

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Consolidated Matter of:

BELLFLOWER UNIFIED SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH CASE NO. 2012060009 (Primary)

PARENT ON BEHALF OF STUDENT,

v.

BELLFLOWER UNIFIED SCHOOL DISTRICT.

OAH CASE NO. 2012060628 (Secondary)

DECISION

Alexa J. Hohensee, Administrative Law Judge (ALJ), from the Office of Administrative Hearings (OAH), heard this matter on January 14-17, 2013, in Bellflower, California.

Attorney Eric Bathen represented Bellflower Unified School District (District). District representative and Special Education Administrator Tracy Rutkowski attended all four days of hearing.

Attorney Bruce Bothwell represented Student. Student's father (Father) and mother (Mother) (jointly, Parents) attended all four days of hearing.

District filed its request for due process hearing (complaint) on May 24, 2012. Parents on behalf of Student filed Student's complaint on June 13, 2012. The cases were consolidated on June 18, 2012. District filed a first amended complaint on December 10,

2012, and by order dated December 10, 2012, District's case was designated the primary case in the consolidated matters. On December 14, 2012, OAH granted the parties' joint request to continue the hearing for good cause. At the end of the hearing, at the joint request of the parties, the hearing was continued to February 4, 2012 for submission of closing briefs. Closing briefs were timely filed and the record was closed on February 4, 2013.

## ISSUES<sup>1</sup>

(1) District's Case: (a) Whether District, in the individualized education program (IEP) of May 3, 2012, offered Student a free appropriate public education (FAPE) in the least restrictive environment (LRE),<sup>2</sup> and if so, (b) whether District is required to contract with the nonpublic agency (NPA) serving Student at the time of that IEP to provide the behavior services specified in that IEP.

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<sup>1</sup> The issues have been refined from those set forth in the prehearing conference (PHC) order to more accurately reflect the evidence produced at the hearing.

<sup>2</sup> At the PHC, both parties stipulated that neither the amount of occupational therapy (OT) offered, nor the lack of speech services, in the May 3, 2012 IEP were a part of the FAPE dispute. Neither party presented evidence on Student's need for OT or speech and language services, if any, and this decision does not contain an analysis of whether, or to what extent, Student has OT or speech and language needs for purposes of receiving a FAPE.

- (2) Student's Case:<sup>3</sup> Whether District denied Student a FAPE at the IEP or manifestation determination team meetings of May 3, May 8 and May 11, 2012, by:
- (a) Failing to have a special education teacher present at each meeting;
  - (b) Failing to offer Student a specific placement at the May 3 or May 11, 2012 meetings;
  - (c) Failing to offer the closest general education placement to Student's home at the May 11, 2012 meeting;
  - (d) Providing misinformation to Parents at the May 8, 2012 meeting regarding the impact of a manifestation determination;
  - (e) Failing to offer to conduct a functional behavior assessment (FBA) after finding Student's behavior to be a manifestation of his disability; or
  - (f) Continuing Student's suspension from school after determining that his behavior was a manifestation of his disability.<sup>4</sup>

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<sup>3</sup> At the hearing, Student withdrew several issues identified in the PHC statement, and on Student's motion Issue 2(b) was amended to include the IEP team meeting of May 3, 2012. Student's sub-issues have been re-numbered for this decision.

<sup>4</sup> Student did not seek an expedited due process hearing, as District allowed Student to return to his placement prior to Student's filing. OAH did not treat this issue as an expedited matter because the gravamen of the issue is whether Student was denied a FAPE because District did not provide all components of Student's IEP during a suspension of less than 10 days.

## FACTUAL FINDINGS

### JURISDICTION AND BACKGROUND INFORMATION

1. Student was seven years old, and in the first grade, at the time of the hearing. Student has lived within the boundaries of District at all times relevant to this proceeding, and was eligible for special education as a child exhibiting autistic-like behaviors.

2. Student attended a District preschool special day class (SDC) during the 2009-2010 school year. Parents were unhappy with the preschool SDC, and placed Student in general education kindergarten at a private school, for partial days, and for one semester, during the 2010-2011 school year.

### 2010-2011 TRIENNIAL IEP

3. Student's triennial IEP team meeting was held on May 6, 2011, when Student was five years old. In preparation for the triennial, District conducted comprehensive psychoeducational, behavior, speech and language, occupational therapy, and adapted physical education assessments.

4. District assessors found it difficult to complete assessments in the area of academics due to Student's elevated levels of distractibility and behavioral difficulties, but generally found that Student had skills in the four to seven year old range, although he was most comfortable with tasks in the two to three year old range.

5. District retained the Center for Autism and Related Disorders (CARD) to conduct the behavior assessment. At the time of the behavior assessment, Student was using one word to communicate with familiar adults, lacked eye contact, could not sustain interactive play or reciprocal social exchanges, and had maladaptive behaviors including noncompliance, vocalizations, tantrums, and biting himself. Student understood some receptive instructions, was verbal, recognized sight words and colors,

and had a large vocabulary of labels, although he did not use this knowledge for functional communication.

6. The May 6, 2011 IEP included goals and objectives in the areas of academics (reading and writing), communication and self-help. Student was offered retention in kindergarten in a full day SDC program, with speech and language therapy, occupational therapy (OT), 40 hours per week of direct support of a one-on-one aide trained in applied behavioral analysis (ABA), a type of behavior modification that is often used to address communication deficits and maladaptive behaviors in children with autism, and ABA consultation and supervision for 20 hours per month, with services through the extended school year (ESY).

7. At the time of the May 6, 2011 IEP team meeting, District and Student were in a due process dispute concerning Student's education program dating from 2010. Parents did not consent to the May 6, 2011 IEP.

#### 2011-2012 SCHOOL YEAR

8. District and Student reached a settlement of their due process dispute in June 2011. As a result of the settlement, the May 6, 2011 IEP was amended to provide Student with a 40-hour per week ABA program for the 2011-2012 school year in both home and school settings, with Student on a shortened school schedule. As implemented, Student attended a general education kindergarten classroom in the morning for two hours (in the fall semester) and three hours (in the spring semester), at Esther Lindstrom Elementary School (Lindstrom), Student's home school. The amended IEP included an NPA one-on-one ABA behavior aide (ABA aide) at school, and in Student's home for the remainder of the day, for a total of 40 hours per week.

9. The May 6, 2011 IEP, as amended, contained 16 behavior goals in the areas of receptive and expressive language (spontaneous requesting, spontaneous requesting and direction following), self-direction (eye contact, gaining attention, peer

socialization, appropriate engagement in activities, planning and organization, following peer instructions, peer referencing, joint attention, inhibiting inappropriate responses, safety awareness, imitation skills) and self-care (toileting). Generally, Student did not work on goals in the school setting until he had established competency in the necessary skills in the home program, although goals such as responding to peer direction and imitating peers were necessarily worked on in the school setting. CARD provided the ABA aides for both the school and home programs. The ABA aides did not provide academic instruction. In the classroom, the ABA aides used ABA principles according to CARD's "treatment plan" to help Student maintain attention and focus, socialize with peers, and to inhibit maladaptive and distracting behaviors, such as making high pitched sounds, tantrumming and biting himself. The ABA aides were also trained in, and responsible for, collecting detailed data on Student's behavior in the classroom and his response to treatment interventions.

10. Pursuant to the May 6, 2011 IEP, as amended, Student received 40 hours of one-on-one ABA aide support per week; 20 hours per month of NPA ABA consultation and supervision per month, 30 minutes of school based group speech therapy twice a week, 50 minutes of clinic based individual OT twice a week, 45 minutes of school based OT consultation once a week, and 30 minutes of school based inclusion support twice a month.<sup>5</sup>

11. For the 2011-2012 school year, Student attended Evelyn Albert's general education kindergarten classroom at Lindstrom, with 29 other students and his ABA aide for one-on-one behavior support. Lindstrom's principal, Beverly Swanson, assigned

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<sup>5</sup> The components of the program and related services in the May 6, 2011 IEP, as amended by the confidential settlement agreement, were not in dispute in this proceeding, and are referenced for background purposes only.

Student to Ms. Albert because Ms. Albert had not had an inclusion student in her class before. Ms. Swanson rotated inclusion students among the teachers at Lindstrom because she did not want any teacher to have an inclusion student in his or her classroom two years in a row. Ms. Swanson believed that inclusion students were labor intensive and hard work, and she wanted to spread the burden among her staff.

12. The school day for Ms. Albert's class began at 8:30 a.m. with a whole school assembly for 10 minutes, and then 20 minutes of opening activities in the classroom, such as singing number and alphabet songs. From 9:00 a.m. to 10:00 a.m., the students worked on language arts, with teacher instruction followed by desk work with workbooks. Students then had a 10 minute snack and 15 minute recess, followed by 45 minutes of follow-up activities from morning or instruction in math. At 11:15 a.m., students worked in small groups at activity centers, and the teacher worked with one of the groups. Lunch was from 11:55 to 12:35, followed by 20 minutes of nap time during which Ms. Albert read aloud. The remainder of the day consisted of science or social studies at 12:55 p.m., computer lab at 1:05 p.m., more science or social studies at 1:30 p.m., a 20 minute recess at 1:55 p.m., show and tell sharing at 2:15 p.m., physical education (PE) at 2:30 p.m., and dismissal at 2:55 p.m.

13. Student rarely sang along in the morning, and worked with his ABA aide after the teacher instructed the class in language arts and math. Student ate alone with his aide before recess, due to allergies that resulted in hives upon skin contact with dairy or beef products. Student's aide carried an EpiPen in case of a severe reaction. Student would sit with his classmates in group activities although he preferred to work by himself. Student would join in some center activities in a small group, although he preferred his own space at the activity centers. Throughout the day, Student made vocalizations that were disruptive to other students, both in volume and frequency, and he interrupted lessons by leaving his seat. Student had trouble with transitions, and

would often tantrum and bite his hands or knees. Student's ABA aides removed Student from the classroom when Student was disruptive, usually as a consequence of his behavior or to address Student's sensory needs, but sometimes at Ms. Albert's request. Student's time out of class ranged from five minutes to 15 minutes; usually a couple of times per day. Although Student's disruptions sometimes interfered with Ms. Albert's instructional lectures, she was able to conduct classroom lessons most of the time.

14. In the fall semester of the 2011-2012 school year, Student left school at 10:55 a.m., after approximately two hours in the classroom. In the spring semester, Student left school at 11:55 a.m. after three hours in the classroom, and missed lunch, nap time, social studies/science, computer lab, PE and show and tell sharing time.

15. Student was very successful academically in Ms. Albert's classroom. By the second trimester, Student received "meets the grade level standard" scores on his progress report in science, fine arts, physical education, and all areas of language arts and mathematics except in (i) listening and speaking and (ii) mathematical reasoning, in which he scored "approaching the grade level standard." By the end of the year, Student was reading, where some typical classmates were not, and, with some prompting, was writing grammatically correct sentences with good spelling. Student could complete a sheet of addition problems with minimal prompting, and did not need mathematical concepts explained with manipulatives. Ms. Albert prepared Student's progress reports.

16. Socially, Student's classmates initiated communication exchanges with Student, but Student had to be prompted to respond. Student was verbal, and could use words when prompted. On the playground, Student's play was directed by the ABA aide, and Student did not spontaneously initiate social contact with other students. Student preferred running and climbing on equipment to interacting with other students.

17. Ms. Albert, who testified at hearing, held an elementary teaching credential, and had taught for 21 years, the last four years teaching kindergarten.



Student was the first fully included special needs student in one of her classes. She had never before taught a student with autism. Ms. Albert received no training in teaching students with special needs or with autism, from District or from any other source. Ms. Albert relied upon District's inclusion specialist, Regina Jane Nilsson, as well as Student's ABA aides, for support in the classroom. Ms. Nilsson monitored Student's progress on his IEP goals and objectives.

18. Ms. Albert opined that Student did not make much progress in her class, that she did not know if Student progressed in reading at all, that she did not see much academic progress and that Student did not make progress in her class that she "could measure." Ms. Albert's credibility and opinions were undermined by her admissions that she could not recall if Student learned to write in her class, she did not actually test Student for improved reading skills at the end of the year, she never expressed concerns about Student's academic progress to Parents, and she only interacted with Student a couple of times per week. Her opinions were also contradicted by the progress reports, and Ms. Albert did not convincingly explain that inconsistency. Instead, she gave confused testimony that the progress reports were inaccurate because she had actually graded Student on his goals and objectives, not grade level standards, or perhaps she had graded him on a combination of both. Her unpersuasive and inconsistent testimony was given less weight than the progress reports she prepared at the time Student's skills were reported. Notably, Ms. Albert appeared to question whether Student should be credited with skill mastery when he had to be prompted to respond by his aide, although the academic goals in Student's IEP allowed for prompted responses. Ms. Albert's opinion on Student's progress on his goals and objectives during the 2011-2012 school year was accorded little weight due to her lack of familiarity with Student's IEP, her reliance on Ms. Nilsson to track Student's progress on Student's goals and

objectives, her limited interaction with Student and her disregard of skills exhibited by Student if he was prompted.

19. Ms. Albert also opined that Student's behaviors increased from January to June because he was increasingly frustrated. However, her opinion was contradicted by the behavior data taken during that time period (see Factual Finding 34), and this opinion was given less weight than that of Marina Bulkin, Student's ABA supervisor, who reported on documented improvements in Student's maladaptive behaviors over the 2011-2012 school year at Student's next annual IEP team meeting.

20. Ms. Albert testified credibly that she had not observed Student socializing with students in the classroom or on the playground. She candidly admitted that she was able to conduct most of her classroom lessons despite Student's disruptions. Ms. Albert's opinion that Student missed important instructional time and social opportunities by leaving school three hours early each day was persuasive, and consistent with similar opinions offered by Student's first grade general education teacher Mara Cummins, and District's expert Dr. Charlop, set forth below.

21. In the fall semester of the 2011-2012 school year, Student bit a substitute ABA aide on the shoulder and left a bruise.

22. On March 20, 2012, Student was with a substitute ABA aide and began to tantrum during classroom opening activities. Ms. Albert went to hold Student's legs down to prevent Student from kicking other students, and Student bit Ms. Albert on the ankle, causing bruising.

23. On April 19, 2012, Student bit another student lightly on the arm.

24. On May 2, 2012, on the playground, and when Student's ABA aide was speaking with Student's occupational therapist and not watching Student, Student bit a young girl from another class on the web of her hand when she tried to grab a hula hoop away from Student. The bite broke the skin, and left a mark the size of a dime, but

did not need stitches. Ms. Swanson immediately suspended Student for four school days, through May 8, 2012, the same number of days a student who was not in special education would have been suspended for the same conduct. Although Ms. Swanson had previously dealt with biting incidents from typically developing kindergarten students, those bites usually did not break the skin or involve multiple incidents with the same child.

#### MAY 3, 2012 ANNUAL IEP TEAM MEETING

25. On May 3, 2012, District convened Student's prescheduled annual IEP team meeting. The meeting was attended by administrative designee Kathleen Roberts, Ms. Albert, Ms. Nilsson, Student's ABA supervisor Ms. Bulkin, school psychologist Tricia Acosta, Student's occupational therapist and Parents.

26. Ms. Roberts had been an administrator for District since 2012. Ms. Roberts held a special education credential to teach students with learning disabilities, and a lifetime credential in general education. She had taught resource specialist classes, but had never taught an SDC. However, her duties required her to regularly visit District schools and classrooms, and she was familiar with District's elementary general education and SDC classes for students with both mild/moderate or severe disabilities.

27. Ms. Acosta, the school psychologist, attended the IEP team meeting to take notes and ensure that the IEP paperwork was complete. She held a bachelor's degree in psychology and two master's degrees in school counseling and school psychology. She worked as an ABA aide for CARD from 2000 through 2003 in both school and home settings. Ms. Acosta had a preliminary administrative services credential, and was the administrator of District's seventh grade through adult transition programs. At the time of the IEP team meeting, Ms. Acosta had never met Student or observed him.

28. Ms. Nilsson attended the meeting as a special education teacher. Ms. Nilsson held a master's degree in special education, mild/moderate, and had held an education specialist credential (mild/moderate) since 2002. Ms. Nilsson obtained her added autism authorization in 2012, although it was unclear from her testimony, or her resume, whether she received this authorization prior to the end of the 2011-2012 school year. Ms. Nilsson was an instructional assistant in SDC classrooms from 1989 through 1999, and taught an elementary SDC in 1999-2000. She had been a kindergarten through sixth grade inclusion specialist with District since 2005. Her duties as an inclusion specialist included directing instructional aides, providing support to general education classrooms, coordinating service personnel for included students, overseeing accommodations and modifications for included students, and monitoring progress on IEP goals for included students on her case load. Ms. Nilsson's duties required her to spend time in general education classrooms, with little time spent in SDC classrooms, and she was not familiar with the SDC programs in District. Ms. Nilsson was Student's case manager for the 2011-2012 school year, and met with Student every trimester to assess his progress on goals and benchmarks.

29. Ms. Nilsson prepared and presented Student's present levels of performance (PLOP's) to the May 3, 2012 IEP team. In academics, with prompts and reinforcement, Student was identifying and decoding words at the first grade level, could read all 60 high frequency kindergarten words, could add numbers and sums to 10 and subtract numbers less than 10, and could write sentences with correct capitalization and punctuation. Student found listening to stories to be challenging, and was unable to answer comprehension questions. In the area of communication, although Student was verbal, his autism impacted his functional use of language, which was mostly prompted or scripted by his ABA aide. Ms. Nilsson reported that Student's frustration and anxiety over communication led to tantrumming, and that Student did

not contribute to class discussions or ask questions, except for simple requests to familiar people for preferred tasks or items. In the area of social emotional/behavior, Ms. Nilsson noted that Student required prompting and scripted language to respond to social contacts, had difficulties with attention and task completion, tantrummed, and lacked impulse control. She also reported that in the classroom, Student required a one-on-one behavior aide, continuous prompts, incentives, redirection, extra time to complete classwork and breaks, and had an inconsistent ability to attend to tasks. Student had met two of his four academic goals. Ms. Nilsson proposed new goals in the areas of reading, writing, math, social/emotional skills, fine motor skills, and sensory processing, most of which allowed for cueing or prompting.

30. As part of her inclusion specialist duties, Ms. Nilsson observed Student in Ms. Albert's classroom about one time per week from September 2011 through January 2012, after which time she checked on him more often because Ms. Albert reported escalating behavioral problems. It was Ms. Nilsson's opinion that Student was making academic progress in Ms. Albert's class. She saw less socialization progress, although she observed Student joining in some center activities.

31. At hearing, Ms. Nilsson noted that Student's kindergarten classmates initiated social contacts with Student, and although he did not have spontaneous responses, he would respond appropriately when prompted. Ms. Nilsson opined that she would like to see Student less dependent on prompting. Ms. Nilsson had spoken to the ABA aides about trying to pull back, but she acknowledged that Student needed a high level of prompting to stay on task and keep up with the class during lessons. However, when Ms. Nilsson tested Student one-on-one, Student did not rely as much on the ABA aide. Ms. Nilsson had given the ABA aides workbooks at the first grade level because Student seemed bored with the level of academic work in Ms. Albert's classroom.

32. Ms. Nilsson was the individual tasked with monitoring Student's academic progress and observed him in the classroom regularly. Her opinions regarding Student's progress were logical and credible. However, Ms. Nilsson's opinion that Student should be placed in an SDC so that Student would receive specialized instruction, and a modified curriculum with supplementary materials, was in direct conflict with her testimony that Student was progressing well academically in the general education setting and with her own testing. Ms. Nilsson's testing found Student meeting grade level standards without curriculum modification or the need for manipulatives or supplementary materials. Ms. Nilsson, despite experience with SDC's early in her career, was unfamiliar with District's SDC classrooms. Therefore, her unsupported opinion that Student required the specialized instruction and resources of an SDC to access grade level curriculum was given little weight.

33. The ABA supervisor from CARD, Ms. Bulkin, prepared and presented a progress report on the May 2011 IEP behavior goals. Student had met his goals of increasing spontaneous requests for desired items and activities, following one-step directions, cleaning up after engaging in tasks, and waiting for 30 seconds to play with a specific toy after being told to wait. He had not met his goals of spontaneous commenting, establishing eye contact on request, consistently engaging in cooperative turn taking with his peers, engaging in appropriate activity during down time, consistently referencing his peers, or consistently imitating his peers. However, Student referenced his peers when he missed a class instruction two out of five opportunities, and followed peer instructions seven out of 10 times. Although Student had not met his goals in these areas, he demonstrated good progress in important skills for forming peer relationships and accessing his environment appropriately. CARD proposed 14 new behavior goals in the areas of communication, task completion, following instructions, attention, turn taking and social interaction, most of which allowed for prompting.

34. Ms. Bulkin presented data, collected in the classroom by Student's ABA aides, that showed significant decreases in all maladaptive behaviors from September 2011 through April 2012, with temporary increases in February and March 2012, as measured by average number of incidents per hour (indicated in parentheses): noncompliance (September 2.13 to April 0.44), tantrumming (September 2.13 to April 0.81), physical self-stimulatory behavior (September 4.44 to April 1.25), verbal self-stimulatory behavior (September 8.10 to April 2.75), and mouthing (September 0.63 to April 0.11). CARD presented the IEP team with a proposed behavior intervention plan (BIP) for Student to reduce the frequency of each maladaptive behavior and replace them with appropriate behaviors. Ms. Bulkin had been advised of the recent biting incidents. Accordingly, the proposed BIP addressed Student's "[a]ggression: episodes of [Student] biting, hitting or pushing another person," by identifying antecedents, directing antecedent modification, and introducing replacement behaviors and consequence manipulations to reduce physical aggression.

35. Ms. Bulkin conducted Student's initial behavior assessment in April 2011, and had observed Student in his classrooms at Lindstrom for two to two and a half hours each month since September 2011. Ms. Bulkin reviewed the daily data taken on Student's behaviors as well as the quarterly reports on that data prepared by the senior therapists and the notes of ABA team meetings, and made updates to Student's treatment plan as necessary. The purpose of the daily data sheets was to identify the frequency of maladaptive behavior, track the occurrence of appropriate behavior, and to determine which conduct is independent and whether and what level of prompting takes place. For example, in response to Student's use of tantrumming to avoid non-preferred activities, Ms. Bulkin modified the consequence of leaving the classroom by having a desk provided for Student outside of the classroom where he could be removed when tantrumming, but, to mitigate any reinforcement of task avoidance

behavior, no preferred activities were available at the desk and Student was required to return to the nonpreferred activity at the desk (such as doing math problems in a workbook) before returning to the classroom. CARD provided District with an IEP summary report, proposed goals and a proposed behavior intervention plan prior to the May 3, 2012 IEP team meeting.

36. Ms. Bulkin received her bachelor's degree in psychology from UCLA in 2002, and her master's degree in psychology from Pepperdine University in 2005. She has been a board certified behavior analyst since 2006. She has worked for CARD since 2001. CARD is an established NPA provider of behavior services to children and teenagers on the autism spectrum. Ms. Bulkin worked her way up from therapist, to managing therapist, to case supervisor, and has been the managing supervisor for CARD's Torrance office for the past six years. Her duties as a managing supervisor include overseeing therapists (ABA aides) and supervisors, conducting team meetings, addressing parent concerns, training staff and acting as liaison to funding sources, in addition to handling her own caseload of 15 clients, including Student.

37. Ms. Bulkin provided detailed and thoughtful testimony concerning her observations of Student and his communication and behavior needs. She was familiar with his goals and objectives, and was able to review the data and promptly respond to questions concerning Student's progress and the settings in which various skills were being addressed. Ms. Bulkin opined that a placement with typically developing peers, rather than an SDC, was more appropriate for Student because he had academic strengths in language arts and math, and that the social skills he needed to learn required peers who could model behavior and had the language for reciprocal conversations. Her testimony concerning Student's communication and behavior needs, and his progress on his May 6, 2011 IEP behavior goals, was persuasive and accorded great weight. Ms. Bulkin acknowledged that Student could work on his annual goals in a



school setting, although it was easier to work on many of Student's goals in the home due to the need for intense repetition. She opined that Student could attend school for less than a full instructional day to provide his ABA aides with time to work with him on learning skills for communication and behavior in the home setting, which could then be generalized to the school setting. Ms. Bulkin did not have a teaching credential and had not looked at the first grade curriculum. She naturally demonstrated greater concern with treating the symptoms of Student's autism and having Student progress in his treatment plan than in having Student learn academic material and core curriculum, such as comprehending what he read. Her opinion that Student did not need to attend school for a full instructional day, was accorded less weight than those of credentialed educators.

38. The proposed academic goals and objectives, and the proposed behavior goals and BIP, were approved by the IEP team and written into the IEP. The IEP offered services to be provided from May 3, 2012 through May 3, 2013, including clinic based OT with an NPA for 50 minutes twice per week, school based OT with an NPA for 40 minutes per week, ABA direct one-on-one support by an NPA for 40 hours per week in "home/school," 20 hours per month of ABA consultation and supervision by an NPA in "home/school," and daily specialized academic instruction in a mild to moderate SDC (MM/SDC). The IEP also offered these services through the 2011-2012 extended school year (ESY), defined in the IEP as June 21 through September 3, 2012. Accommodations were offered in the areas of classroom environment (a study carrel to reduce distractions<sup>6</sup>, extra time or prompts for responses, shortened assignments, step by step directions, a rest space away from the classroom, task reinforcements, verbal

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<sup>6</sup> A short cardboard divider placed on top of the desk to minimize distractions. Ms. Nilsson testified that many students use them.

encouragement/coaching, and visual aids), classroom testing (additional time, prompting to stay on task, shortened tests with items to assess mastery, and rereading of directions), and health (a plan to address dairy and beef allergies). At Parents' request, the team agreed that class materials from the second half of the school day would be sent home.

39. The IEP team discussed Student's placement. District IEP team members proposed that Student be immediately placed in an MM/SDC classroom due to the "current level of needed supports [required by Student] academically and behaviorally." When Parents expressed disagreement with this recommendation and noted his success in Ms. Albert's classroom, District members of the IEP team tabled further discussion of placement. There was no discussion as to which of the District MM/SDC's, if any, would meet Student's needs. In the section of the IEP documenting placement options considered, District wrote "District is offering [a] special day class mild/moderate setting as [Student's] least restrictive environment. SDC M/M provides free and appropriate public education at this time." In the placement section of the May 3, 2012 IEP, District wrote "SDC M/M within [District.]" and offered 18 percent of Student's time in general education, but "not...in the general education environment for academics because [Student] requires a high level of support academically/behaviorally to access the curriculum." No specific SDC was offered.

40. Ms. Roberts was familiar with the mild to moderate and severe SDC classrooms throughout the District. She believed that two of the District's seven primary SDC classes would best meet Student's needs, but, as there was no discussion of the SDC programs in the District, she did not share this information with the IEP team.

41. Ms. Acosta had some knowledge of the SDC's available, of which only five were for students with mild to moderate disabilities. She did not think that all of the primary MM/SDC classes in the District would be appropriate for Student, nor did she

have an opinion on any one MM/SDC that would be appropriate for Student. However, at hearing she opined that had the IEP team discussed MM/SDC placements, they would have had to look at the availability of classrooms and which available classrooms would meet Student's needs. Because there was no team discussion about the available SDC's within the District, Ms. Acosta did not share her knowledge or opinions with the IEP team.

42. Other members of the May 3, 2012 IEP team meeting, including Ms. Albert, Ms. Bulkin and Parents, were not knowledgeable concerning MM/SDC programs within the District.

43. If the IEP team had offered a specific classroom, and explained the benefits of that classroom over general education for Student, Parents would have observed the classroom and considered it. The MM/SDC at Lindstrom was designed for first through third grades, and had Mother been provided with an opportunity to discuss SDC classrooms in the District, she would have expressed a concern that if Student, as a kindergartener, was immediately placed in a MM/SDC, he would no longer attend his home school. Ms. Roberts testified at hearing that Student was chronologically a first grader and could have gone into the Lindstrom MM/SDC, but as there was no discussion about available SDC's, Parents were not provided with this information.

44. As a result of the biting incident the day before the IEP team meeting, District IEP team members determined that, although CARD had conducted an FBA of Student in 2011, a far more in-depth functional analysis assessment (FAA) was required by California law because Student had inflicted a serious injury on another student, and District considered Student a danger to himself and others. At the meeting, District presented Parents with an assessment plan that included an FAA and a "full psychoeducational" assessment to "assess all areas of eligibility and current functioning levels."

45. Parents consented to implementation of the goals as written, and to “behavior support provided through CARD and OT provided by Gallagher Pediatrics.” Parents did not consent to the proposed SDC placement.<sup>7</sup> Parents did not sign the assessment plan for both an FAA and psychoeducational assessment, in part because a psychoeducational assessment had been done on Student just one year earlier.

#### MAY 8 AND MAY 11, 2012 MANIFESTATION DETERMINATION MEETINGS

46. On May 7, 2012, District gave Parents notice of an IEP team meeting to be convened on May 8, 2012. Parents arrived at Lindstrom for the IEP team meeting believing that its purpose was to discuss Student’s re-entry into school after his suspension for biting. However, Parents were taken by Ms. Swanson, and an administrator responsible for discipline at Lindstrom, Cari Ignarra, into a “pre-expulsion” meeting and informed that District was about to conduct a manifestation determination meeting. Ms. Ignarra explained that if the manifestation determination team determined that Student’s biting behavior was not a result of his disability, Parents would next go into an expulsion hearing and Student could be expelled in the same manner as a general education student. Ms. Swanson explained that if Student’s biting behavior was found to be a manifestation of his disability, Student would need to be immediately placed in an SDC.

47. Ms. Ignarra left the room, and Ms. Swanson convened a meeting to determine if Student’s conduct in biting another student on May 2, 2012 was a manifestation of his disability. The meeting was attended by Ms. Swanson, Ms. Roberts, special education program administrator Tracy Rutkowski, a school psychologist, and

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<sup>7</sup> Parents wrote their partial consent, and disagreement with placement, onto the IEP on May 16, 2012.

Parents. Parents protested the receipt of short notice, and requested that the meeting be rescheduled to allow CARD staff to attend, but District declined.

48. The manifestation determination team reviewed Student's triennial evaluations, discipline record, IEP and BIP, and Ms. Albert reported her observations of Student. District determined that Student's autism impacted his verbal and nonverbal communication and interaction with peers, and that the biting incident was a manifestation of his disability, and was not a result of District's failure to implement Student's BIP. Parents, who believed that they had the untenable choice of having their son expelled or placed in an SDC, declined to participate in the manifestation determination. When it became clear that Parents would not consent to an SDC placement, Ms. Swanson suspended the meeting without any team recommendations on returning Student to Lindstrom. Ms. Swanson then handed Parents a pre-typed letter extending Student's suspension, and offering one hour per day of home instruction and the full 40 hours of ABA services at home during the suspension.

49. The testimony of Mother and Ms. Swanson at hearing differed significantly concerning the events of the May 8, 2012 pre-expulsion meeting. Mother testified that Ms. Swanson told Parents that Student would either be expelled or placed in an SDC, and refused to allow Student to return to Lindstrom. Ms. Swanson testified that she and Ms. Ignarra had simply explained the disciplinary system to Parents prior to the meeting. She did not recall stating that Student would either be expelled or immediately placed in an SDC, depending upon the manifestation determination outcome, and opined that District did not have the authority to make a unilateral change in placement. Ms. Swanson had an administrative credential, and had been a principal for District for the past 13 years, seven of those years at Lindstrom. However, Mother's testimony was more credible since, given Ms. Swanson's failure to recall the conversation and her conduct at the May 8, 2012 manifestation determination meeting, where instead of allowing the

meeting to proceed to conclusion so that Student could return to Ms. Albert's class, Ms. Swanson prematurely terminated the meeting, extended Student's suspension, and offered home instruction, effectively imposing an informal expulsion. Ms. Swanson had grave worries about the safety of the other students on the Lindstrom campus, was under intense pressure from the parent of the girl who was bitten and other parents to protect their children, and felt strongly that Student would be stigmatized as a biter and unable to socialize at Lindstrom, demonstrating strong motivation at that time to remove Student from her campus. The only MM/SDC at Lindstrom was designated for first through third grade students, and a MM/SDC placement would have removed Student, a kindergarten student, from Lindstrom. In general, Ms. Swanson's testimony on the danger posed to others by Student seemed forced and exaggerated, and her version of events at the pre-expulsion meeting was given less weight than that of Parent, who appeared sincere, and whose testimony was consistent with subsequent events.

50. On May 9, 2012, District notified Parents that it had scheduled another manifestation determination meeting, and again presented Parents with a copy of the proposed FAA/psychoeducational assessment plan. That same day, Parents retained counsel for Student for the purpose of getting their son back into school. Student's attorney wrote to District's attorney that Parents could not attend the May 11, 2012 meeting. The letter stated that the meeting should not be held without Parents, that Parents would not consent to any change in placement or services, that Student should be permitted to return to Lindstrom, and that the Parents would consider consenting to the FAA without a psychoeducational assessment.

51. On Friday, May 11, 2012, District convened an IEP team meeting without Parents present "since the issue of how [Student] would return to school was not

resolved." The meeting was attended by Ms. Swanson, Ms. Roberts, Ms. Rutkowski, Ms. Nilsson and a school psychologist.

52. The May 11, 2012 IEP team noted that "it would be difficult at best, if not impossible" to have Student successfully re-enter Lindstrom because Ms. Albert, the bitten girl, the girl's parents, and other staff and students were afraid of Student, so a change in school sites was necessary. The team offered Student a general education classroom at Washington Elementary School (Washington) with the same services and level of ABA support, beginning May 15, 2012. Washington was not Student's home school, so Student was also offered transportation with an aide to accompany him during transport. The IEP team also "suggested" a change in NPA behavior providers, as CARD was not perceived as properly monitoring or mitigating Student's behavior, and because the behavior reports by CARD were in "direct opposition" to school personnel reports.

53. Parents received the offer of placement in general education at Washington on Saturday, May 12, 2012. Parents did not consent to the change in placement. Student's attorney again contacted District's attorney on Monday, May 14, and arranged for Student to return to Ms. Albert's classroom on Tuesday, May 15, 2012, which Student did.

54. District placed an adult instructional aide in Ms. Albert's classroom through the end of the school year to assist and protect the other students. Ms. Nilsson visited Ms. Albert's classroom every morning while Student was there to observe Student's behavior, lend support to the other adults and to protect Student's classmates, if necessary. Ms. Nilsson and Student's ABA aide arranged for one or two volunteer children to engage in facilitated play activities with Student, in a separate space in the classroom or on the playground away from other children. The facilitated

play was a success, and Ms. Nilsson and the ABA aide had no difficulty finding children to play with Student.

55. Student had no further biting incidents for the remainder of the school year. Mother, who had taken a few early childhood education classes, worked with Student at home on academic materials from classes Student missed in the afternoon.

## 2012-2013 SCHOOL YEAR

56. Through the date of hearing, Student attended Ms. Cummins's first grade general education classroom at Lindstrom for the 2012-2013 school year. Because Parents had not consented to the new IEP, the May 2011 IEP as modified in June 2011 was implemented as "stay put."

57. Ms. Cummins's classroom attended general assembly from 8:30 a.m. to 8:45 a.m., with language arts and math from 8:45 a.m. through 9:55 a.m., followed by a 15 minute recess, and further language arts and math instruction through 11:30 a.m. A 40 minute lunch break was taken from 11:35 a.m. through 12:15 p.m., followed by 15 minutes of silent reading, 40 minutes of reading aloud and other activities reinforcing the morning's lessons, plus 30 minutes of social studies. The students had a 10 minute recess at 1:45 p.m., and when they returned to the classroom, spent 20 minutes confirming their homework assignments and packing up to go home. From 2:15 p.m. through 2:55 p.m. students worked on a language arts program.

58. Student began the day with his ABA aide in a quiet room, and often missed a few minutes of morning instruction. He also went to the quiet room for 20 minutes after recess and missed the beginning of the math instruction. Student made constant humming or nonverbal noises, but the volume decreased over the school year. Ms. Cummins moved Student's desk to a space near the door so that his ABA aides could remove him from the room without disrupting the class, and slightly away from his neighbors to provide him with a more distraction free environment and to minimize



distraction to the classmates in his vicinity. When Student's aides removed him from the classroom, Student missed three to 20 minutes of instructional time. Although Student could be disruptive to the class, Ms. Cummins was still able to conduct her lessons.

59. Socially and behaviorally, Student's classmates constantly tried to engage with Student, although he continued to need prompting to respond. Student worked in small groups at the centers, but preferred his own space and was less frustrated when working by himself. Student tantrummed frequently at the beginning of the school year, but hadn't tantrummed recently at the time of the hearing. Student sat apart from other students during recess/snack due to his allergies, but when he was done eating, other kids would come up to him and ask him to play. Student's classmates had strong social skills, and spoke to him, passed him papers and acknowledged him coming in and leaving. Student participated in PE exercises with his classmates, but he usually did not complete the exercises. Student was generally apprehensive on Fridays, which were testing days, although throughout the year his hand-biting decreased, and was increasingly replaced by biting a rubber tube on the end of his pencil provided for that purpose. The week prior to hearing, Student had begun leaving his desk and escaping from the room. His classmates showed concern about Student's well-being at those times. Student made some or substantial progress on all of his social/emotional goals, such as reducing incidences of high intensity vocalization and tantrumming protests of non-preferred tasks.

60. Academically, Student exhibited good skills when tested one-on-one by Ms. Nilsson, and needed fewer prompts. Student also made good progress on his May 3, 2012 IEP preacademic goals. In the classroom, Student needed continuous prompts for attention and redirection, and could not take the same standardized tests as his classmates. Student's homework was returned on a daily basis. Ms. Cummins indicated on Student's progress reports and logs that he was doing well academically. However,

Student missed valuable instructional time, including stories and lesson information imparted to his classmates, by leaving early each day.

61. Ms. Cummins held a credential in elementary education and had taught first grade for 18 years. Although Ms. Cummins had taught fully included students in her classes, she had never had a fully included student with autism before. She received no training in working with children with autism, except for one day of general training in October 2012. After the one day training, Ms. Cummins decided that Student should be placed in an SDC because he was so prompt dependent. There was no evidence that she was familiar with SDC classrooms or had the behavior background or training to understand ABA principles or the use of prompts in the learning process for autistic children. She expressed strong frustration at not knowing if Student was actually showing mastery of skills when he was being prompted and “hoped he listened” when he was quiet during her instruction because he did not make eye contact with her. Ms. Cummins was unaware if the ABA aides were providing academic instruction, and opined that it was difficult for her to determine what work Student was doing independently. She did not know why Student had a tube on his pencil. Ms. Cummins admitted that typically developing elementary school children are disruptive in class. Ms. Cummins’s testimony demonstrated a general lack of understanding of autism, and the role of prompting in assisting autistic children to regulate attention, behavior and communication, and a surprising lack of knowledge of Student in particular. She did not know, after having Student in her class for a full semester, that he was not receiving academic instruction from his ABA aides, that cuing, prompting and coaching were accommodations in his IEP and incorporated in his academic goals, or that he chewed the tube on his pencil as a replacement behavior for biting his hand. Her observations of Student’s behavior in her classroom, and her opinion that Student was missing valuable instructional time by attending school for half a day, were given significant weight.

However, Ms. Cummins' opinions on Student's ability to learn in a general education environment, need for an SDC placement, and progress on his goals were given very little weight given she was unfamiliar with Student's disability, and with his goals and objectives.

62. On September 20, 2012, District prepared an assessment plan for an FAA only. Parents signed the assessment plan on September 21, 2012.

63. School psychologist Stephanie Holleran conducted the FAA in October 2012, while Student was in first grade. She conducted the FAA in the environments where Student exhibited the target behaviors, in his first grade classroom and on the playground. Her report, dated November 13, 2012, described the purpose of the FAA as determining (1) the function of Student's disruptive behaviors, such as biting himself and others, vocalizing and eloping, and (2) whether Student's current placement was appropriate.

64. Ms. Holleran observed Student in his classroom for 30 minutes to two hours per day, five days a week, for two weeks. She gathered information about Student's behavior in the classroom from Ms. Cummins, Ms. Nilsson, and Parents. Ms. Holleran was critical of her ability to "completely capture the full range" of Student's behaviors because he was frequently prompted and cued by his ABA aides. During her observations, she saw Student bite only his pencil, with the exception of one attempt to bite his ABA aide on October 2, 2012. She observed only two tantrums, both on October 2, 2012. Vocalizations occurred from one to 11 times over a period of one to two hours, and Student made one attempt to elope. During three recording periods, Student was on task 55, 47 and 22.5 percent of the time, when his peers were on task 100, 78 and 77 percent of the time for the same period. Ms. Holleran looked at antecedents, target behavior and consequences, and concluded that Student engaged in maladaptive behavior to escape non-preferred tasks, to obtain a preferred item or activity, or to gain

attention. She noted that Student disrupted the flow, concentration and learning of the other students, and felt that Student's ABA aides dictated Student's school routine rather than Ms. Cummins, and concluded that Student was "independent and parallel" to Ms. Cummins' class, rather than a part of it. Ms. Holleran recommended that Student would be better served and less frustrated with instruction in a smaller classroom environment, where a routine could be scheduled to alternate preferred and non-preferred activities with positive reinforcement.<sup>8</sup>

65. Ms. Bulkin continued to provide consultation and supervision services for 20 hours per month, and observed Student in Ms. Cummins's class for approximately two and a half hours each week during the 2011-2012 school year. In September, the ABA aides were training Student to be more responsive to gestural cues and to more consistently follow written prompts in order to fade prompt dependence in the school setting. Peers were used more often to prompt Student, for example, telling him "Don't forget to push in your chair." CARD was also addressing communication skills in the school setting, such as sentence strips on the desk to remind him to use functional requests. One of the first prompts Student received when he exhibited frustration was to use his words. By December 2012, CARD reported significant decreases in all maladaptive behaviors from September 2011 through December 2012, as measured by average number of incidents per hour (indicated in parentheses): noncompliance (September 2.13 to December 0.82, which included a slight rise from 0.51 in September 2012); tantrumming (September 2.13 to December 0.04); physical self-stimulatory behavior (September 4.44 to December 0.94); verbal self-stimulatory behavior (September 8.10 to December 2.0), and mouthing (September 0.63 to December 0.19).

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<sup>8</sup> Neither Ms. Holleran's qualifications to conduct the FAA, nor the adequacy or accuracy of the FAA, were issues in dispute in this proceeding.

By December 2012, Student's ability to respond to the instruction to "work quietly" without vocalizations for two minutes, to imitate his peers, to stay on task for three minutes, and follow direct instructions from the teacher, were improving.

66. During the 2012-2013 school year through the time of hearing, Ms. Bulkin observed that Student's tantrums and vocalizations had decreased in frequency and intensity, his noncompliance and self-stimulatory behaviors had decreased, his use of functional communication had increased, his imitation skills had increased, he had the ability to wait for a reinforcer, and had learned appropriate skills. Student's vocalizations became so infrequent that he made a loud enough noise for the class to hear once an hour, and otherwise, the volume of his vocalizations was not audible to the majority of the students in his class. The students in Ms. Cummins's class were less likely than the students in Ms. Albert's class to turn and look at him when he made noises, and even so, were easily redirected by the teacher. Ms. Bulkin opined that Student benefitted socially in general education, because he had typical peer models, was learning to follow peer directions making him less dependent upon adults, and because his typical peers willingly approached him to engage in reciprocal conversations. Ms. Bulkin did not perceive that the typical kindergarten or first grade students were afraid of Student.

67. Ms. Bulkin opined that Student was receiving educational and non-academic benefit from Ms. Cummins' general education classroom. Student had understood what was learned in kindergarten and applied it in first grade; he independently contributed to classroom routines, learned class songs, learned to write dictated sentences, and only exhibited difficulty with comprehension questions.

68. Ms. Bulkin's opinions concerning Student's behaviors in the classroom for the 2012-2013 school year were given greater weight than those of Ms. Holleran. Ms. Holleran testified superficially regarding her FAA, and did not go over the contents of the report in detail at the hearing. She was not familiar with Student at the time of the

assessment, and although the FAA was supposed to focus on target behaviors, she did not gather significant behavioral information from CARD data or personnel. Ms. Holleran was not familiar with Student's ABA treatment plan, and therefore her criticism of the aides in cuing and prompting Student was unconvincing, and her conclusion that Student was working "parallel" to his classmates and not as part of the class routine because of his need for prompting was unpersuasive. Ms. Bulkin's observations and opinions concerning the decrease in Student's maladaptive behaviors and disruptions to the class were supported by the behavioral data collected, and were given great weight. According to the FAA report that Student was on task nearly 50 percent of the time over more than one observation, with few disruptive behaviors, corroborated Ms. Bulkin's observations and the CARD data.

#### DISTRICT'S EXPERT

69. District retained Dr. Marjorie Charlop to observe Student in his first grade classroom prior to the hearing, and to render an opinion at hearing regarding Student's educational needs.

70. Dr. Charlop held a bachelor's degree in psychology from UCLA, a master's degree and doctorate in psychology and behavioral psychology from Claremont Graduate University. She did a post-doctoral fellowship at Johns Hopkins in behavioral pediatrics and has been a professor of psychology at Claremont Graduate University for 29 years. She has published and presented extensively on areas of treatment for children with autism, and established the Claremont Autism Center (CAC) to deliver services to children with autism. She often works with SDC teachers as part of her duties with the CAC.

71. Dr. Charlop observed Student in Ms. Cummins's classroom for two mornings, and reviewed his school records, including assessments, for eight to 10 hours. She also observed Lisa Cornell's MM/SDC classroom at Lindstrom, and spoke to Ms.

Albert, Ms. Cummins and Ms. Cornell.<sup>9</sup> She did not speak with Ms. Nilsson or Ms. Bulkin. She also observed another SDC classroom at Lindstrom and a MM/SDC classroom at another school site.

72. Dr. Charlop had impressive credentials, and she was sincere and passionate in her testimony regarding the needs of students with autism in general. However, she was not familiar with Student, she observed him seven months after the May 3, 2012 IEP offer was made, and her testimony regarding Student's abilities, learning styles and needs was generally accorded less weight than those who had worked with Student in the educational setting. For example, Dr. Charlop was critical of Student eating alone with the aide at snack time, but was unaware that Student was separated from other students while eating due to dairy and beef allergies, although the allergies are noted in several places on Student's IEP's, and a query to Student's ABA aide or supervisor would have provided her with important contextual information for her observation. Dr. Charlop also noted no social skills programming, and seemed unaware that Student's ABA program worked on social skills, or that District had never offered a formal social skills program to Student, in any setting. Dr. Charlop admitted that she was unclear as to the purpose of the ABA aides in the classroom, as they were sometimes addressing behavior and sometimes not, again displaying an unfamiliarity with Student's ABA program that would have been remedied with a review of his ABA records and a conversation with Ms. Bulkin regarding the fading of Student's prompts. Notably, when Dr. Charlop walked around Ms. Cummins's classroom during worksheet time and asked Student to write his name, he did so, and when she asked him to do a

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<sup>9</sup> Lindstrom MM/SDC teacher, Lisa Cornell, testified at the hearing. She was not familiar with Student, had not reviewed Student's school records, and did not render an opinion on whether her classroom was appropriate for Student.

math problem, he did, without any prompting from his ABA aide. Dr. Charlop's criticisms of Student's ABA program and ABA aides, and her opinion that Student required placement in an SDC rather than general education, were given little weight in light of her lack of knowledge of Student and his IEP. However, in light of her extensive experience in working with children with autism in general, her opinion that Student was of an age where it was of utmost importance that Student learn to speak and interact with his peers in a school environment was given significant weight.

73. Dr. Charlop opined that 90 percent correct behavioral responses with prompting does not equate to having learned the behavior without prompts, although she admitted that if a behavior goal includes prompting, then progress is made on a goal regardless of whether prompting is involved. She also admitted that Student was doing fine in a general education setting, and was a "smart kid" capable of doing work in a general education classroom. Her testimony that Student required the more visual instruction provided in SDC classes, and that his behaviors were the result of noise in a large classroom was made without documentary or data support, and constituted no more than speculation based upon brief observations.

74. Interestingly, Dr. Charlop opined that Ms. Cornell's MM/SDC classroom would not be appropriate for Student because Ms. Cornell had only second and third grade students, and they appeared to be at a higher functioning level than Student. She also observed another SDC classroom at Lindstrom, but quickly ruled it out as inappropriate for Student because the students would not provide appropriate verbal role models. In fact, Dr. Charlop had to visit an entirely different school site to find an MM/SDC classroom population that was predominately first grade, and where the academics were more advanced and at grade level. Dr. Charlop agreed that it was a fair statement to say that not all SDC's are created equal.



75. Dr. Charlop concluded that Student needed an instructional aide rather than a behavior aide, a more verbal and socially-oriented education, and an SDC classroom that lets him “get closer to his full potential.” However, given that she did not know Student or his ABA program, this opinion had little weight.

## LEGAL CONCLUSIONS

1. The petitioner has the burden of persuasion. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) Therefore, District has the burden of persuasion for the issues raised in Issues 1(a) and 1(b), and Student has the burden of persuasion for the issues raised in Issues 2(a) through (f).

### DISTRICT’S CASE

Issue 1 – (a) Whether District, in the IEP of May 3, 2012, offered Student a FAPE in the LRE, and if so, (b) whether District is required to contract with the NPA serving Student at the time of that IEP to provide the behavior services specified in that IEP.

2. In Issue 1(a), District contends that it offered Student a FAPE in the May 3, 2012 IEP. Specifically, District contends that the IEP met all procedural requirements, and that the placement and services offered were reasonably calculated to provide Student a FAPE at the time it was drafted. In particular, District argues that its MM/SDC program was the LRE because Student was not getting sufficient educational and social/emotional benefit in general education classes when compared to Student’s impact on the general education class because of his disability-related behaviors. Student disagrees, contending that the LRE for Student was general education for all classes because Student would receive educational and social/emotional benefit from a general education program. As discussed below, District failed to meet its burden of proof by a preponderance of the evidence that Student was offered a FAPE in the LRE.

3. In Issue 1(b), District seeks a determination that Parents cannot condition their consent to NPA services upon District contracting with a specific NPA. Parents disagree, arguing that District cannot change an NPA provider without an IEP meeting in which the change of a provider is discussed, and because implementation of a change of providers was not part of the May 3, 8 or 11, 2012 meetings, there is no issue of change of providers to be decided in this action. As discussed below, District did not meet its burden of showing that the IEP offered Student a FAPE, and there was no evidence that District sought to implement a change in Student's ABA provider. Accordingly, District's issue 1(b) seeks an advisory opinion which OAH declines to issue.

4. California special education law and the Individuals with Disabilities Education Act (20 U.S.C. § 1400, et seq. (IDEA)) provide that children with disabilities have the right to a FAPE that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and independent living. (20 U.S.C. § 1412(a)(1)(A); Ed. Code, §§ 56000, 56026.) 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. (20 U.S.C. § 1401(9).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29).) "Related services" are transportation and other developmental, corrective and supportive services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); Ed. Code, § 56363, subd. (a) [In California, related services are called designated instruction and services].)

5. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 200 [102 S.Ct. 3034, 73 L.Ed.2d 690] ("*Rowley*"), the 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.) *Rowley* also made clear that the IDEA does not provide for an “education...designed according to the parent’s desires.” (*Id.* at p. 207.) 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.)

6. The Ninth Circuit Court of Appeals has held that despite legislative changes to special education laws since *Rowley*, to date, 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.)

#### Issue 1(a) - Procedural Requirements

7. An IEP team meeting must be held at least annually to review the pupil’s progress, whether the annual goals are being achieved, and the appropriateness of placement. (Ed. Code, § 56343, subd. (d).) The meeting must be held at a mutually agreed-upon time and place. (Ed. Code, § 56341.5, subd. (c).)

8. An IEP team is required to include: one or both of the student’s parents or their representative; a regular education teacher if a student is, or may be, participating in regular education; a special education teacher; a representative of the school district who is qualified to provide or supervise specially designed instruction, is knowledgeable

about the general education curriculum and is knowledgeable about available resources; a person who can interpret the instructional implications of assessments results; at the discretion of the parties, other individuals; and when appropriate, the person with exceptional needs. (34 C.F.R. § 300.321(a)(2006)<sup>10</sup>; Ed. Code, §§ 56341, subd. (b), 56342.5.)

9. An IEP is a written document detailing, in relevant part, the student's current levels of academic and functional performance, a statement of measurable academic and functional goals, a description of the manner in which goals will be measured, a statement of the special education and related services that are to be provided to the student and the date they are to begin, the anticipated frequency, location and duration of services and modifications, an explanation of the extent to which the child will not participate with nondisabled children in a regular class or other activities, and a statement of any accommodations that are necessary to measure the academic achievement and functional performance of the child on State and district-wide assessments. (20 U.S.C. § 1414(d); Ed. Code, § 56345, subd. (a).)

10. The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child; and the provision of FAPE to the child. (34 C.F.R. § 300.501(a); Ed. Code, § 56500.4.) A parent has meaningfully participated in the development of an IEP when he or she is informed of the child's problems, attends the IEP meeting, expresses disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1036 [parent who has an opportunity to

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<sup>10</sup> All subsequent references to the Code of Federal Regulations are to the 2006 revisions, unless otherwise stated.

discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].)

11. Meaningful parental participation also requires that the IEP document fulfill the IDEA's explicit requirement of written prior notice to parents when a school district proposes, or refuses, to initiate or change the educational placement of a disabled child. (See 20 U.S.C. § 1415(b)(1)(C).) The procedural requirement of a formal IEP offer creates a clear record and eliminates troublesome factual disputes years later about what placement and services were offered. (*Union School Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526 (*Union*).) A formal written offer is therefore more than a mere technicality, and this requirement is vigorously enforced. (*Ibid.*)

12. A formal, specific offer from a school district (1) alerts the parents of the need to consider seriously whether the proposed placement is appropriate under the IDEA, (2) helps parents determine whether to reject or accept the placement with supplemental services, and (3) allows the district to be more prepared to introduce relevant evidence at hearing regarding the appropriateness of placement. (See *Union, supra*, 15 F.3d at p. 1526.)

13. A school district may not dispense with this procedural requirement as an empty gesture if parents indicate that they will not accept the offer. "[A] school district cannot escape its obligation under the IDEA to offer formally an appropriate education placement by arguing that a disabled child's parents expressed unwillingness to accept that placement." (*Union, supra*, 15 F.3d at p. 1526.) The IDEA does not make a district's duties contingent on parental cooperation with, or acquiescence in, the district's preferred course of action. (See *Anchorage School Dist. v. M.P.* (9th Cir. 2012) 689 F.3d 1047, 1055 (*Anchorage*).)

14. The IDEA mandates that the "location" of services be identified in an educational placement. (20 U.S.C. § 1414(d)(1)(A)(i)(VII).) California's implementing

regulations define a "specific educational placement" as "that unique combination of facilities, personnel, location or equipment necessary to provide instructional services to an individual with exceptional needs" (Cal. Code Regs., tit. 5, § 3042, subd. (a).) A school district "must ensure that..[t]he child's placement...[i]s as close as possible to the child's home." (34 C.F.R. § 300.116(b)(3).) The school district "must ensure that...[u]nless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled." (34 C.F.R. § 300.116(c).)

15. District failed to meet its burden to prove that the IEP was conducted in procedural compliance with the IDEA, as the IEP met some, but not all, of the attendance and written requirements.

16. District demonstrated by a preponderance of the evidence that Student's annual IEP was timely held, at a mutually agreed upon time and place, to review Student's progress on his goals and the appropriateness of placement. (Factual Findings 25-45 and Legal Conclusions 1 and 4-7.)

17. The weight of the evidence also established that the IEP team had all required participants. In addition to Parents, Evelyn Albert, a general education teacher was present, as were Kathleen Roberts and Regina Nilsson, both of whom were credentialed special education teachers. During the 2011-2012 school year, Ms. Nilsson had observed Student in Ms. Albert's classroom on a weekly basis, consulted with his teacher, and evaluated Student for progress on his annual goals, and so could speak knowledgeably to the IEP team about Student's performance. Ms. Roberts, the administrative designee, was qualified to provide or supervise specially designed instruction, knowledgeable about the general education curriculum and knowledgeable about available resources within District. Student's ABA supervisor, Marina Bulkin, and occupational therapist were also present, and familiar with Student and qualified to interpret the instructional implications of their assessments of Student's behavior,

social/emotional and OT levels to the IEP team. A school psychologist, Tricia Acosta, was present to explain the additional psychoeducational testing sought by District in light of the biting incident that had occurred the day before. These attendees were sufficient to meet the procedural requirements for the composition of an IEP team. (Factual Findings 1-45 and Legal Conclusions 1, 4-6, 8.)

18. District demonstrated that some, but not all, of the written requirements for an IEP were met. The IEP team was presented with detailed reports on Student's academic PLOP's and progress on his academic goals by Ms. Nilsson. Ms. Bulkin summarized data collected on Student's functional performance and progress on behavior and social/emotional goals. The IEP team discussed the reports and drafted measurable goals and objectives in the areas of reading, writing, math, communication, behavior and social skills that addressed Student's identified educational needs. The goals had a direct relationship between Student's PLOP's and the educational services to be provided, focusing on grade level academics, reading comprehension, and Student's behavioral and functional communication needs. The team also discussed and adopted the BIP presented by Ms. Bulkin, which she had recently modified to address Student's biting behavior, as well as the accommodations recommended for Student in the classroom. Therefore, District met its procedural obligation to include present levels of academic achievement and functional performance, measurable goals, accommodations and services designed to support Student in achieving those goals in the IEP. (Factual Findings 1-4 and Legal Conclusions 1, 4-6, 9.)

19. However, although the May 3, 2012 IEP lists the frequency and duration of ABA services offered, it does not specify where those services were to be performed, or for what part of the school day. The IEP states that the location of the services will be "home/school," failing to allocate the proportion of services that would be provided in the school setting or in the home setting. It is impossible to determine from the IEP

document whether Student was offered a full-day school program with supplemental home services, or a 40-hour home program, or something in between. The "services" page of the IEP does not offer any clarification. The accommodations/ modifications section merely states that Student was offered "1-1 ABA support, modified day" and that at the time of the IEP was attending kindergarten for three hours and fifteen minutes each day. This statement does not address whether the same period of attendance, or more, was offered for the upcoming year during which Student would be attending first grade. This lack of clarity extends to the IEP's statement that Student was offered 18 percent of his "time" in general education. Because the length of Student's school day is unclear, a statement that any portion of that school day will be spent in general education cannot fulfill the requirement that the IEP include an explanation of the extent to which the child will participate with nondisabled children in a regular class or other activities. District's failure to clearly delineate the location in which Student would receive his ABA services, or to provide a meaningful statement of the length of Student's school day or of the amount of time Student would be educated with typically developing peers, constitutes a violation of the written requirements for an IEP. (Factual Findings 1-45 and Legal Conclusions 1, 4-6, 9.)

20. District met its burden of showing by a preponderance of the evidence that Parents were afforded an opportunity to participate in the May 3, 2012 IEP team meeting and to express their dissatisfaction with the meeting and resultant IEP. Parents attended the IEP team meeting at a mutually agreed upon time, and were informed of Student's abilities, achievements and needs. Parents participated in the team discussions, and expressed their agreement or disagreement with the IEP team's conclusions. At the IEP team meeting, Parents expressly consented to the IEP's goals and BIP, as well as the services offered. Parents disagreed with placement in an SDC, and wrote their disagreement on the IEP. Therefore, Parents had an opportunity to



participate in the May 3, 2012 IEP team meeting. (Factual Findings 1-45 and Legal Conclusions 1, 4-11.)

21. Although Parents participated, the evidence also established that District failed to make a specific placement offer. No specific MM/SDC classroom was offered at the May 3, 2012 IEP team meeting, and available and appropriate MM/SDC classrooms within District were not even described or discussed. Ms. Albert, Ms. Nilsson, Ms. Roberts, Ms. Acosta and Mother testified uniformly and without equivocation that no specific classroom or school location was offered or discussed at the IEP team meeting of May 3, 2012. District team members perceived that Parents would not accept an SDC placement, and therefore chose not to discuss or offer any specific SDC classroom to meet Student's unique needs. However, per *Anchorage*, District's duty to offer placement was not contingent upon Parents' cooperation, and per *Union*, Parents' perceived unwillingness to accept an SDC placement did not excuse District's obligation to formally offer an appropriate placement. (Factual Findings 1-45 and Legal Conclusions 1, 4-14.)

22. District contends that the requirement that a "location" be identified in an offer of placement does require that a specific school site be identified, characterizing the neighborhood school requirement of the IDEA as a mere proximity preference. However, there is nothing discretionary in federal regulations that mandate that a school district "ensure" that a student's placement be "as close as possible" to the student's home, and that the student be educated in the school that he or she would attend if not disabled, unless the disability requires some other arrangement. (See 34 C.F.R. §§ 300.116(b)(3) and (c).) *Union* requires that the procedural requirements of a placement offer be "enforced rigorously," and until and unless a school district designates a specific school site in its placement offer, the parent of a disabled student has no means of determining if the offer complies with federal requirements that their

child be educated in his or her home school unless the child's disability requires otherwise. District's failure to specify a specific school site in its May 3, 2012 IEP offer constituted a procedural violation of Student's rights as a matter of law. (Factual Findings 1-45 and Legal Conclusions 1, 4-14, 21.)

23. Further, the evidence showed that the MM/SDC classrooms throughout the District were not the same, and not all were appropriate for Student, fatally undermining District's contention that its offer of any MM/SDC within the District sufficiently described the "location" where Student would receive the special education and services for his unique needs. Ms. Roberts, the District's administrative designee at the May 3, 2012 IEP team meeting, believed that two of the seven primary SDC classes within the District would be appropriate for Student. Ms. Acosta, who was also familiar with the District's primary SDC's, indicated that there were only five "mild to moderate" primary SDC classrooms, and that she did not believe that all five of the elementary MM/SDC's were appropriate for Student. Both Ms. Acosta and Ms. Roberts cautioned that the availability of space in each classroom had to be considered before a class was offered. The District's own expert, Dr. Charlop, opined that for the 2012-2013 school year, Ms. Cornell's MM/SDC at Lindstrom would not have been appropriate for Student because the second and third graders in that class were too high functioning for Student. She had also observed another SDC at Lindstrom, which she quickly ruled out as inappropriate because a number of the students in that class would not be appropriate verbal role models. In light of the gross disparity of programs and students among District's primary MM/SDC classrooms, and the opinions of two May 3, 2012 IEP team members that not all the primary MM/SDC programs in the District were appropriate for Student, District's argument that the designation of an MM/SDC within District was a sufficiently specific placement offer for Parents to consider seriously

whether such placement was appropriate must fail. (Factual Findings 1-45 and Legal Conclusions 1, 4-14, 21, 22.)

#### Issue 1(a) - Substantive Requirements

24. In order for an IEP to meet the substantive requirement of offering a FAPE, the IEP must offer access to an education that is sufficient to confer some educational benefit upon child. (*Rowley, supra*, 458 U.S. at p. 200.) In developing the IEP, the IEP team must consider the strengths of the child, the concerns of the parents for enhancing the child's education, the result of the most recent evaluation of the child, and the academic, developmental, and functional needs of the child. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. §§ 300.324 (a).)

25. In determining the educational placement of a child with a disability a school district must ensure that: (1) the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and takes into account the requirement that children be educated in the LRE; (2) placement is determined annually, is based on the child's IEP and is as close as possible to the child's home; (3) unless the IEP specifies otherwise, the child attends the school that he or she would if non-disabled; (4) in selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and (5) a child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum. (34 C.F.R. § 300.116.)

26. To provide the LRE, school districts must ensure, to the maximum extent appropriate, that (1) children with disabilities are educated with non-disabled peers; and that (2) special classes or separate schooling occur only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids

and services cannot be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56031; 34 C.F.R. 300.114 (a).) To determine whether a special education student could be satisfactorily educated in a regular education environment, the Ninth Circuit Court of Appeals has balanced the following factors: (1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect the student has on the teacher and children in the regular class; and (4) the costs of mainstreaming the student. (*Sacramento City Unified School Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1404 (*Rachel H.*) [adopting factors identified in *Daniel R.R. v. State Board of Ed.* (5th Cir. 1989) 874 F.2d 1036, 1048-1050]; see also *Clyde K. v. Puyallup School Dist. No. 3* (9th Cir. 1994) 35 F.3d 1396, 1401-1402 [applying *Rachel H.* factors to determine that self-contained placement outside of a general education environment was the LRE for an aggressive and disruptive student with attention deficit hyperactivity disorder and Tourette's Syndrome].) If it is determined that a child cannot be educated in a general education environment, then the LRE analysis requires determining whether the child has been mainstreamed to the maximum extent that is appropriate in light of the continuum of program options.<sup>11</sup> (*Daniel R.R. v. State Board of Ed., supra*, 874 F.2d at p. 1050.) The continuum of program options includes, but is not limited to: regular education; resource specialist programs; designated instruction and services; special classes; nonpublic, nonsectarian schools; state special schools; specially designed instruction in settings other than classrooms; itinerant instruction in settings other than classrooms; and instruction using telecommunication instruction in the home or instructions in hospitals or institutions. (Ed. Code, § 56361.)

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<sup>11</sup> "Mainstreaming" is a term used to describe opportunities for disabled students to engage in activities with nondisabled students. (*M.L. v. Federal Way School Dist.* (9th Cir. 2005) 394 F.3d 634, 640, fn. 7.)

27. An IEP is evaluated in light of the information available to the IEP team at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9<sup>th</sup> Cir. 1999) 195 F.3d 1141, 1149 (*Adams*)). "An IEP is a snapshot, not a retrospective." (*Id.* at p. 1149, citing *Fuhrman v. East Hanover Bd. of Education, supra*, 993 F.2d at p. 1041.) Whether a student was denied a FAPE is ultimately evaluated in terms of what was objectively reasonable at the time the IEP was developed. (*Adams*, 195 F.3d at 1149.)

28. Here, although the May 3, 2012 IEP was reasonably calculated to provide Student with some educational benefit in light of his unique needs, the offer of placement was inconsistent with the IDEA because it was not in the LRE and did not provide for Student to attend the same school he would attend if he was not disabled. Specifically, although the services offered were designed to meet Student's unique needs and were reasonably calculated to provide educational benefit to Student in light of the information known by District at the time, District's proposal to change Student's placement to provide these services in an MM/SDC setting, or at other than Student's home school, was unsupported by the evidence. (Factual Findings 1-45 and Legal Conclusions 1, 4-6, 24-27.)

29. District failed to meet its burden of establishing by a preponderance of the evidence that the IEP offered Student placement "as close as possible to the child's home," and "in the school he or she would attend if nondisabled." (See 34 C.F.R. §§ 300.116(b)(3) and (c).) The IEP team did not discuss, nor does the IEP document explain, why Student could not be offered placement at Lindstrom, his home school, rather than at an unspecified site "within [District]." All of the evidence showed that the May 3, 2012 IEP team failed to have a discussion of placement location, and therefore District failed to demonstrate that the placement offered was as close as possible to Student's home school, or that Student's disability required him to attend a program at a school site other than Lindstrom. (Factual Findings 1-45 and Legal Conclusions 1, 4-6, 24-28.)

30. The IDEA expresses a clear policy preference for inclusion to the maximum extent appropriate as an aspiration for all children with special needs, requiring that a child be educated in general education classes with typically-developing peers unless the nature or severity of a particular disability may require separate instruction in order to meet the equally important need for educational benefit. (See 20 U.S.C. § 1412(a)(5)(A); Ed. Code, § 56031; 34 C.F.R. §§ 300.114 & 300.116.) Under *Rachel H.*, the question of whether general education is appropriate requires balancing multiple factors. (See *Rachel H.*, *supra*, 14 F.3d at p. 1404.) Here, applying the *Rachel H.* factors to the facts, shows that general education was appropriate and that District's offered program failed to meet the IDEA's aspiration of inclusion to the maximum extent appropriate.

31. As to the first *Rachel H.* factor, the evidence established that Student was receiving educational benefit from inclusion in a general education classroom. Academics were a strength for Student, and the only academic instruction he received in kindergarten, and again in first grade, was from his classroom teachers, using general education teaching techniques, such as lecture, demonstration, sing along, and rotating stations for practice and group learning. Although Student needed frequent prompts for attention and redirection, the weight of the evidence also showed that Student was absorbing the material and capable of mastering grade level work in the general education kindergarten classroom, despite being frequently off-task and needing periodic removal from the classroom. At the May 3, 2012 IEP team meeting, it was reported that Student met two of his four academic goals, in the areas of reading and math. Student's report cards, which were available to the IEP team for two trimesters, showed that Student was consistently meeting or exceeding grade level expectations. Student was not receiving academic instruction from his ABA aides, demonstrating that Student was acquiring educational benefit in academics from the instruction provided

by Ms. Albert in the general education setting. In fact, Ms. Nilsson provided Ms. Albert with first grade material for Student because Ms. Nilsson thought that Student might be bored with kindergarten material that he learned faster than his typical peers, such as instruction on how to read. There was some evidence that Student had difficulty with reading comprehension, but District did not establish by a preponderance of the evidence that Student's comprehension was so impacted by his disability that he was not accessing the general education curriculum. Although Student was in kindergarten for the second time in Ms. Albert's class, Student had previously attended a private preschool for only partial days, and for only one semester, and the weight of the evidence established that Student made academic progress in Ms. Albert's class from September 2011 through May 2012. The evidence did not show that Student was failing to keep up with his typical peers academically, and therefore Student did not require an SDC placement to benefit educationally. (Factual Findings 1-45 and Legal Conclusions 1, 4-6, 24-27, 30.)

32. As to the second *Rachel H.* factor, the non-academic benefits of a general education placement, the evidence showed that Student benefitted behaviorally in the general education classroom. The behavior data collected by CARD demonstrated to the IEP team that Student had made significant progress on his behavioral goals, including being more compliant, following instructions, and reducing vocalizations, tantrums and self-injury. The testimony of Ms. Bulkin, Student's ABA supervisor, and Ms. Nilsson, the inclusion specialist, that they had seen Student's maladaptive behaviors decrease and appropriate behaviors increase, corroborates the hard numbers provided to the IEP team. Student met eight of 15 behavior goals, and made progress on the other seven, while fully included. Dr. Charlop opined that Student would enjoy increased opportunities for socialization with a social skills program in an SDC, but the District did not present evidence that a social skills program could not also have been offered to

Student in the general education setting. (Factual Findings 1-45 and Legal Conclusions 1, 4-6, 24-27, 30.)

33. The evidence also showed that Student received non-academic social benefit in general education. Dr. Charlop testified that academic periods in general education were not an environment conducive to speaking with peers, however, her opinions were contradicted by the testimony of both Ms. Albert and Ms. Cummins that their students worked daily in small groups at learning stations, establishing that at least two general education classrooms at Lindstrom provided Student with opportunities to socialize during academics. Ms. Bulkin testified persuasively that because Student excelled in academics, academic lessons provided him with opportunities to interact with the teacher and students because he had the knowledge base to contribute. (Factual Findings 1-45 and Legal Conclusions 1, 4-6, 24-27, 30, 32.)

34. District's evidence that Student preferred to keep to himself, did not participate in class discussions, and did not engage in functional communication with typical peers unless cued or prompted by his ABA aides, did not establish that Student did not obtain non-academic benefit from a general education classroom. The general education kindergarten students sat with Student, initiated conversations with him, greeted him, participated in directed play with him, and because their own social skills were strong, would comment on his projects and were able to take cues on more effectively interacting with Student. Student sometimes participated in sing along, and interacted with his typically developing peers with cues, prompts and scripted social exchanges. Student's difficulties with reciprocal communication were inherent in his disability, but as noted by Ms. Bulkin, Student was benefitting from the many opportunities presented in his general education setting to practice social exchanges, model peer behavior, and follow peer directions despite his continued need for adult prompting. Although Student did not demonstrate the eye contact, self-restraint and



classroom engagement that his typical peers did, the totality of the evidence demonstrated that Student received non-academic benefit from his placement in general education. (Factual Findings 1-45 and Legal Conclusions 1, 4-6, 24-27, 30, 32, 33.)

35. As to the third *Rachel H.* factor, even though Student's behaviors had an effect on the teacher and general education students, Ms. Albert was able to conduct her classes even with Student's interruptions and disruptions. According to Ms. Cummins, even typically developing elementary school children are disruptive in class. The data in Ms. Bulkin's report to the May 3, 2012 IEP team showed that Student's disruptive behavior in the kindergarten classroom had decreased dramatically over the months prior to the IEP. Student's classmates did not isolate Student, but regularly attempted to engage Student in social exchanges and play, even though Student required adult prompting to respond. Evidence acquired after the May 2, 2012 biting incident, that Ms. Nilsson readily organized play arrangements between Student and his classmates, supports a reasonable inference that Student's classmates were not afraid of him because he had bitten a girl from another class on the playground, and that District administration's fears that Student would be "stigmatized" and rejected by his general education classmates was nothing more than unfounded and unsupported speculation. The biting incident occurred when Student's ABA aide was not watching Student on the playground and Student was reacting to an act of aggression by a kindergarten student from another class. The other recent biting incidents involved adults, so it was not reasonable to believe that the general education students in Ms. Albert's classroom were in danger from Student. After the biting incident, Student's ABA aides were hyper vigilant, District added an instructional aide to Ms. Albert's class, and Ms. Nilsson visited the classroom every morning, and no further biting incidents occurred in the 2011-2012 school year, or in the 2012-2013 school year in the absence of additional adult support

in Ms. Cummins classroom. District did not establish by a preponderance of the evidence that, but the time of the May 3, 2012 IEP, Student had such an adverse impact on the classroom as to weigh against a general education placement. (Factual Findings 1-45, 61 and Legal Conclusions 1, 4-6, 24-27, 30-34.)

36. Also related to the third *Rachel H.* factor, the evidence suggested that District administration and staff were not supportive of Ms. Albert, and subsequently Ms. Cummins, in addressing Student's behaviors in the classroom. First, Lindstrom's principal, Ms. Swanson, intentionally "rotated" full inclusion students through classrooms to ensure that no teacher received an inclusions student for two years in a row, which effectively ensured that included disabled students like Student would be placed with general education teachers who were inexperienced at integrating children with special needs into their classrooms, or whose experience and skills were stale. Second, Ms. Albert and Ms. Cummins had not received any training in including disabled students in the classroom, or on Student's disability of autism, with the exception of Ms. Cummins' attendance at a one-day workshop on autism. Third, several District witnesses commented on CARD's apparent inability to smoothly integrate Student into the general education classroom, but CARD's responsibility is only to Student, and not to the teacher. Although Ms. Bulkin regularly met with the classroom teacher to consult and supervise the program in the school setting, it is the responsibility of District administrators and staff to provide District teachers with inclusion training and techniques. District cannot place Student in a more restrictive setting to compensate for the lack of sufficient supports for the teacher in the general education classroom. The IDEA mandates inclusion of disabled children to the maximum extent appropriate, and District cannot disregard that obligation because it is difficult, inconvenient or unpopular. (Factual Findings 1-45, 56-68 and Legal Conclusions 1, 4-6, 24-27, 30.)

37. Finally, as to the last *Rachel H.* factor, cost, District did not put on any evidence that the cost of providing Student with 40 hours of one-on-one behavior intervention and 20 hours of ABA supervision in the general education classroom was prohibitive. To the contrary, District offered exactly the same level of ABA support in the SDC setting. (Factual Findings 25-45 and Legal Conclusions 1, 4-6, 24-27, 30.)

38. In conclusion, each of the four *Rachel H.* factors weighed in favor of Student's placement in a general education setting at the time of the IEP. Student had obtained educational benefit, non-academic benefit, had an insufficiently adverse impact on the teacher and students to warrant a change to a more restrictive setting, and the cost of the full inclusion program was not prohibitive. Therefore, District failed to offer Student a FAPE in the LRE. (Factual Findings 1-45, 56-68 and Legal Conclusions 1, 4-6, 24-27, 30-37.)

39. It is worth noting that Student's placement as of the date of hearing, does not stand up to scrutiny under the *Rachel H.* factors, either. Student was spending only three hours of his six and a half hour school day in general education, the LRE. Rather than receiving the educational benefit of a full instructional day with a credentialed teacher, Student was missing lessons in science, history and computer skills, and missing reteaching and reinforcement of language arts lessons, during the afternoon class periods. Student's isolation in the afternoons in a home ABA program, the most restrictive setting, deprived Student of important non-academic benefits, such as opportunities to learn to speak and communicate with peers, in the classroom, on the playground, and during PE. Student was working on the same functional communication and behavior goals in the school and home settings, and although Ms. Bulkin felt that it was easier to teach Student in the home because of the need for intense repetition, the law requires Student to be taught in the least restrictive setting, not the easiest or most preferred setting. Student could, and should, be working on his behavior and functional

communication skills, to the maximum extent possible, in the LRE. The CARD data demonstrated that Student's behaviors were sufficiently under control that he could benefit educationally and non-academically in the general education classroom with sensory breaks and short periods outside the classroom to re-focus and control maladaptive behaviors. At hearing, the educators and behaviorists were in agreement that Student's pragmatic skills were best worked on in the school setting, where Student experienced opportunities to engage in functional communication and socialization with typical peers, as well as peer modeling. Although Student was working on mastery of skills in the home prior to generalizing them to the school setting, Student needed to practice reciprocal social and communication exchanges with other children in the school environment. Isolation in a home program was causing Student to fall further and further behind in acquiring the peer-to-peer social and language skills essential to success in school. In light of the importance of academic instruction, communication and socialization, the benefits of working on Student's behavior goals (which include communication and socialization skills) in a school setting outweigh the ease of providing those behavior services in the restrictive setting of a home program. (Factual Findings 1-45, 56-75 and Legal Conclusions 1, 4-6, 24-27, 30-36.)

40. The May 3, 2012 IEP offered Student 40 hours per week of ABA behavioral support, and both parties agree that Student needs this level of behavioral support. Therefore, to the extent that maintaining an after-school home component of Student's 40-hour ABA behavioral support adds to, but does not detract from, Student's participation in a less restrictive general education classroom for a full school day, such a program would meet Student's unique needs and enable him to make meaningful progress on the goals and objectives in the May 3, 2012 IEP, and constitutes part of a FAPE for Student. (Factual Findings 1-45, 56-75 and Legal Conclusions 1, 4-6, 24-27, 30-36, 39.)

## Issue 1(b) – District Seeks and Advisory Opinion

41. As set forth at Legal Conclusions 21-23 and 31-38, District did not meet its burden of proving by a preponderance of the evidence that the May 3, 2012 IEP offered Student a FAPE, rendering moot the issue of whether it must utilize the ABA provider of Parents' choice to implement that IEP. Further, although the notes of the May 11, 2012 manifestation determination meeting indicate that the manifestation determination team suggested seeking ABA services from a different NPA, District presented no evidence that this issue was raised at an IEP team meeting on or before May 3, 2012, or that District had sought to implement such a change. Despite Student's documented difficulties with transitions and working with unfamiliar behavior aides, no evidence was presented that a plan for transitioning between NPA providers had been presented to, or considered by, Student's IEP team. (Factual Findings 1-55 and Legal Conclusions 1, 4-6, 24-27, 30-36.)

42. Special education due process hearings are limited to an examination of the time frame pleaded in the complaint and as established by the evidence at the hearing and expressly do not include declaratory decisions about how the IDEA would apply hypothetically. (Gov. Code, § 11465.10-11465.60; Cal. Code Regs, tit. 5, § 3089; see also *Princeton University v. Schmid* (1982) 455 U.S. 100, 102 [102 S.Ct. 867, 70 L. Ed. 2d 855] ["courts do not sit to decide hypothetical issues or to give advisory opinions"]; *Stonehouse Homes v. City of Sierra Madre* (2008) 167 Cal.App.4th 531, 539-542 [court deemed the matter not ripe for adjudication because it was asked to speculate on hypothetical situations and there was no showing of imminent and significant hardship].) As District did not meet its burden of showing that the IEP offered Student a FAPE, and no evidence was presented that District sought to implement a change in Student's ABA provider, Issue 1(b) constitutes a request for an advisory opinion which OAH declines to issue.

## STUDENT'S CASE

Issue 2(a) - Whether District denied Student a FAPE at the IEP or manifestation determination team meetings of May 3, May 8 and May 11, 2012, by failing to have a special education teacher present at each meeting.

43. In Issue 2(a), Student contends that District violated his procedural rights because a special education teacher was not in attendance at either the May 3, 2012 IEP team meeting, or the two manifestation determination meetings on May 8, 2012 and May 11, 2012. Student did not raise the issues relating to the manifestation determination meetings in an expedited hearing request under title 20 United States Code section 1415(k), but instead, raised all issues as claims that he was denied a FAPE.<sup>12</sup> Accordingly, they will be treated as such, with some reference to the law of school discipline as needed. District contends that all requisite personnel were present.

44. Legal Conclusions 1, 4-6 and 8 are incorporated herein by reference.

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<sup>12</sup> A parent of a special education student may appeal a school district's determination that particular conduct resulting in a disciplinary change of placement was not a manifestation of the child's disability by requesting an expedited due process hearing. (20 U.S.C. § 1415(k)(H)(3)(A); 34 C.F.R. 300.532(a) & (c).) The hearing must be conducted within 20 school days of the date an expedited due process hearing request is filed and a decision must be rendered within 10 school days after the hearing ends. (20 U.S.C. § 1415(k)(H)(4)(B); 34 C.F.R. 300.532(c)(2).) The ALJ may order that a special education student be returned to his or her original placement if the ALJ determines that the conduct was a manifestation of the student's disability. (20 U.S.C. § 1415(k)(H)(3)(B); 34 C.F.R. 300.532(a) & (c).) Here, Student did not seek an expedited hearing as there was no change of placement, and instead alleged all issues as resulting in denials of a FAPE.

45. Suspension or expulsion of special education students is governed by Title 20 United States Code section 1415(k) and Title 34 Code of Federal Regulations, part 300.350 (See Ed. Code, § 48915.5.) If a special education student violates a code of student conduct, school personnel may remove the student from his or her educational placement without providing services for a period not to exceed 10 days per school year, provided typical children are not provided services during disciplinary removal. (20 U.S.C. § 1415(k)(B); 34 C.F.R. § 300.530(b)(1) & (d)(3).) For disciplinary changes in placement greater than 10 consecutive school days (or that are a pattern that amounts to a change of placement), the disciplinary measures applicable to students without disabilities may be applied to a special education student if the conduct resulting in discipline is determined not to have been a manifestation of the special education student's disability. (20 U.S.C. § 1415(k)(C); 34 C.F.R. §§ 300.530(c) & 300.536(a)(1),(2).)

46. Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the local educational agency (LEA), the parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA) must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine if the student's conduct was a manifestation of the student's disability. (20 U.S.C. § 1415(k)(E); 34 C.F.R. § 300.530(e)(1).) Conduct is a manifestation of the student's disability: (i) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or (ii) if the conduct in question was the direct result of the LEA's failure to implement the IEP. (34 C.F.R. § 300.530(e)(1) & (2).)

47. If the LEA, the parent and the relevant members of the IEP team make the determination that the conduct was a manifestation of the child's disability, the IEP team must (i) conduct an FBA and implement a BIP, provided that the LEA had not conducted

such an assessment prior to the manifestation determination, (ii) where a BIP is in place, review the plan and modify it, as necessary, to address the behavior, and (iii) return the child to the placement from which the child was removed, unless the parent and LEA agree otherwise, or the LEA moves the student to an interim alternative educational setting (IAES). (20 U.S.C. § 1415(k)(1)(F).)

48. The IEP team may place a student in an IAES for not more than 45 school days, regardless of whether the student's behavior is determined to be a manifestation of the student's disability, under any of three "special circumstances." These "special circumstances" include conduct involving drugs, weapons, or infliction of serious bodily injury upon another person while at school, on school premises, or at a school function under the supervision of District. (20 U.S.C. § 1415(k)(1)(G); 20 U.S.C. § 1415(k)(2); 34 C.F.R. § 300.530 (g); 34 C.F.R. § 300.531.) The term "serious bodily injury" for these purposes is defined as bodily injury that involves a substantial risk of death; extreme physical pain; protracted and obvious disfigurement; or protracted loss or impairment of the function of a bodily member, organ, or mental faculty. (18 U.S.C. § 1365(h)(3). "Serious bodily injury" is not simply a cut, abrasion, bruise, burn, or disfigurement; physical pain, illness, or impairment of the function of a bodily member, organ, or mental faculty. (18 U.S.C. § 1365 (h)(4).) Whether there has been a serious bodily injury is a question of fact that is determined based upon the totality of the circumstances of the injury. (See *United States v. Johnson* (9th Cir. 1980) 637 F.2d 1224, 1246.)

49. In the event of a procedural violation, a denial of FAPE may only be found if that procedural violation 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, or caused deprivation of educational benefits. (Ed. Code, § 56505, subd. (f)(2).)



50. First, as to the May 3, 2012 IEP team meeting, District had two credentialed special education teachers in attendance, one of whom was Ms. Nilsson, the inclusion specialist who regularly observed Student in the classroom and monitored the progress on his annual goals. The presence of these two special education teachers was sufficient to meet the attendance requirements for Student's annual IEP team meeting. Student's claim that he was denied a FAPE on this ground fails because District met the IDEA procedural requirements. (Factual Findings 1-45 and Legal Conclusions 1, 4-6, 8, 17.)

51. As to the May 8 and May 11, 2012 manifestation determination meetings, the presence of a special education teacher was not required. Only the LEA, the parent and "relevant" members of the IEP team, as determined by the LEA and parent must be in attendance. (See 20 U.S.C. § 1415(k)(1)(E)(i).) Student presented no evidence that Parents sought to have a special education teacher at the May 8, 2012 manifestation determination meeting, and if so, what difference it would have made in the outcome. As to the May 11, 2012 meeting, Parent refused to attend, and similarly, Student did not present any evidence of how the outcome would have been different. District determined that Student's conduct was a manifestation of his disability, which Student does not dispute. The team offered that Student return to a general education classroom, albeit at a different school site, and did not attempt to place Student in an SDC or an IAES. A special education teacher would not have been a relevant team member at either manifestation meeting, as (i) Student was placed in general education, and (ii) once the biting incident was found to have been a manifestation of Student's disability, which was never seriously in question, Student was required to be returned to his current placement in general education. Student failed to establish by a preponderance of the evidence that he was denied a FAPE because a special education teacher was not present at the May 8, 2012 and May 11, 2012 manifestation determination meetings. (Factual Findings 1-55 and Legal Conclusions 1, 4-6, 45-49.)

Issue 2(b) - Whether District denied Student a FAPE by failing to offer Student a specific placement at the May 3 or May 11, 2012 meetings;

52. In Issue 2(b), Student contends that his procedural rights were violated because District failed to offer a specific placement at the May 3, 2012 IEP team meeting or the May 11, 2012 manifestation determination meeting. District contends that offering a general education classroom at another school was sufficiently specific.

53. Legal Conclusions 1, 4-6, 10-14 and 45-49 are incorporated herein by reference.

54. Procedural violations that infringe on the parents opportunity to participate in the IEP formulation process clearly result in a denial of FAPE. (*W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484 (*Target Range*).

55. As discussed at Legal Conclusions 21 through 23, District committed a procedural violation by failing to offer Student a specific placement at the May 3, 2012 IEP team meeting, which, per *Union*, denied Parents a meaningful opportunity to evaluate the appropriateness of the proposed placement. (Factual Findings 1-45 and Legal Conclusions 1, 4-14, 21-23, 78-82.) Student's remedy for this denial of a FAPE will be discussed below.

56. As to the manifestation determination meeting on May 11, 2012, Student did not meet his burden of showing a procedural violation because a placement offer was not required at such a meeting. Once Student's conduct was determined to be a manifestation of his disability, he was required to be returned to the setting from which he was removed, which he was, two school days later on May 15, 2012. Even though District discussed another school site as an alternative, this was not required. Whether or not the alternate school site offered was sufficiently specific is irrelevant to Student's procedural rights, which required his return to the placement from which he was removed. District could only have changed Student's placement after having determined

that his conduct was a manifestation of his disability either (i) with Parents' agreement or (ii) by placement in an IAES because Student's conduct had caused serious bodily injury. Here, District did not place Student in an IAES, and its offer of a change of placement to which Parents could have agreed, whether specific or not, did not constitute a violation of Student's procedural rights under the IDEA's discipline provisions. Student cannot be said to have been denied a FAPE on this ground when there is no requirement of a specific placement offer at a manifestation determination meeting. (Factual Findings 1-55 and Legal Conclusions 1, 4-6, 45-49, 54.)

Issue 2(c) - Whether District denied Student a FAPE by failing to offer the closest general education placement to Student's home at the May 11, 2012 meeting.

57. In Issue 2(c), Student contends that the placement offer of a general education classroom at Washington at the May 11, 2012 IEP team meeting violated his procedural rights, because Washington was not Student's home school. District disagrees, and argues that District offered Washington because Student could not be educated at Lindstrom, due to his stigma as a "biter."

58. Legal Conclusions 1, 4-6, 10-14, 45-49 and 54 are incorporated herein by reference.

59. As discussed in the analysis of Issue 2(b), Student's procedural rights at a manifestation determination meeting required him to be returned to the placement from which he was removed prior to the conduct that was determined to have been a manifestation of his disability, unless District and Parents agreed to a different placement or Student's conduct warranted placement in an IAES. Parents did not attend the May 11, 2012 meeting, and District sent home a written offer to change Student's placement, but did not implement any change in placement. Parents did not agree to the offered change of placement, and Student's counsel informed District that Parents

did not agree to such a change. Student was promptly returned to Ms. Albert's classroom. On this showing, Student failed to establish by a preponderance of the evidence that District's offer to return Student to Washington, rather than Lindstrom, violated Student's procedural rights because Washington was not Student's home school. District was required to return Student to his placement prior to the discipline incident, and Student was not deprived of a FAPE by the failure to make a specific offer of an alternate placement. (Factual Findings 1-55 and Legal Conclusions 1, 4-6, 10-14, 45-49, 54, 56.)

Issue 2(d) - Whether District denied Student a FAPE by providing misinformation to Parents at the May 8, 2012 IEP meeting regarding the impact of a manifestation determination.

60. In Issue 2(d), Student contends his procedural rights were violated because Parents were given misinformation at the pre-expulsion meeting that prefaced the May 8, 2012 manifestation determination meeting. District contends that no misinformation was given, and that Parents were confused.

61. Legal Conclusions 1, 4-6, 45-49 and 54 are incorporated herein by reference.

62. An LEA is required, not later than the date on which the decision to take disciplinary action is made, to notify the disabled student's parents of that decision, and of all procedural safeguards accorded under 20 United States Code § 1414(k). (20 U.S.C. § 1415(k)(1)(H).)

63. The weight of the evidence established that Parents were not informed of Student's right to return to his prior placement upon a determination that the biting incident was a manifestation of his disability. Instead, Ms. Swanson, the principal at Lindstrom, told Parents that if Student was found to have bitten the girl on the playground as a manifestation of his disability, Student would be immediately placed in

an SDC. This misinformation was a violation of District's procedural obligation to inform Parents of the procedural safeguards accorded by the IDEA in discipline matters to children with disabilities. (Factual Findings 1-55 and Legal Conclusions 1, 4-6, 45-49, 54, 62.)

64. A denial of FAPE may only be shown if a procedural violation impeded the child's right to FAPE, significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of FAPE, or caused a deprivation of educational benefits. Here, whether or not Ms. Swanson sought to influence the Parents' participation at the May 8, 2012 IEP team meeting, or to discourage their participation in the meeting altogether, the weight of the evidence established that Parents were fearful of participating, and did not participate, in the manifestation determination proceedings as a result of Ms. Swanson's statements. Ms. Swanson presented Parents with the choice of agreeing that their son's conduct was not a manifestation of his autism, in which case he would be expelled, or agreeing that the conduct was a manifestation of Student's autism, in which case District incorrectly informed Parents that Student would be unilaterally placed in a more restrictive SDC setting. This legally incorrect information placed Parents in the untenable position of invoking a change of placement for their son if they took any action at all. However, Student cannot be said to have been harmed in any way by the misinformation, as Student's placement was never changed. Specifically, as a matter of law, suspensions of less than 10 school days are not considered a change of placement, and here, at most, Student missed four half days at school. Under these facts, it cannot be said that the misinformation impeded Student's right to a FAPE, significantly impeded the Parent's opportunity to participate in the decision making process regarding the provision of a FAPE, or caused a deprivation of educational benefits. Student was not denied a FAPE on this ground. (Factual Findings 1-55 and Legal Conclusions 1, 4-6, 45-49, 54, 62, 63.)

Issue 2(e) - Whether District denied Student a FAPE by failing to offer to conduct a functional behavior assessment after finding Student's behavior to be a manifestation of his disability.

65. In Issue 2(e), Student contends that he was denied a FAPE because District did not conduct an FBA under 34 Code of Federal Regulations part 300.530 (f). District contends that it offered to conduct an FAA at the May 3, 2012 IEP team meeting, and provided an assessment plan to Parents on May 3, 2012, and again on May 9, 2012 after the May 9, 2012 manifestation determination meeting.<sup>13</sup>

66. Legal Conclusions 1, 4-6 and 45-49 are incorporated herein by reference.

67. If it is determined that a child's conduct was a manifestation of the child's disability, the IEP team must, (1) either conduct an FBA, or if a BIP had already been developed, review the BIP, and modify it as necessary, to address the behavior, and (2) unless the conduct involved bringing a weapon or drugs to school, or the student poses a danger to himself or others and the school district, in which case District may unilaterally place a student with a disability in an IAES, return the child to the placement from which the child was removed, unless the parent and school district agree to a

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<sup>13</sup> In his closing brief, Student attempts to characterize this issue as a failure to follow California law on positive behavior interventions under Education Code sections 56520 through 56525, and California Code of Regulations, title 5, section 3052. However, the California law cited by Student's counsel in his closing brief is not related to procedures following manifestation determination meetings, and would be an entirely new issue. "[T]he party requesting the due process hearing shall not be allowed to raise issues at the due process hearing that were not raised in the [complaint]." (Ed. Code, § 56502, subd. (i); see 20 U.S.C. § 1415(f)(3)(B).) Accordingly, this issue will be analyzed solely as an alleged violation of 34 Code of Federal Regulations part 300.530 (f), as pleaded in Student's complaint.

change of placement as part of a behavioral intervention plan. (20 U.S.C. § 1415(k)(1)(F)(i) and (ii); 34 C.F.R. 300.530(f).)

68. Student did not meet his burden of establishing by a preponderance of the evidence that District was required to conduct another FBA upon determining that Student had bitten a girl on the playground as a manifestation of his disability. At the time Student bit the girl on the playground on May 2, 2012, he had already bitten two other persons during the 2011-2012 school year, with incidents on March 20 and April 19, 2012. District relayed information on the biting incidents to Student's ABA supervisor, Ms. Bulkin, and the BIP presented to the May 3, 2012 IEP team addressed Student's biting behavior. That BIP specifically addressed episodes of Student biting, hitting or pushing another person, whether or not accompanied by a tantrum episode. Therefore, the weight of the evidence established that the IEP team had a current BIP addressing Student's biting behavior that was reviewed at the May 3, 2012 IEP team meeting and not deemed to require revision, and District was not required to conduct a further FBA. (Factual Findings 1-68 and Legal Conclusions 1, 4-6, 45-49, 67.)

69. Even had District been required to conduct another FBA, it complied with that requirement by seeking to conduct an FAA, a more in depth assessment of the antecedents and consequences of maladaptive behavior than an FBA. District sought to conduct an FAA pursuant to Education Code, sections 56520 through 56525 and Title 5, California Code of Regulations, section 3052 (commonly referred to as the "Hughes Bill"), which require that a school district conduct an FAA and, based on the results, develop or modify an existing BIP, when a student is found to have caused a serious injury as a result of his disability. District provided Parents with an assessment plan for an FAA at the May 3, 2012 IEP team meeting, and again on May 9, 2012, and performance of an FAA would have met the procedural requirements of the IDEA's

procedural requirement to conduct a post-manifestation determination FBA. (Factual Findings 1-68 and Legal Conclusions 1, 4-6, 45-49, 67, 68.)

70. In addition, were District required to conduct an FAA (or FBA), Student failed to meet his burden of establishing by a preponderance of the evidence that District did not timely perform the FAA. After the biting incident of May 2, 2012, District promptly presented Parents with an assessment plan for an FAA on May 3, 2012. District presented the plan to Parents again on May 9, 2012. Although Parents contend that District intended to conduct the FAA in an SDC setting, the evidence showed that Student was returned to a general education setting on May 15, 2012, and the FAA would have been conducted in the setting in which Student was placed. Parents' contention that District was delaying the FAA to pressure Parents to consent to an SDC placement constituted no more than unfounded speculation. Parents consented to the assessment plan on September 21, 2012, and District school psychologist, Ms. Holleran, promptly conducted the FAA while Student was in Ms. Cummins' general education classroom. The weight of the evidence established that District would, and did, promptly conduct an FAA in the general education setting upon Parents' consent. (Factual Findings 1-68 and Legal Conclusions 1, 4-6, 45-49, 54, 67-69.)

71. A denial of FAPE may only be shown if a procedural violation impeded the child's right to FAPE, significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of FAPE, or caused a deprivation of educational benefits. Student put on no evidence concerning if, or to what extent, his BIP should have been modified in light of the FAA that was conducted in September and October 2012, or concerning his parents involvement in the IEP team meeting that reviewed the FAA. Therefore, Student failed to meet his burden of establishing by a preponderance of the evidence that any procedural violation in failing to timely conduct



an FBA resulted in a substantive denial of a FAPE. (Factual Findings 1-68 and Legal Conclusions 1, 4-6, 45-49, 54, 57-70.)

Issue 2(f) - Whether District denied Student a FAPE by continuing Student's suspension from school after determining that his behavior was a manifestation of his disability.

72. In Issue 2(f), Student contends that he was denied a FAPE after Student's conduct was determined to be a manifestation of his disability on May 8, 2012, because he was suspended for a period of less than 10 days, but longer than the original suspension. District disagrees, and argues that it may suspend a student with a disability for up to 10 consecutive school days for a single incident of misconduct, and the suspension will not constitute a unilateral change in placement in violation of the IDEA.

73. Legal Conclusions 1, 4-6, 45-49 and 54 are incorporated herein by reference.

74. The IDEA provides that a school district can remove a student with a disability who violates a code of student conduct from his current placement to an appropriate IAES, another setting, or suspension for not more than 10 consecutive school days, provided the same change of placement would be made in the case of a student without a disability. (Ed. Code, § 48903; 34 C.F.R. 300.520(b).)

75. When a student alleges the denial of a FAPE based on the failure to implement an IEP, in order to prevail, the student must prove that any failure to implement the IEP was "material," which means that the services provided to a disabled child falls "significantly short of the services required by the child's IEP." (*Van Duyn v. Baker School Dist.* 5J (9th Cir. 2007) 502 F.3d 811, 822 (*Van Duyn*).) "There is no statutory requirement of perfect adherence to the IEP, nor any reason rooted in the statutory text to view minor implementation failures as denials of a free appropriate public education." (*Id.* at p. 821.)

76. Here, District policy provided for a four day suspension of a non-disabled student who bit another student as severely as Student did. Student was suspended for biting on May 2, 2012, and a four day suspension would have required his return to Lindstrom on May 8, 2012. Student was not returned to Ms. Albert's class until May 15, 2012, five school days later. Once the May 8, 2012 IEP team determined that Student's conduct was a manifestation of his disability, District was required to return Student to his current placement that same day. It was a violation of Student's procedural rights for District to suspend him for longer than it would have a non-disabled student, regardless of whether or not such a suspension constituted a unilateral change of placement. (Factual Findings 1-58 and Legal Conclusions 1, 4-6, 45-49, 54, 74, 75.)

77. District's procedural violation kept Student out of school for five additional days, and unquestionably deprived Student of educational benefit. However, the evidence established that in kindergarten Student attended school for only three hours and 15 minutes a day, and daily missed approximately 15 to 45 minutes of instructional time while in the quiet (sensory) room before school or after recess, or when removed from the classroom by his aide. Student also routinely ate his snack alone, and did not miss peer socialization during the snack portion of recess. Student was offered his ABA program during his extended suspension, and so did not receive services significantly short of those offered in his IEP. In sum, for those additional five days, Student continued to receive the benefit of his ABA home program, and the loss of something less than 12 hours of instructional time during the 2011-2012 school year was the type of minor implementation failure contemplated in *Van Duyn*. Therefore, the extension of Student's suspension was not a material failure of implementation of Student's IEP, and did not result in a denial of a FAPE. (Factual Findings 1-68 and Legal Conclusions 1, 4-6, 45-49, 54, 74-76.)

## STUDENT'S REMEDY FOR DISTRICT'S FAILURE TO OFFER A FAPE

78. Where a person brings an action alleging a violation of the IDEA, the court, or an administrative law judge, is empowered to "grant such relief as [it] determines is appropriate." (See 20 U.S.C. § 1415(i)(2)(C)(iii).) School districts may be ordered to provide compensatory education or additional services to a student who has been denied a FAPE. (*Student W. v. Puyallup School Dist.* (9th Cir. 1994) 31 F.3d 1489, 1496.) The conduct of both parties must be reviewed and considered to determine whether relief is appropriate. (*Id.* at p. 1496.) These are equitable remedies that courts may employ to craft "appropriate relief" for a party. (*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. Dist. 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.*)

79. The remedies sought by Student in his complaint were (i) that District be barred from implementing Student's educational program in an SDC, (ii) that District not be permitted to change Student's NPA provider of ABA services, (iii) that District fund two hours of individual speech therapy per week, and (iv) that District reimburse Parents for an independent educational evaluation (IEE). This decision addresses the first form of requested relief, specifically, that an SDC placement would not be a FAPE. As to the second form of requested relief, OAH declines to provide an advisory opinion presented as equitable relief. As to the third and fourth form of requested relief, Student put on no evidence of his need for speech services, nor that his Parents obtained an IEE at their own expense that should equitably be reimbursed.

80. The weight of the evidence established that neither an SDC, nor Student's program at the time of hearing, are in the LRE, and under *Rowley*, Student is entitled to

special education and related services that educate him in the LRE to the maximum extent possible. Student's current partial day school program, combined with his time outside of the classroom for sensory needs and behavior management, not only takes Student away from the least restrictive setting of general education, it also deprives him of appropriate academic instruction and important opportunities to practice functional communication and socialization skills with typical peers. This unfortunate circumstance has resulted, at least in part, from District's failure to clearly identify in Student's IEP the amount of time Student should be spending in the school setting for academic instruction and non-academic benefit, and the amount of time Student should be spending outside of the classroom in an ABA behavior program. Looking at the totality of the circumstances, with a focus on Student's needs, an appropriate remedy is one reasonably calculated to provide the educational benefits that likely would have accrued from special education services the District should have provided in the first place. (Factual Findings 1-75 and Legal Conclusions 1, 4-14, 19, 21-40, 78, 79.)

81. As discussed at length in this decision, Student was making good academic progress in the general education classroom with one-on-one ABA support for attention and redirection, both in kindergarten and first grade. With prompts and cuing, Student was doing well in most academic subjects, with the exception of reading comprehension. However, by not attending the afternoon classroom periods, Student missed opportunities for reinforcement of language arts concepts learned earlier in the day, which could address his difficulties with reading comprehension, as well as valuable instruction in science, history and computer skills. Student was not receiving academic instruction during his in-home program to compensate for missed classroom lessons, and grade level standards become more rigorous as grade levels advance. Academics are an area of strength for Student, and Student received both academic and social benefit from attending school during core instruction. However, Student has ongoing

difficulty in the important area of content comprehension, and should receive instruction in academics from a credentialed teacher, with reinforcement of concepts throughout the school day, rather than attempting to learn core curriculum from Mother while working on homework in the evening. Student made good progress on behavior, socialization and communication in the general education classroom. Student is able to work on his behavior goals in the school setting as well as the home setting, and requires typical peers to model good communication skills and behavior. Student's goals include such skills as peer-to-peer interaction and imitation of classroom conduct by typical peers, necessitating a classroom setting. Student should not be excluded from academic instruction and important social opportunities provided in the classroom, and placed in a restrictive home environment, because that makes it easier for Students' ABA aides to work on goals for part of the school day. Student is entitled to be taught in the LRE, not the easiest or best program. In light of the significant and persuasive evidence that Student is doing well in the general education setting and requires a full day of instruction in the LRE, attendance at school for a full school day is an important component of a FAPE for Student.<sup>14</sup> (Factual Findings 1-75 and Legal Conclusions 1, 4-14, 19, 21-40, 78-80.)

82. The parties do not dispute that Student requires 40 hours of behavior support throughout the day. After a full regular school day, Student can work for the remaining one-on-one ABA hours on behavior and communication skills at home for transfer to the school setting. Therefore a FAPE includes an in-home program component that will support Student's full inclusion in a general education classroom. The remedy ordered for District's denial of a FAPE to Student will include in-home on-

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<sup>14</sup> Ms. Cummins' classroom day begins at 8:30 a.m. and runs through 2:55 p.m., for a full school day of six hours and 25 minutes.

on-one ABA services to work on Student's behavior goals and skills for transfer to the classroom setting. Any remaining ABA service hours not used to support Student in the classroom full-time will be provided at Student's home, after school. The days of the week and number of hours of each ABA home session shall be determined by the ABA service provider, in consultation with Parents. In total, Student's school-based and in-home one-on-one ABA services will be provided for 40 hours per week when school is in session for the remainder of the 2012-2013 school year, and during a 10-week period between the 2012-2013 and 2013-2014 school year. The May 3, 2012 IEP defined the 2011-2012 ESY as a 10-week period from June 21 through September 3, 2012, and therefore, prospective services will be ordered for a 10-week period between the end of the 2012-2013 school year and the beginning of the 2013-2014 school year, referred to for purposes of this decision as the 2012-2013 ESY. (Factual Findings 1-75 and Legal Conclusions 1, 4-14, 19, 21-40, 78-81.)

## ORDER

1. Student's placement shall be in a general education classroom at Lindstrom, his home school, with the goals and objectives and the accommodations and related services set forth in Student's IEP dated May 3, 2012, and including the 10-week 2012-2013 ESY, except as modified in order 2, below.
2. Student's 40 hours per week of one-on-one ABA behavior intervention services will be provided in the classroom daily for a full regular school day, that is, approximately six and a half hours, and shall be provided through the remainder of the 2012-2013 school year and the 10-week 2012-2013 ESY. Any remaining ABA service hours not used to support Student in the classroom full-time will be provided at Student's home, after school. The days of the week and number of hours of each ABA home session shall be determined by the ABA service provider, in consultation with Parents.

3. If, and only to the extent that, District does not have a general education classroom available for the 10-week 2012-2013 ESY, Student's 40 hours per week of one-on-one ABA services shall be provided in the home.

## PREVAILING PARTY

Pursuant to Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, Student prevailed on Issue 1(a). District prevailed on Issues 2(a), 2(c), 2(d), 2(e) and 2(f). Both Student and District partially prevailed on Issue 2(b). The ALJ declined to issue an advisory opinion on Issue 1(b).

## RIGHT TO APPEAL THIS DECISION

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

DATED: March 13, 2013

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*/s/*  
ALEXA J. HOHENSEE  
Administrative Law Judge  
Office of Administrative Hearings