timely Student’s assistive technology needs, the services it offered to him in January 2013, would have been offered the year before. Student was deprived of goals, therapy, and the iTouch itself for almost an entire school year. The ALJ has considered Ms. Cottier’s recommendation of a minimum of three, 20-minute individual speech therapy sessions

a week to support the use of an electronic device, and the District's actual provision of services in Student's January 23, 2013 and May 2, 2013 IEP's. Applying the equitable principles discussed in Legal Conclusion 88, the ALJ finds it reasonable and equitable for the District to be ordered to provide Student with 20 sessions of individual compensatory assistive technology therapy sessions to specifically address Student's functional communication needs. The sessions will be provided to Student in 20 minute increments during Student's school day. The District will provide no more than one compensatory session a week in addition to whatever speech therapy and/or assistive technology therapy sessions being provided pursuant to Student's IEP. The District shall have 12 months from the date of this decision to provide Student with the compensatory services ordered here.

91. Since Student failed to prevail on any other issue he raised at this hearing, the many other requests he made for remedies are not warranted.

ORDER

1. The District shall provide Student with 20 sessions of individual assistive technology services to assist him in using the iTouch for purposes of functional communication. These sessions shall be in addition to any speech and/or assistive technology services provided by Student's IEP's. The District shall provide the 20 sessions of compensatory services in 20 minute increments during Student's school day. The District shall not provide more than one compensatory session per week of school. The District shall provide the hours over a time period not exceeding 12 months from the date of this decision.
2. All other relief requested by Student is denied.

PREVAILING PARTY

The decision in a special education administrative due process proceeding must indicate the extent to which each party prevailed on issues heard and decided. (Ed. Code, § 56507, subd. (d).) Here, Student partially prevailed on a small portion of Issues 1 and 2. The District prevailed on all other issues heard.

RIGHT TO APPEAL

The parties in this case have the right to appeal this Decision by bringing a civil action in a court of competent jurisdiction. (20 U.S.C. § 1415(i)(2)(A); 34 C.F.R. § 300.516(a); Ed. Code, § 56505, subd. (k).) An appeal or civil action must be brought within 90 days of the receipt of this Decision. (20 U.S.C. § 1415(i)(2)(B); 34 C.F.R. § 300.516(b); Ed. Code, § 56505, subd. (k).)

DATED: December 26, 2013

/s/

DARRELL LEPKOWSKY

Administrative Law Judge

Office of Administrative Hearings