

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Consolidated Matters of:

PARENT ON BEHALF OF STUDENT,

v.

DOWNEY UNIFIED SCHOOL DISTRICT,

OAH CASE NO. 2014050208

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DOWNEY UNIFIED SCHOOL DISTRICT,

v.

PARENT ON BEHALF OF STUDENT.

OAH CASE NO. 2014041256

CORRECTED DECISION<sup>1</sup>

Downey Unified School District filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on April 30, 2014, naming Student. Student filed a complaint with OAH on May 2, 2014, naming District. The matters were consolidated for hearing by Order dated May 7, 2014, with Student's matter designated as the primary case for purposes of calculating the 45-day deadline for issuance of a decision. By Order dated June 6, 2014, District's complaint was amended, but Student's matter was again designated as the primary case and the

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<sup>1</sup> The only correction made was to add that the hearing was also conducted on October 20, 2014.

timelines were not reset. The consolidated matters were continued for good cause on June 13, 2014.

Administrative Law Judge Alexa J. Hohensee heard this matter in Downey, California on September 29-30 and October 1-2, 7-9, 13-15 and 20, 2014.

N. Jane DuBovy, Attorney at Law, represented Student. Carolina Watts, advocate, assisted Ms. DuBovy. Student's Mother and Father attended the hearing on behalf of Student.

May Kellogg, Attorney at Law, represented District. Dr. Brian Murray, special education program administrator, or Ruth Valadez, special education director, attended each day of hearing on behalf of District.

At the close of the hearing, a continuance to November 10, 2014, was granted for filing of written closing arguments. On that day, the briefs were timely filed, the record was closed, and the matter was submitted for decision.

## ISSUES?<sup>2,3</sup>

### STUDENT'S CASE

1. Did District deny Student a free appropriate public education from May 2, 2012, through the end of the 2011-2012 school year by:
  - a. Failing to convene individualized education program team meetings when Student did not make anticipated progress;
  - b. Failing to assess Student in all areas of suspected disability, particularly in the areas of psychoeducational, language and speech, assistive and augmentative communication, assistive technology, and functional behavior;
  - c. Failing to take into consideration Parents' concerns with regard to academics, behavior and communication at the June 12, 2012 IEP team meeting;
  - d. Predetermining the offer of placement in the June 12, 2012 IEP;
  - e. Failing to include all required content in the June 12, 2012 IEP document, including appropriate goals and statements of special education and related services offered;

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<sup>2</sup> The issues have been rephrased and reorganized for clarity. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School District* (9th Cir. 2010) 626 F.3d 431, 442-443.) Student withdrew his issues concerning assessments for adaptive physical education during the hearing.

<sup>3</sup> Student's complaint alleged that District failed to assess for, or offer, recreational therapy. However, Student introduced no evidence in support of that claim at hearing and does not pursue it in his closing brief, so it is considered abandoned for purposes of this decision. Student's claim that District failed to timely assess due to lack of anticipated progress in the 2013-2014 school year was abandoned in his closing brief.

- f. Failing to offer or provide special education, related services and support that met Student's unique educational needs, including in the areas of language and speech, augmentative alternative communication, assistive technology, occupational therapy, social skills instruction, and behavior intervention, including a research based intervention program utilizing a one-to-one aide; and
- g. Failing to offer an appropriate placement in the June 12, 2012 IEP?
- 2. Did District deny Student a FAPE during the 2012-2013 school year by:
  - a. Failing to convene individualized education program team meetings when Student did not make anticipated progress;
  - b. Failing to assess Student in all areas of suspected disability, particularly in the areas of psychoeducational, language and speech, assistive and augmentative communication, assistive technology, and functional behavior;
  - c. Failing to take into consideration Parents' concerns with regard to academics, behavior and communication at the June 12 and 25, 2013 IEP team meetings;
  - d. Predetermining the offer of placement in the June 12, 2013 IEP;
  - e. Failing to include all required content in the June 12, 2013 IEP document, including appropriate goals and statements of special education and related services offered;
  - f. Failing to offer or provide special education, related services and support that met Student's unique educational needs, including in the areas of language and speech, augmentative alternative communication, assistive technology, occupational therapy, social skills instruction, and behavior intervention, including a research based intervention program utilizing a one-to-one aide, and an extended school year; and

- g. Failing to offer an appropriate placement in the least restrictive environment in the June 12, 2013 IEP?
- 3. Did District deny Student a FAPE during the 2013-2014 school year by:
  - a. Failing to conduct an appropriate psychoeducational assessment of Student in April 2014;
  - b. Failing to take into consideration Parent-funded assessments or Parents' concerns with regard to academics, behavior and communication at the October 22, 2013 and April 22, 2014 IEP team meetings;
  - c. Predetermining the offer of placement in the October 2013 and April 2014 IEP's;
  - d. Failing to include all required content in the October 22, 2013 and April 22, 2014 IEP documents, including appropriate goals and statements of special education and related services offered;
  - e. Failing to offer or provide special education, related services and support that met Student's unique educational needs, including in the areas of language and speech, augmentative alternative communication, assistive technology, occupational therapy, social skills instruction, and behavior intervention, including a research based intervention program utilizing a one-to-one aide, and an extended school year; and
  - f. Failing to offer an appropriate placement in the least restrictive environment in the October 22, 2013 and April 22, 2014 IEP's?

#### DISTRICT'S CASE

4. Were District's March and April 2014 assessments of Student in the following areas appropriate, such that Student is not entitled to independent educational evaluations at public expense: (a) psychoeducational, (b) speech and

language, (c) occupational therapy, (d) functional behavior, and (e) augmentative communication/assistive technology?

5. Did the District offer Student a FAPE in the least restrictive environment in the IEP of April 22, 2014?

## SUMMARY OF DECISION

Student did not meet his burden of persuasion on any of the issues presented in Student's case, except Issue 2(e) regarding adequate documentation of the summer school offer in the June 12, 2013 IEP document. The weight of the evidence established that for all school years in dispute: Student was making anticipated progress and did not require IEP review team meetings more often than annually; Student was appropriately assessed in all areas of suspected disability; the IEP teams took into consideration Parents' concerns and the information provided by Parents; District IEP team members did not predetermine District's offer of services or placement; Student's IEP's contained all required content, with the exception of specifics of District's offer of an extended school year program for summer 2013; and except for Summer 2013, District offered and provided special education, related services and supports that met Student's unique educational needs in the least restrictive environment. District met its burden of persuasion on all issues in District's case. District's March and April 2014 assessments of Student were appropriately conducted such that Student is not entitled to independent educational evaluations. District offered Student a FAPE in the least restrictive environment in the April 22, 2014 IEP, and may implement that IEP without Parents' consent.<sup>4</sup> Relief for Student for District's failure to adequately document its Summer

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<sup>4</sup> District requested a finding that Student was truant when Parents removed him from school to attend private Lindamood-Bell sessions. OAH jurisdiction is limited to determining whether a Student has been offered and provided a FAPE, and this decision

2013 offer is awarded in the form of partial reimbursement for Student's attendance in a privately funded summer program.

## FACTUAL FINDINGS

### JURISDICTION AND BACKGROUND

1. Student turned 13-years-old and was in seventh grade during the course of the hearing. Student has autism, and at all times relevant was eligible for special education and related services on that basis.

2. Student lived within the boundaries of the District at all times relevant to this proceeding.

### MAY 24, 2011 TRIENNIAL IEP

3. During the 2010-2011 school year, Student attended fourth grade at District's Rio Hondo Elementary School in a special day class for students whose academic skills were below grade level. The class was designed for students with speech, behavior and communication disorders, and referred to as the "SBC" class.

4. Undisputed District assessments conducted in Spring of 2011 showed Student's cognitive level was generally at the pre-conceptual level typical of children two to four years old, with some emerging skills in the pre-conceptual level at the four to seven year old range. Student required visual clues and verbal prompts to respond to "who," "what," and simple "where" questions (also known as "WH questions"). Student frequently engaged in echolalia, or repeating back what was said, rather than in conversational exchanges. Student had delayed fine motor and visual motor skills (used

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declines to address whether Student's absences constitute truancy under non-IDEA statutes or regulations. (See 20 U.S.C. § 1415(b)(6); Ed. Code, § 56501, subd. (a); *Wyner v. Manhattan Beach Unified Sch. Dist.* (9th Cir. 2000) 223 F.3d 1026, 1028-1029.)

in handwriting), and delayed gross motor and motor planning skills (used in physical activities such as kicking a ball). Student was well-behaved, although he sometimes hugged or squeezed other students. Student had difficulty maintaining attention, and needed frequent sensory breaks on classroom equipment (such as jumping on a trampoline or therapy ball) throughout the day.

5. The May 24, 2011 IEP team adopted annual goals for Student in the areas of: reading (respond to three-to-four word questions utilizing a visual aide and prompts, read 30 common sight words); writing (print legible words and sentences); math (identify coins, add 10 single digit addition problems with visual aide and verbal prompting); visual motor skills (far-point copy with appropriate spacing and line placement); motor skills development (jumping rope, punting soccer ball); sensory processing (functional sensory work tasks); language/communication (visually attend to and label objects); and social/emotional skills (respond to social interaction cues from peers for four minutes).

6. Parents did not consent to the May 24, 2011 IEP beyond implementation of the goals.

#### 2011-2012 SCHOOL YEAR

7. Student attended the fifth grade SBC classroom at Rio Hondo. Carla Williamson was Student's SBC teacher for the last part of the school year. Ms. Williamson's class used the Edmark reading program, which is based upon peer reviewed research and has been shown to be effective in developing and strengthening reading skills in students with severe functional cognitive delays. The Edmark program is divided into two levels, with 100 lessons each. Each lesson is focused on a specific word, and teaches recognition, fluency, spelling, decoding and comprehension. Edmark utilizes discrete trial techniques, and focuses on one word until the student demonstrates 90 percent mastery of the word in all areas. Edmark is designed for students to move at

their own pace, and each lesson builds upon words learned in the prior lessons. Lessons become progressively more difficult, and test materials are included in each lesson to objectively measure progress. Edmark teaches skills through the first grade level in Level 1, and through the third grade level in Level 2.

8. In Ms. Williamson's classroom, Student completed lessons 1 through 33 of Edmark, Level 1. His writing showed improved letter sizing and ability to stay on the lines, although he still required verbal prompting to "finger space" his letters properly. Student learned to label objects and identify his own body parts, and made progress on answering WH questions, although he continued to struggle with more abstract concepts and reading comprehension. Student was able to communicate verbally, but continued to be echolalic. Student responded well to sensory strategies developed by his occupational therapist for use in the classroom. With movement breaks built into his class routine, Student only occasionally demonstrated sensory seeking behaviors and those did not appear to impact Student's ability to participate in class-related tasks. Student improved his gross motor skills in adapted PE, and at recess would sometimes demonstrate spontaneous communication by running up to his adapted physical education teacher and verbally asking for a ball.

9. Nancy Matthews was a District program director assigned to Rio Hondo for the 2011-2012 school year, and Student was on her caseload. Ms. Matthews monitored Student's progress, and supported his SBC classroom. No behavior, academic or social concerns about Student were reported to her.

10. At home, Student was more active. Toward the end of the 2011-2012 school year, Parents retained Dr. Timothy Gunn to perform a neuropsychological assessment of Student over the summer, in part to determine if there was a neurological basis for Student's increased activity, such as attention deficit hyperactivity disorder.

June 12, 2012 IEP

11. District convened Student's annual IEP review team meeting on June 12, 2012. Although Dr. Gunn had contacted District to arrange an observation of Student at school, he had not done so prior to the IEP team meeting.

12. All relevant District team members attended the meeting. Parents attended with an attorney representing Student, and an advocate for Student from the South Central Los Angeles Regional Center.

13. Ms. Williamson reported that Student made good progress on his reading, writing, math, and social emotional skills goals. Student could answer simple factual questions regarding a story passage, retell events (particularly on preferred topics), copy from a near-point model, identify coins, and maintain attention in a one-on-one setting for three minutes with minimal prompting. Student partially met his goal for giving his name and phone number. However, Student required models to copy simple text and could not spell the 31 words he had learned in the Edmark reading program. Ms. Williamson proposed new goals in reading, writing, math, attending (maintain focus to task for 5 minutes) and social skills, and recommended continued placement in an SBC classroom.

14. ThucUyen (Na) Nguyen, Student's occupational therapist, reported on fine motor and sensory goals. Ms. Nguyen provided occupational therapy services to Student during the 2011-2012 school year, and consulted with Student's teacher as needed, typically when she dropped Student off after his weekly session. Ms. Nguyen possessed state and national licenses to practice occupational therapy. Ms. Nguyen had extensive training in working with children with autism, in sensory processing disorders and sensory integration, and in classroom-based sensory interventions. She reported that Student made substantial progress on his visual motor skills, sensory and fine motor skills. Student copied from a white board with improved letter sizing and ability

to stay on the lines, although he did not meet the goal because he still required verbal prompting to space his letters properly. Student's sensory seeking behaviors had decreased to the point that they were no longer interfering with his class participation. Student engaged in fine motor manipulation activities with good attention, although he showed increased distractibility during visual motor tasks such as writing. Ms. Nguyen proposed a new visual motor goal for Student to write five to six sentences showing appropriate mechanics, such as size and spacing. She recommended that Student continue to receive 30 minutes of individual occupational therapy each week, with two added 30-minute consultations per year provided to Student's teacher. Ms. Nguyen was not of the opinion that Student required another occupational therapy or sensory processing assessment to identify his needs in those areas for the June 2012 IEP team.

15. Jacqueline Haney reported to the IEP team on Student's progress on his language/communication goals. Ms. Haney received her license and American Speech-Language Hearing Association (ASHA) certification as a speech language pathologist in 2010. She has bachelor's and master's degrees in communicative disorders, completed the assistive technology specialist's program at California State University Dominguez Hills in 2008, and has completed training in the Picture Exchange Communication System (PECS). Ms. Haney was familiar with Student and testified credibly and persuasively at hearing. Her opinions regarding Student's abilities and needs in the area of speech and language, and the services necessary to address those needs, were accorded great weight.<sup>5</sup>

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<sup>5</sup> Although there was conflicting evidence about whether Ms. Haney was licensed as a speech pathologist prior to 2010, the conflicts were plausibly explained by Ms. Haney's name change due to marriage and possession of another license as a speech pathology assistant. Because this hearing focused on events in 2012 and later, the

16. Ms. Haney explained to the team that Student understood simple questions but had difficulty responding. He used inappropriate greetings, such as saying "Time for speech," rather than saying "Hello" or asking "Is it time for speech?" Student met his goals of labeling objects and identifying his own body parts, and made progress on answering WH questions, although Student also needed prompting or re-direction. Ms. Haney proposed new language and communication goals for Student to verbalize appropriate social vocabulary ("good morning," "your turn") and answer "WH" questions about himself, and a social skills goal for Student to take five turns in a game with peers. Ms. Haney proposed that Student continue to receive individual speech therapy for 30 minutes twice a week, but proposed adding a 30 minute group session once a week. Ms. Haney did not believe that Student required another speech or language assessment to identify his communication needs at that time. She did not believe that Student required an augmentative and alternative communication assessment because he was verbal and it was important to expand on his verbal language, rather than provide him with alternatives to verbal language. She did not believe that Student needed an assistive technology assessment for the same reason. Ms. Haney worked successfully with Student by providing him with visual cues, such as cards, to help him comprehend the verbal language, and using repeated verbal cues, as sometimes Student did not take in auditory information and needed time to process what was said.

17. Student's adapted physical education teacher, Daniel Estrella, reported on Student's gross motor abilities, and that Student had met one of his gross motor goals, and had made good progress on another. Mr. Estrella proposed new, slightly more

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dispute regarding the date she received her credential did not significantly impact the credibility of her testimony.

difficult gross motor skills goals and recommended that Student participate in group adapted physical education for 30 minutes two times per week.

18. The team adopted the proposed goals in reading (answer WH questions related to a story with mastered vocabulary; read 69 new sight words); math (two-digit addition with carrying, state value of coins and bills); writing (write and spell 50 sight words ); visual motor skills (far point copy five to six sentences with proper spacing and line placement); language/communication (use appropriate social vocabulary; answer personal WH questions); self-care (give name, address and phone number); social emotional (maintain attention and focus for five minutes in a small group); social skills (take five turns in structured game with peers); and motor skill development (kick ball, three sit-ups). Each of these goals was more difficult than the prior year's goals. For example, one of Student's social emotional goals was to maintain attention and focus in a group setting, rather than in a one-on-one setting as in the year before.

19. The goals were measurable. Each goal indicated the setting in which Student was to perform the skill (such as one-on-one, small group, during structured task), how the skill would be measured (such as 80% of trials over two weeks, proper attention/focus as demonstrated by eye gaze and body posture), the length of time or number of times the skill was to be performed, the measurement tools (such as observation data, teacher assessment, work samples) as well as the number or percentage of times Student would be required to demonstrate the skill over a specified trial period. The goals indicated whether the skill was to be demonstrated independently or with prompting (such as with no more than three verbal and/or physical prompts, using modeling and role-play).

20. Parents requested that Student be retained because he was not ready for sixth grade. District team members expressed that Student's absences and tardies had adversely impacted his academic progress. However, they understood that the transition

to middle school was challenging for many students, and that another year in the SBC classroom would strengthen Student's academic and communication skills, and agreed to retain Student.

21. The team adopted the service recommendations. The June 12, 2012 IEP offered Student: specialized academic instruction in a fifth grade SBC classroom with general education PE three times per week; adapted PE for 60 minutes two times per week; individualized speech therapy for 60 minutes two times per week and small group speech therapy for 30 minutes once per week; individualized occupational therapy for 30 minutes one time per week; and occupational therapy consultation for 30 minutes twice a year. The IEP included a projected start date for services and modifications and, the anticipated frequency, location and duration of services and modifications.

22. Parents informed the team that they were having a neuropsychological assessment done by Dr. Gunn over the summer.

23. Parents consented to implementation of the goals and the increase in occupational therapy and speech services. On the signature page of the June 12, 2012 IEP, Parents also selectively initialed an optional statement that they had been given an opportunity to help develop the IEP.

#### July 2012 Privately Funded Neuropsychological Assessment

24. At Parents' expense, Dr. Gunn performed a neuropsychological assessment of Student during June and July of 2012. Dr. Gunn received his doctorate in psychology in 2008, his psychologist license in 2009, and has extensive experience in conducting neuropsychological and psychodiagnostic testing of children in hospital and clinic settings. He presented nationally in 2010 on neuropsychological profiles of intellectually gifted children, and has published articles on gifted students with ADHD (2012) and the relationship between sensory deficits, ADHD and externalizing behaviors in an urban preschool population (2009). However, he has assessed less than 100 children with

autism, and only five to ten children with severe autism. He has no training in applied behavior analysis (ABA). Dr. Gunn feels very strongly that autism is curable, or that its symptoms can be minimized to the point of an autistic individual being undifferentiated from a typically developing individual.

25. Dr. Gunn observed Student in Ms. Williamson's SBC classroom on the last day of the 2011-2012 school year. Student worked on a worksheet activity at his desk with a classroom aide, remained in his seat without redirection, and correctly turned in the paper at the back of the room. Student required redirection by a classroom aide to return to his seat, but during the following reading activity Student was attentive, followed the lesson, and was able to read a sentence out loud with some prompting. Student exhibited some echolalia, for example, in response to "What is the weather?" Student said "Weather." Student asked to go to the bathroom and was allowed to do so. Student participated in a PowerPoint activity and chose a computer program he liked for computer time, where he sat quietly and was engaged and focused. Afterwards, during a one-on-one Edmark reading program lesson, Student was able to read simple-four word sentences.

26. Dr. Gunn reviewed private psychological assessment reports from 2007 and 2008, a private speech assessment report from 2008, District's 2011 triennial assessment reports, and Student's June 12, 2012 IEP. He administered an extensive battery of cognitive ability and academic achievement tests to Student. On tests of academic skills, Student ranked at or below the first percentile. Student was unable to complete a standardized intelligence scale, and Dr. Gunn concluded that Student's autism interfered with his ability to administer cognitive tests and it was not possible to determine Student's intellectual ability.

27. Dr. Gunn tested Student's communication skills, and found them very delayed. He also administered a variety of social emotional and adaptive functioning

measures by having Father and Ms. Williamson complete rating questionnaires, and found social and adaptive functioning delays. Dr. Gunn did not diagnose student with ADHD.

28. In his report, dated July 9, 2012, Dr. Gunn recommended that Student receive 40 hours per week of one-on-one ABA intervention in a clinic setting for the next two years. He warned that without such immediate and intensive treatment, Student would "not be able to access the school curriculum and will very likely remain functionally impaired for vocational and adaptive purposes." Dr. Gunn also recommended further assessments in speech, physical therapy, occupational therapy and sensory processing; and consultation with a pediatric psychiatrist on psychopharmacological treatment for anxiety.

29. Parents did not provide a copy of Dr. Gunn's report to District when the 2012-2013 school year began. Father's testimony on this factual dispute was contradictory. Father testified that a copy was sent to District in Fall 2012 by certified mail, but when questioned further, Father did not recall whether it had been sent by Parents or Dr. Gunn. Student did not offer a copy of a certified mail receipt into evidence. Dr. Gunn did not testify that he had mailed a copy of his report to District. Father could not recall if he had requested an IEP team meeting to review Dr. Gunn's assessment in Fall 2012, and could only affirmatively state that he had informed the June 12, 2012 IEP team that he would want a meeting to review results after Dr. Gunn completed his assessment.

30. Dr. Murray, District's special education program administrator, had not seen a copy of Dr. Gunn's report prior to an IEP in June 2013. No District staff member recalled that they had seen Dr. Gunn's report prior to the June 2013 IEP. Rosa Patterson, who completed a private behavior assessment of Student in Fall 2012 (discussed below), had not been given a copy of Dr. Gunn's July 2012 report, although Parents asked her to

review psychological evaluations from 2006, 2007 and 2008. Parents also did not inform District when Student began private occupational and speech therapy in 2013 (discussed below), and did not provide copies of progress reports from those therapists to District. When Father was questioned about whether he had provided a legible copy of the report to District, he responded that he had "handed" a legible copy to District. Father was not credible or persuasive in his testimony that District received a copy of Dr. Gunn's report in Fall 2012. A preponderance of the evidence established that, throughout the years in dispute, Parents were selective and secretive about sharing assessment and progress reports, and did not promptly share Dr. Gunn's report with District. Parents provided a copy of Dr. Gunn's report to District for the first time when Father carried a copy into the June 12, 2013 IEP team meeting.

#### 2012-2013 SCHOOL YEAR

31. Student's SBC fifth grade classroom teacher during the 2012-2013 school year was Jennifer Walls. Ms. Walls has a bachelor's of science degree in human development, a master's degree in special education, and credentials to teach children with mild/moderate and moderate/severe disabilities. She has taught students with moderate to severe autism for over 13 years. Ms. Walls is trained in a variety of autism interventions, including ABA, discrete trial training, the TEACCH<sup>6</sup> approach, PECS, and facilitated communication. Ms. Walls is also trained in a variety of positive behavior intervention techniques and is a certified behavior intervention case manager.

32. Ms. Walls' SBC classroom was designed using techniques and strategies known to be effective for teaching students with autism. It was highly structured, used

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<sup>6</sup> TEACCH involves structured teaching, organizing the physical environment, developing schedules and work systems, and utilizing visual materials to develop skills and to assist students in gaining independence.

positive behavior supports and interventions, and had frequent time built in for social behavior and communication skills training in addition to academics. Ms. Walls implemented a variety of ABA methodologies, including visual schedules, audible transition cues, praise for appropriate behavior, errorless teaching (every answer praised) and data keeping. She used discrete trial training (mass trials and frequent praise for correct answers) in classroom centers and for topics requiring an intensive method of instruction. Ms. Walls implemented the positive behavior strategy of a token economy (in which students are motivated by earning points, items or praise) with token boards to visually represent the goal that each student was working toward. Sensory behavior strategies in the classroom included therapy balls to sit on for fidgety students, squeezes, tickles, a rocking chair and breaks from the task at hand, and sensory activities such as placing small items in a container full of rice for the students to find by touch. These methodologies and strategies were based on peer-reviewed research to be effective in teaching students with severe autism.

33. Ms. Walls' SBC classroom had 8-10 students with moderate to severe disabilities and six adults (Ms. Walls, three ABA trained classroom aides, and two one-on-one aides). During the 2012-2013 school year, Ms. Walls and her classroom aides completed six to eight days of District training in a variety of ABA and discrete trial techniques, including data collection, providing scheduled reinforcement, determining functions of behavior, positive behavior interventions and supports and behavior plans, including hands-on practice and nonviolent crises intervention.

34. Recess and lunch were with the entire population of the elementary school, but at lunch on Tuesdays and Thursdays the SBC students would be joined by typically developing fourth and fifth grade peers as part of the "Social Squad." Social Squad provided SBC students with opportunities to work on social skills concepts introduced in class while paired with a typical peer (social buddy) to participate in

games. Social Squad was run by Ms. Walls in collaboration with her students' speech and occupational therapists, the adaptive physical education teacher and the school's board certified behavior analyst. It gave Ms. Walls' students an opportunity to learn turn taking, waiting in line, practicing appropriate stances (for sports) and sportsmanship with supportive typical peers. Social Squad was embedded in the SBC program, and was not separately designated on IEP's.

35. Ms. Walls used the Edmark reading program with Student. Student's June 2012 IEP indicated that Student had completed Edmark lesson 33 the previous year, but she found that Student experienced some regression over summer to lesson 31 mastery.

36. Student's reading goals were to (i) answer who, what, where questions related to a story with mastered vocabulary and (ii) read 69 new sight words. Although both goals referenced Edmark lesson 100 in parenthesis, suggesting mastery of 69 new words in a school year, Ms. Walls identified reading comprehension as an area of weakness for Student, and found that Student needed to work on each lesson for one to two weeks to master a word, including comprehension. In 2012-2013, Student progressed steadily to Edmark lesson 61 with comprehension mastery, which Ms. Walls opined was good progress. Ms. Walls did not use a set writing curriculum, and created materials adapted to the needs of each of her students, focusing on topics of interest. Ms. Walls used the Touch Math program, which is research based and proven effective for students with autism. Student had opportunities to work on math skills with money and during classroom cooking activities (following recipes).

37. Ms. Walls incorporated a sensory diet recommended by Student's occupational therapist and behavior strategies recommended by the board certified behavior analyst who supported her classroom. With these strategies in place, Student's attention increased and he was easily redirected from inappropriate behaviors. Student's tantrum behavior was virtually eliminated by the end of the school year. Student

displayed much less anxiety leading up to non-preferred activities, and thrived in the Social Squad.

38. Student received occupational therapy for 30 minutes per week from Pam Hindman, an occupational therapist well qualified to provide occupational therapy and sensory integration services to children with autism. She provided services in the occupational therapy room at Rio Hondo, which was set up like a sensory integration clinic with large equipment, suspended equipment and fine motor areas and materials. Student's handwriting improved over the 2012-2013 school year, and he needed less prompting to space his words. Student had difficulty with his visual motor goal of far-point copying, but learned the practical strategy of going to the board and checking his work. Ms. Hindman believed that the sensory strategies she developed for Student, such as squeezing a ball of Theraputty, were working well to improve Student's attention and focus.

39. Student received individual speech therapy from District speech pathologist, Leeya Shaked, for 30 minutes two times each week, and in a small group once a week. Ms. Shaked worked with Student on greeting others appropriately and turn taking, as well as answering WH questions. Student's ability to acquire the skills targeted by his goals was increased when Ms. Shaked broke Student's goals into smaller increments and added visuals.

#### November 2012 Privately Funded Behavior Assessment

40. In Fall 2012, Parents retained Rosa Patterson, of Autism Behavior Services, to perform a behavior analysis of Student, targeting problem behaviors of tantrums, aggression (squeezing or head banging), stereotypy (hand flapping, echolalia, high pitched noises), crying and rigidity (inflexible in daily schedule, refusal to transition between tasks). Ms. Patterson earned a bachelor's degree in psychology from UCLA in 1996, a master's degree in counseling, and was certified as an associate behavior analyst

in 2003. She became a board certified behavior analyst in 2009. She worked as an autism specialist for Tustin Unified School District from 2003 to 2010. Ms. Patterson was trained and experienced in ABA.

41. Ms. Patterson observed Student in Ms. Walls' classroom twice, for 45-60 minutes each time. Student engaged in a play activity with aide and teacher support, independently got up from his seat and walked outside to participate in snack time and returned independently, and played with other students during recess with a classroom aide. Student was able to check his visual schedule independently and follow whole group instructions. Ms. Patterson observed the classroom adults encouraging Student to engage in conversation during all of these activities, and saw Ms. Walls modeling for Student, which is less intrusive than verbal prompts. Student displayed a need for redirection eight times during that hour, and engaged in verbal and physical stereotypy and giggling 13 times. During recess, he required repeated prompts to get in line to return to class. Ms. Walls' class was making Halloween spider treats with graham crackers, licorice and icing, and with some prompts Student was able to respond to questions about the activity and participate. Student also used his visual schedule, and correctly responded to questions regarding scheduled activities. Ms. Patterson did not speak with Ms. Walls at either observation, and did not observe Student during Social Squad, so she was unaware of the social opportunities provided by Social Squad. Ms. Patterson had intended to observe a math lesson in the afternoon, and was disturbed that the class did a cooking activity instead, which the aide indicated was due to the students being restless that day. Ms. Patterson did not speak to Ms. Walls about the activity, and was unaware that classroom cooking activities reinforced learned math skills.

42. Ms. Patterson administered various behavior rating scale questionnaires to Ms. Walls and Father. She determined that Student had delays in communication, social

interaction and in all developmental areas. In adaptive skills, Student could dress himself completely with the exception of tying shoes, use the bathroom without help, play simple computer games, fix himself a bowl of cereal or a sandwich, although he could not give his name, telephone number and address, use the phone, order from a menu or use money without adult assistance. Parents provided Ms. Patterson with old psychological assessments of Student (2007 and 2008) and an outdated May 6, 2010 IEP. Parents did not give her a copy of Dr. Gunn's July 2012 report or the June 12, 2012 IEP, and Ms. Patterson was not aware of Student's current goals or the services recommended by District at that time.

43. Ms. Patterson developed an ABA "treatment plan" for Student, with many goals similar to those adopted by the June 12, 2012 IEP team, for example, for Student to read sentences, spell words, write sentences, learn to play new games, play with peers. She drafted goals in the areas of cognition, language and communication, problem behaviors and social emotional skills. Ms. Patterson's November 10, 2012, report recommended that tasks be modified to Student's level of functioning, replacement behaviors be practiced to replace problem behaviors, Student be given warnings for challenging upcoming activities, breaks be scheduled, supervised indoor and outdoor play be offered, choices be offered, and that the least number of prompts be used. These recommendations were very similar to the instructional strategies and techniques being implemented by Ms. Walls and Student's service providers, in the classroom, during Social Squad, and throughout the school day. Her report recommended a treatment plan of 10 hours per week of home ABA services.

44. Ms. Patterson also recommended that Student's school placement be changed to a "less restrictive environment" consisting of a mild/moderate classroom, with a one-on-one ABA aide, to give Student access to more advanced language, social and behavior models, which is in stark contrast to Dr. Gunn's recommendation of a far

more restrictive setting. She recommended more focus on academic and social skills with a teacher who had experience and training in working with children on the autism spectrum. Although not stated in the report, it was Ms. Patterson's opinion that Student needed *facilitated* access to typical peers, and a facilitated social group would have provided the socialization benefits Student needed in lieu of placement in a classroom with typical peers. Ms. Patterson was unaware of Ms. Walls' extensive training and experience, and her recommendation for more academics was based upon parental report that the SBC class did not focus on academics. At hearing, Ms. Patterson described Student as "pretty severe" and opined that Student required one-on-one instruction. Parents did not immediately share Ms. Patterson's report with District.

#### Privately-Funded Speech and Occupational Therapy Services

45. In January 2013, Student began to receive private "speech treatment" for 60 minutes two times per week through his medical insurance. Parents did not notify District that Student was receiving private speech therapy. Student's private therapist, DG Therapy, worked on Student's receptive language (following directions) and pragmatic/social language (turn taking, greetings and maintaining conversation). After six months of treatment (January - June 2013), Student was reported to have made progress, but DG Therapy recommended continuing the same goals and adding a goal for Student to answer open-ended questions about events and his feelings. Parents did not receive this report prior to Student's annual IEP review in June 2013, and did not subsequently share the report with District.

46. In April 2013, Student began receiving 60 minutes per week of speech and language therapy at Whittier Area Parents' Association for the Developmentally Handicapped. This speech therapy consisted of "facilitated" or assisted communication. Student's goals were to respond to multiple choice questions presented on a dry-erase board with a field of four answers, to type complete sentence responses to direct

questions with no touch (pointing to keys on a picture of a keyboard), and to use a multimodal communication system (speech, typing, Proloquo2Go on iPad, choice board) to produce a three to five sentence narrative. Student's therapist would provide verbal prompts, and give Student physical support, either hand over hand or holding the wrist, elbow or arm, to assist Student in pointing to answers or typing his responses. Parents did not inform District that Student was receiving facilitated communication services.

47. In April 2013, Student began to receive occupational therapy at DG Therapy as a "therapeutic intervention" for 60 minutes per week through his medical insurance. Parents did not notify District that Student was receiving private occupational therapy services. DG Therapy determined that Student had sensory seeking behavior and sensory processing and modulation issues, which were addressed with sensory integration strategies to help Student maintain attention to task. DG Therapy also addressed Student's self-dressing. Student's goals were written to facilitate Student's development and play at home and in the community. An incomplete report dated September 9, 2013, noted progress on sensory modulation and self-help skills, and recommended that the current goals be updated and continued. Parents did not receive this report prior to Student's annual IEP review in June 2013, and did not subsequently share the report with District.

#### Privately Funded Lindamood-Bell Testing

48. On April 8, 2013, Parents funded a "diagnostic learning evaluation" of Student by Lindamood-Bell Learning Process, a private company that claims to teach children to read. Lindamood-Bell does not conduct a reading assessment as that term is commonly understood, as it does not report on the significance of each test result, does not identify the child's needs, and does not explain how or which components of its program will address the child's needs. Lindamood-Bell administers to all children the same fixed battery of tests, pre-chosen by its main office. Lindamood-Bell does not

afford its staff the flexibility to choose which tests are appropriate to measure a particular student's abilities, and does not appear to have staff at its offices educated or trained to make such choices.<sup>7</sup> Lindamood-Bell does not review existing reports on a child's cognitive abilities or academic levels. Of the 17 tests or subtests administered by Lindamood-Bell to Student, Student was unable to perform on five, unable to complete three, and did not have valid scores for another three. On the six tests with valid results, Student scored at or below the first percentile. Based on this testing, Lindamood-Bell recommended that Student develop his language processing and literacy skills with one-on-one Lindamood-Bell instruction for four hours per day, five days per week for six to eight weeks (160-200 hours). Lindamood-Bell recommended three of its programs: Talkies Visualizing and Verbalizing for Language Comprehension and Expression (Talkies); Visualizing and Verbalizing for Language Comprehension and Thinking; and Seeing Stars. The evaluation report did not identify Student's needs, explain how the recommended programs would address Student's needs, or provide a breakdown of the instruction time to be allocated among the three recommended programs. None of the three recommended Lindamood-Bell programs are based upon peer reviewed scientific research, and they have not been shown to be effective for teaching reading skills, or any skills, to children with severe developmental disabilities. Parents did not immediately share this evaluation with District.

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<sup>7</sup> Lindamood-Bell also administers several outdated tests, which are not normed against current populations. Newer populations tend to have a broader knowledge base, so administration of an outdated test may artificially inflate the knowledge or skill measured as compared to the current population. Lindamood-Bell has negotiated special license agreements with test manufacturers to continue administering outdated tests.

June 12, 2013 IEP

49. On June 12, 2013, District convened Student's annual IEP review team meeting. All relevant District IEP team members attended. Parents attended with an advocate from Student's attorney's office, Carolina Watts, and Ms. Patterson. Ms. Patterson is referenced in the IEP team meeting notes as the "home BCBA," but her agency was not at that time providing services to Student. Dr. Murray also attended as a District administrator knowledgeable about prospective middle school placements.

50. Dr. Murray is a very highly qualified school psychologist with over 20 years of experience, including experience in behavior intervention, assessments and learning disabilities. Dr. Murray earned his bachelor's degree in psychology in 1988, and his master's degree in counseling in 1991, with a master's thesis looking at reading achievement in learning disabled students. He earned his doctorate in educational psychology in 2004. He has been a licensed school psychologist since 1991. Dr. Murray brought to the team a wealth of knowledge on cognitive functioning, academic assessments and how children learn to read.

51. The June 12, 2013, meeting was the first time Parents provided District with Dr. Gunn's July 2012 neuropsychological assessment, Ms. Patterson's November 2012 behavior assessment, and Lindamood-Bell's April 2013 learning evaluation.

52. Ms. Walls reported that Student had met one reading goal and made progress on another, with increases in word mastery and comprehension. Student could spell 49 of 60 words, which Ms. Walls considered excellent progress on his writing goal. Student met both of his math goals. Student did not meet his attention goal, as he could attend for only one to three minutes during small group instruction without prompts. However, Student did meet his social skills goal by taking five to ten turns during group games with one non-verbal prompt, and would state whose turn it was with one verbal prompt. During the 2012-2013 school year, Student was tardy 41 times

and absent for 20 days. Despite having lost the equivalent of one month of instruction due to absences, it was Ms. Walls' opinion that Student had made very good progress in his educational program. Ms. Walls proposed goals to increase reading skills, comprehension, writing (spelling) and math.

53. Ms. Hindman reported that Student had made progress on his visual motor goal of far-point copying and had greatly improved in the writing mechanics of spacing and line placement. However, he did not meet the goal because he still required frequent redirection to task. Ms. Hindman proposed a new visual perceptual motor goal to work on more consistent print sizing, and an attention and focus goal incorporating sensory strategies to increase Student's attention to a non-preferred academic task and decrease his need for prompts. Ms. Hindman had observed that Student could focus for up to three minutes without redirection on preferred classroom tasks, but needed 15 prompts in 15 minutes on academic tasks. She reported that Student was seeking less muscle/joint stimulation (trampoline, therapy ball) and more auditory (tapping), tactile (touching) and visual (looking at the periphery) input when off-task, and recommended a token board, sensory motor strategies and positive praise to keep Student on task. Ms. Hindman recommended that the level of services continue to be 30 minutes per week of individual occupational therapy with two 30-minute consultations. Ms. Hindman was not of the opinion that Student required another occupational therapy or sensory processing assessment to identify his needs in those areas for the June 2013 IEP team.

54. Ms. Shaked, District's speech pathologist, reported that Student had met his goals of greeting others appropriately and turn taking, and had partially met his goal of answering WH questions. She proposed goals to focus on decreasing Student's echolalia and increasing his spontaneous speech, and increasing Student's use of "I" and "me" when speaking (rather than saying, for example, "[Student] wants...") without

prompting. In response to a comment that Student was leaning on others and perseverating on areas of concern, such as an absent classmate, Ms. Shaked proposed goals for Student to maintain personal space and maintain focus on learning objectives. In response to Parents' request, Ms. Shaked also proposed goals about using pronouns ("I" and "me") and appropriately asking for help. Ms. Shaked recommended continuing the same level of weekly speech services: two 30-minute individual sessions and one 30-minute small group session.

55. Student's adaptive PE teacher, Mr. Estrella, reported that Student was making progress on his gross motor skills. He recommended continuing a physical fitness goal (sit-ups), and proposed a goal building on Student's emerging basketball dribbling skills. Parents requested that Student be integrated into general education physical education in middle school, and Mr. Estrella recommended that Student attend general education physical education, with 60 minutes per week of adapted physical education.

56. Parents requested that the IEP team consider placing Student in a mild/moderate classroom, and general education elective classes, as recommended by Ms. Patterson, so that he would be challenged academically and have more interaction with typical peers. Ms. Walls reported that Student had demonstrated appropriate behavior with the general education students during recess, lunch and Social Squad, and recommended that Student be placed in an SBC classroom for core academics, with a combination of mild/moderate and general education elective classes for the remainder of the day. The IEP team noted that Student would need a one-on-one aide to accompany him outside of the SBC classroom.

57. The team discussed having Student participate in the middle school general education "exploratory wheel" of electives, in which students participated in a rotating series of short, six-week classes, including keyboarding. Arrangements were

made for the meeting to adjourn and reconvene after Parents and Ms. Patterson had an opportunity to observe a variety of middle school programs.

58. District team members discussed that middle school would have a much larger population than elementary school, and Student's schedule would require him to navigate the campus from room to room throughout the day. The team proposed that an IEP team meeting be held one month into the school year (a "30-day review"), after Student had settled into middle school to discuss how integration into general education and mild/moderate classes was working.

59. Parents requested that District fund the hours of Lindamood-Bell instruction recommended by Lindamood-Bell, in lieu of a District summer program. Dr. Murray had an opportunity to review the Lindamood-Bell evaluation during the meeting. He observed that, like approximately 20 other Lindamood-Bell evaluations he had seen before, it used at least one out-of-date test. Further, the evaluation had no foundation for the recommendation given, including a lack of background information, information on how testing was conducted, variables that may have affected the validity of the testing, an analysis of test scores and their significance, the strategies necessary to work with Student, what the recommended programs would look like, or even which program was recommended. He recommended against a Lindamood-Bell program on the lack of information concerning how the program would address Student's educational needs. The team declined to adopt Lindamood-Bell's recommendation, and indicated that Dr. Murray would respond further to Parents' request in writing. Parents announced that they would enroll Student in Lindamood-Bell that summer and seek reimbursement from District. The meeting was adjourned, and arrangements were made for Parents to view programs at Doty Middle School.

60. Ms. Patterson observed both an SBC class and a mild/moderate special day class at Doty Middle School. She observed the teacher in the SBC class, Daniel Rojas,

using discrete trial training, visuals, breaking down information, reinforcing with frequency, and presenting materials in an organized manner. She did not see these same supports in the mild/moderate class.

61. The last day of the 2012-2013 school year was June 20, 2014. On June 21, 2013, Parents enrolled Student in Lindamood-Bell. Student began instruction at Lindamood-Bell on June 24, 2013.

62. During the time between meetings, Dr. Murray had an opportunity to review Dr. Gunn's neuropsychological report as. He noted that it was almost a year old and that Dr. Gunn had been unable to determine Student's cognitive level. Dr. Murray plausibly concluded that further assessment to determine Student's cognitive level in June 2013 was not needed, as the present levels of performance and progress reported to the IEP team were consistent with Student's functional cognitive level as identified in District's triennial psychoeducational assessment in 2011.

#### June 25, 2013 IEP Team Meeting

63. The IEP team meeting was reconvened on June 25, 2014. It was attended by Dr. Murray, Ms. Walls, Mr. Raridon, Parents, Student's advocate Ms. Watts, and Parents' behavior consultant Ms. Patterson.

64. The IEP team discussed the classroom observations and agreed that a one-on-one ABA trained aide would not only support Student in navigating a new campus, but provide consistency as Student transitioned between classrooms and assist Student with attention to task, self-regulation and interaction with typical peers.

65. The IEP team adopted goals in: vocabulary (read 100 sight words); reading comprehension (answer questions after reading a story); spelling (write/spell 100 sight words); math (subtraction with carrying, combine coins to \$0.50); attention (attend to non-preferred task for 10 minutes); visual motor (maintain writing size); language and communication (answer WH questions about daily activities and personal, maintain

arms-length distance from others, talk for three minutes on a preferred topic then move onto new topic, use "I" and "me" spontaneously); behavior (ask for help when needed, identify internal arousal state and select appropriate sensory-motor strategy to improve attention) and physical fitness (setups, dribble basketball). Each goal was slightly more difficult than the previous goal, for example, Student was required to respond to WH from a field of four choices, up from two choices. Each goal was measurable.

66. The IEP team offered Student the following educational program: specialized academic instruction in an SBC classroom for English language arts and math (core academics), in the mild/moderate special day class for history and science, and in general education for physical education and an elective; an ABA trained one-on-one aide throughout the school day; three hours of aide supervision per month through November 30, 2013, and two hours per month after; individual occupational therapy for 30 minutes per week with one hour per year of consultation; individual speech therapy for 30 minutes two times per week and group speech therapy for 30 minutes once per week; and adaptive physical education for one hour per week.<sup>8</sup> The IEP included a projected start date for services and modifications and, the anticipated frequency, location and duration of services and modifications.

67. The IEP also offered an extended school year program over the summer, but did not specify where the program would be located or what the program would look like. Parents understood that the summer program was for three hours per day, four days per week, for four weeks, but were unclear whether, or what amount of, occupational therapy, speech therapy or adapted physical education was offered, and whether a one-on-one aide would be provided. Parents would have considered having

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<sup>8</sup> The IEP document developed at the June 12 and June 25, 2013, meetings was referred to by District, and is referred to in this decision, as the June 12, 2013 IEP.

Student attend all or part of District's summer program if it had been clear to them that District was offering a middle school SBC class with a full-time one-on-one aide as well as occupational therapy, speech services and adapted PE. However, it was not clear to Parents from the team discussion what summer program was offered, and Parents decided to keep Student in the Lindamood-Bell program.

#### Summer 2013 at Lindamood-Bell

68. From June 24, 2013, through August 31, 2013, Student attended one-on-one instruction at Lindamood-Bell for four hours per day, five days per week. Student was instructed in the Talkies program. Parents' cost for this program was \$2,180.00 per five-day (20 hour) week.

69. The Talkies program is not research based, and it is not peer reviewed. There is no published research that Talkies is effective in teaching any skills, such as reading or language development, to children with severe developmental disabilities. The individuals who work with children one-on-one in the Talkies program are called "clinicians" because they work in a clinic setting, but they are not required to have any educational diplomas, degrees or experience. Clinicians are not required to be trained in ABA techniques. The most important attribute of a clinician is that they be cheerful to keep a child motivated during long hours of one-on-one lessons. Lindamood-Bell's job advertisements refer to clinicians as "tutors" to reach the broadest possible job applicant pool. Clinicians receive seven to ten days of training in Lindamood-Bell programs, and watch other clinicians at work prior to working with children. Clinicians are supervised by "consultants" who are not required to have any particular degree or teaching credentials. Consultants are supervised by their Lindamood-Bell center director. Anne Perry was director of the Lindamood Bell center attended by Student during summer 2013. Ms. Perry has a K-12 teaching credential. She does not have a special education degree. She does not have a credential authorizing her to teach children with

disabilities, either mild/moderate or moderate/severe. She is not a licensed speech and language pathologist. She is not a licensed psychologist. She is not a licensed occupational therapist, and has no training in sensory processing disorders. She is not trained in ABA. She does not have training in analyzing test scores. Ms. Perry was responsible for supervising Student's program, relaying Student's test results to Parents, and recommending further Lindamood-Bell program hours.

70. Lindamood-Bell does not track the number of attempts made, or the amount of adult assistance required, for a student to complete a Talkies task. It does not maintain work samples, and does not document the number, type or frequency of cues or prompts given to a child, or the time it takes for a child to respond. Instead, a consultant speaks to the clinician, or tutor, and prepares a weekly "progress report" by jotting letters next to a checklist of Talkies concepts, noting if the concepts have been introduced ("I"), whether the child is proficient ("P") or partially proficient ("PP"), or whether the concept should be deferred to the next goal ("N"). Anecdotal information is placed at the bottom of the progress report. By August 27, 2013, after 10 weeks and 176 hours of lessons, Lindamood-Bell rated Student proficient and partially proficient in different parts of the Talkies program. Per anecdotal comments, Student could give appropriate responses when questioned about "imagery for pictures" with difficulty and modeling. When working with two- to three-word sentence stories, Student could recall some of the information, but sometimes needed questioning or modeling before verbalizing responses. His consultant concluded that Student's ability to "access" the clinician's questions continued to improve, although that improvement was not measured or quantified.

71. Ms. Patterson observed Student at Lindamood Bell in summer 2013. Student worked with a Lindamood-Bell clinician in a plain room with a table and a couple of chairs. She observed Student to have a good attention span, but the pace was

quick and he received frequent breaks. She noted that Student needed some behavior interventions, but when Student did not respond, the clinician would "back it down." Student's behaviors and inattention were so bad initially that he was almost rejected from the Lindamood-Bell program, and a Parent or other adult was required to stay with Student during his sessions to control his behaviors. The trip from Student's home to the Lindamood-Bell center was approximately 27 miles, and due to the need to stay with Student, Parents' made only one daily round trip to the Lindamood-Bell center during Summer 2013.

72. On July 31, 2013, Dr. Murray responded in writing to Parents' request for reimbursement of the costs of a Lindamood-Bell program in lieu of the District's summer program. Dr. Murray explained that summer programs are provided to prevent or minimize academic regression over the summer, and informed Parents that the District declined to pay for Lindamood-Bell lessons that were not designed for that purpose. At that time, the extended school year summer programs were already over. Dr. Murray also inquired if Parents consented to the June 12, 2013 IEP.

73. On August 12, 2013, Student's advocate, Ms. Watts, responded to Dr. Murray's letter. Ms. Watts reiterated Parents' request for reimbursement for Lindamood-Bell's "intensive 1:1 reading intervention," and stated that Parents consented to implementation of the June 13, 2013 IEP, although Parents did not agree that the IEP offered a FAPE.

74. While Student was attending Lindamood-Bell during over Summer 2013, he did not attend the facilitated communication therapy with the Whittier Area Parents' Association, missed multiple speech therapy sessions with DG Therapy, and missed most of his private occupational therapy sessions.

75. On August 29, 2013, Lindamood-Bell administered the same battery of tests that it had administered to Student in April 2013. Lindamood-Bell tests children for

progress in their programs by administering the same tests, usually in 10 to 12 week intervals. This testing method violates best practice, which generally prohibits the administration of a test more than once a year. Repeated administration of the same test at shorter intervals results in a "practice effect," which invalidates the results because the student learns the test and can perform better without a commensurate improvement in the underlying knowledge or ability being tested. Much of the content of the Talkies program "teaches to the test," that is, it teaches the specific material contained in the fixed battery of tests administered by Lindamood-Bell. Lindamood-Bell also allows its test administrators to deviate from the test by prompting, cuing and modeling during the test, which may invalidate test results, and Lindamood-Bell does not record the type, frequency or duration of prompts or modeling given during testing.

76. Student showed no progress after almost 200 hours of intensive one-on-one Talkies lessons. Student answered a few more questions correctly on a few tests, but the result was that Student continued to score below or at the first percentile on most tests, and made miniscule movement into the second percentile on one. Student answered zero questions correctly on tests of paragraph reading, passage recall, and accuracy, and answered one or two questions correctly on tests of reading rate, fluency and comprehension. These scores placed Student below the first percentile. Student was able to complete two tests that he could not do in April 2013, but he scored below the first percentile on both. Student was unable to attempt an auditory conceptualization test that he partially completed in April 2013. Despite this lack of progress, Ms. Perry recommended that Parents enroll Student in another 400-600 hours of Lindamood-Bell instruction. Parents did not immediately share this information with District.

## 2013-2014 SCHOOL YEAR

77. Daniel Rojas taught Student's SBC classroom at Doty Middle School. The class included a range of students from sixth through eighth grade. There were eight

students and six adults in the classroom (Mr. Rojas, two classroom aides and three aides assigned to specific students).

78. Mr. Rojas is a highly qualified teacher of children with developmental disabilities, and has extensive education, training and experience in teaching students on the autism spectrum. He has a bachelor's degree in psychology, and a master's degree in special education. He has teaching credentials for children with mild/moderate disabilities, children with moderate/severe disabilities, and early childhood special education. He has an ABA certificate from UCLA, a cross-cultural language and academic development certificate and training in facilitated communication. He interned as a behavior therapist at the UCLA Lovaas Institute in 2002, where he was trained in and implemented ABA methodologies, discrete trials, and behavior modification therapy for children with autism. Mr. Rojas has taught children with autism for 13 years, including children with intellectual disabilities and learning disabilities. Mr. Rojas has been a special day class teacher for students with autism at District for the past nine years. At hearing, Mr. Rojas was very thoughtful, thorough and informative in responding to most questions. His testimony about his SBC class in general, and Student in particular, was passionate and persuasive. His testimony concerning Student's educational needs, progress, placement and services was accorded great weight.

79. Mr. Rojas used ABA methodologies in his classroom, including helping with behaviors through data collection, using a token economy, and using positive reinforcement to target social and emotional goals. He also uses PECS, Boardmaker (a program for making visual schedules), discrete trials, and some TEACCH methodology such as organizing the classroom into learning centers and having a very structured program. Mr. Rojas uses multiple learning programs in the SBC classroom, including Basics 2 to target academic and social needs for students with severe disabilities,

Edmark to target reading skills such as decoding and comprehension, Touch Math to teach number correspondence and math skills, and Touch Money to teach money skills. All of these programs are based on peer-reviewed research, proven effective for teaching students with severe developmental disabilities, and provide measurement of progress with objective data. Mr. Rojas also follows a community-based instruction curriculum, Triad, to teach his SBC students adaptive living and social skills, which are practiced during weekly community outings. Both Ms. Patterson and Dr. Gunn observed Mr. Rojas' classroom during the 2013-2014 school year, and were very impressed.

80. In 2013-2014, Mr. Rojas' students had many opportunities to practice language and communication skills throughout the day, and had a social skills class on Tuesday afternoons. Wednesday was a minimum day that ended at 12:30 p.m. and had shorter periods. After lunch on Fridays, the class would play outdoor activities such as soccer with the eighth grade general education students during fifth period, and engage in preferred activities (board games, short video, outside play on a nice day) during sixth period. Both of these afternoon periods on Fridays provided opportunities to reinforce the social skills the SBC students were learning.

81. Thursdays, after first period adapted PE, were devoted to community-based activities. Each week, Mr. Rojas' class would walk to nearby locations, such as the Stonewood Mall, a laundromat, Jack in the Box, the Dollar Tree store, the City library or See's Candies. From Monday through Wednesday, Mr. Rojas would prepare his students for the outing by working relevant information into the lessons. For example, students might practice reading skills on a modified menu if they were visiting a restaurant, practice writing skills by writing down what they would order, and practice math and money skills by determining the price of what they wanted to buy and how many dollars and coins they would need to pay for their purchase. Mr. Rojas had the students prepare for the outing during snack time, where they could practice lining up to purchase a

snack item, asking for the item, counting money, paying for the item, and putting the change in their wallet. Mr. Rojas worked with the people at each community location in advance so that they could help the students practice their social skills. For example, the woman behind the See's Candies counter would require each student to make eye contact and give her a greeting before she would give them a free piece of candy. The students would work on activity sheets about the outing after their return to class on Thursday afternoons.

82. During lunch on Wednesdays, Student participated in the Where Everyone Belongs social skills program with typical peers. This program was developed by Mr. Rojas in collaboration with the school psychologist, the speech pathologist, sixth, seventh and eighth grade counselors, school administrators and the entire special education department. It was designed to teach social skills, appropriate greetings, personal space, and appropriate behavior in different school settings. Prior to Where Everyone Belongs lunches, Mr. Rojas would give his students a lesson on the skills that would be practiced. The lunches began with all students, SBC and typical, watching a short video lesson. Then the students would play board games with each other for 20 minutes, giving the SBC students an opportunity to practice such skills as greeting, leadership, turn taking, and sportsmanship.

83. At the beginning of the 2013-2014 school year, Mr. Rojas observed that Student had difficulty sustaining a conversation and a limited attention span of two to three minutes. Mr. Rojas worked with Student on communication, engaging him in conversations throughout the day, structuring conversational opportunities with classmates, arranging conversational practice with cashiers and other adults during community outings, and facilitating conversations with typical peers at lunch, during Where Everyone Belongs lunches, and during Friday activities. A lunch purchase during a community outing required a three- to four-turn conversation, and although Student

initially needed a worksheet to guide him, that had faded. By the end of the school year, Student could engage in three to four conversational turns. Student would get very anxious if there was disruption in his routine, such as an absent classmate, but as the year progressed Student thrived in the structure and routine of Mr. Rojas' classroom. At the beginning of the year student could engage with a peer for only a few minutes with a high level of prompting. Mr. Rojas implemented the sensory strategies suggested by Student's occupational therapist to increase Student's attention, and by the end of the 2013-2014 school year, student was able to independently engage in social play with his classmates for close to 15 minutes.

84. Academically, Student had regressed over Summer 2013. His spelling mastery fell from Edmark lesson 49 to Edmark lesson 33. Student also had a significant drop in his ability to answer WH questions from a field of two choices from the baseline reported in his June 12, 2013 IEP. This was a high level of regression that Mr. Rojas only saw in students who did not attend an extended school year summer program. Behaviorally, Mr. Rojas used a token economy to keep Student engaged and encourage him to follow classroom routines. For example, if Student answered a question correctly, he would get a checkmark with reminders that he was working toward a specific reward, and by December 2013, Student was working independently with fewer prompts to stay on task.

85. Mr. Rojas met weekly with District board certified behavior analyst Ms. Raridon, and sometimes up to three times per week. They would review data on his students, go over their progress on behavior goals, see how the aides were doing, look at frequency of behaviors, identify new behaviors, and to obtain training for himself and the aides. He consulted with her several times during the 2013-2014 school year regarding Student's progress on behavior goals, and felt that her input was helpful. It was Mr. Rojas' opinion that he had adequate supports for Student to make progress on

his communication, behavioral, social emotional and academic goals, and that Student did not need further assessment during the 2013-2014 school year to identify his educationally related needs.

86. For the 2013-2014 school year, Student was assigned a full-time, female adult one-on-one aide. Student's aide completed ABA training with Ms. Raridon, and was familiar with ABA techniques and strategies. Because she was female, Student's aide could not accompany Student in the boys' locker room, or in the boys' restroom. However, Student was fairly independent in dressing himself, although he had to wear slip-on shoes because he could not tie shoelaces, and there were multiple adult males supervising the boys' locker room. Student was also able to use the restroom independently.

87. Student attended Humberto Garcia's sixth grade mild/moderate history class at the beginning of the 2013-2014 school year. The students in the history class were on grade level curriculum, but had third or fourth grade reading ability. Mr. Garcia has teaching credentials in science and mild/moderate disabilities. His history course covered ancient civilizations, such as Mesopotamia and ancient Egypt, and he modified the work by shortening readings, highlighting main ideas, modeling, assigning a project and by modifying test questions to test subject mastery. Approximately 50 percent of the class was taught with whole group instruction. Student attended his class with his one-on-one aide, and other than sometimes disturbing easily distracted peers, Student's behaviors were not overly disruptive. Mr. Garcia initially assigned Student the modified classwork and homework, but it soon became apparent that Student's abilities were very low, and the work could not be modified to Student's comprehension level. Student appeared unable to maintain attention in class, and his ability to interact with his classmates and participate in class instruction was very limited. Even getting Student to write his name on an in-class worksheet required a high level of prompting, and Mr.

Garcia had to focus more on Student than his other students. Student left the class 10 minutes early each day to join the SBC class for snack, which was not disruptive, but Student missed entire days of the class to attend community outings and receive occupational or speech therapy. Because Student only attended class two times per week, he could not keep up with assignments. Mr. Garcia collaborated with Mr. Rojas on a weekly basis. Neither Mr. Garcia nor Mr. Rojas believed that Student received academic or social benefit from attending the mild/moderate history class.

88. Student attended Robert Becker's general education keyboarding class at the beginning of the 2013-2014 school year. Student did not distract the other students, and had keyboarding skills better than some of his typically developing peers. Mr. Becker was particularly impressed with Student's aide, who enabled Student to participate in some classroom assignments and facilitated interaction with his classmates. There was little opportunity for Student to socialize, as the keyboarding class was set up to mimic a business environment, and there was no talking allowed and little discussion. Mr. Becker's recall of Student and the length of time spent in his class was limited, but he was of the opinion that Student brought a positive dynamic to the class and taught the other students to appreciate the challenges faced by someone with a disability.

89. Two weeks into the school year, Parents reported to Mr. Estrella that Student was coming home with his clothes on backwards and that they were worried about his safety in the boys' locker room for mainstreamed physical education without his aide. Mother met with Mr. Estrella, who assured her that during first period there were adult male aides in the locker room (assigned to other students), and that Mr. Estrella himself was in the locker room with his own students, so Student was well supervised, but Parents insisted that Student be placed in adapted physical education.

Mother executed an amendment to the June 12, 2013 IEP dated September 13, 2013, providing for Student to attend adaptive physical education five days a week.

90. Ms. Patterson observed Student in school on September 13, 2013. She observed Student in Mr. Garcia's history class, during snack and recess, and in Mr. Rojas' class. She did not observe many behavior strategies being implemented or pro-social behavior being encouraged by the aide in the mild/moderate class, which she thought looked like a smaller version of a general education classroom with modified grade level curriculum

#### October 22, 2013 IEP Team Meeting

91. District convened a 30-day IEP review meeting on October 22, 2013, to discuss Student's integration into mild/moderate and general education classes and the private assessments. Relevant District team members attended the meeting. Student team members included Parents, their advocate Ms. Watts, Ms. Perry from Lindamood-Bell, and behavior consultant Ms. Patterson. The meeting lasted approximately four hours.

92. For the first hour, the team discussed Ms. Patterson's April 2012 behavior assessment in great detail. The team recognized that most, if not all, of the goals proposed by Ms. Patterson to be worked on in the home could also be worked on in the school setting, and many were very similar to the goals in the June 2012, 2013 IEP. Ms. Patterson reiterated the school-based recommendations in her report, essentially 30-hours per week of behavior intervention with supervision, placement in a mild/moderate classroom, home services and collaboration for consistency across settings, and year round services with no longer than a two week break.

93. Mr. Rojas reported on Student's participation in Mr. Garcia's mild/moderate class, and Mr. Becker reported on Student's participation in general education keyboarding. Ms. Raridon reported that Student's behavior in the history and

keyboard classes was getting more disruptive, and Student was exhibiting increased scripting and less attention. Parents and District team members agreed that Student needed to work on his self-regulation and attention skills in the SBC classroom before he could successfully generalize those skills to general education classes. Ms. Patterson understood that Student would not learn academics in the mild/moderate or general education classes, but had hoped Student would have positive social interactions in those classes and that access could be used with Student as a motivational tool. At hearing, Ms. Patterson conceded that students need to be taught at their developmental level, and that instruction too far above their level could promote maladaptive behavior. Ms. Patterson opined that Student would likely experience aggression, tantrum and protest behaviors in a mild/moderate or general education classroom if he did not have the correct supports and modifications. The team agreed to explore having Student attend general education art when it came up on the exploratory wheel of electives, as Student enjoyed art.

94. Joan Zinn reviewed Student's progress on his speech and language goals. Ms. Zinn is a highly qualified speech pathologist with decades of experience working as a speech pathologist in the school setting. Ms. Zinn told the team that she could address Ms. Patterson's proposed goals of approaching, initiating and continuing conversations with others within existing goals, but agreed to draft an additional goal specifically for this skill. Student was still dependent on prompts to initiate and focus on conversation. She noted that Student had a good vocabulary, and was working on answering personal questions. She was already working with Student on prepositional concepts and describing things, but agreed to draft additional goals specifically addressing these skills. Mr. Rojas noted that all of these speech and language skills were also worked on during the SBC class.

95. At Ms. Patterson's request, Ms. Zinn agreed to draft a goal for Student to label his own emotions, although she explained that emotions were an abstract concept, and Mother agreed to provide photographs of Student expressing a variety of emotions for his speech therapy sessions. Ms. Zinn opined at hearing that the skills identified in the additional language and communication goals were already being addressed by the June 12, 2013 goals. The additional goals did no more than break down the skills to more closely monitor progress, and did not warrant an increase in speech services beyond what Ms. Zinn had already recommended (three 30-minute sessions per week). Ms. Zinn did not believe that Student required further assessment to identify his language and communication needs.

96. Ms. Raridon reported that when Student was immersed in a familiar, highly structured environment, he was able to attend for longer periods with fewer prompts. However, when the structure broke down, so did Student's attention. She noted that Student had begun exhibiting some maladaptive behaviors, including touching others, self-touching, and aggression (hard squeezing), that would be tracked and addressed by the one-on-one aide. Mr. Rojas explained that the behaviors addressed in Ms. Patterson's proposed goals were already being addressed in his classroom, but Ms. Raridon agreed to draft goals to address completing tasks with fewer prompts, exhibiting more independence in using a schedule, and a safety goal of requesting permission to leave a designated area.

97. Ms. Perry reviewed the results of Student's August 29, 2013, Lindamood-Bell testing after 10 weeks of intensive one-on-one Talkies instruction over the summer. Despite the lack of improved scores, Ms. Perry reported that Student was proficient or partially proficient in a long list of language development skills. District members asked to see work samples, but Ms. Watts, Student's advocate, said Ms. Perry could not disclose those samples without written consent from Parents. Team members were

unaware, and Ms. Perry did not disclose, that Lindamood-Bell did not maintain work samples. The only information Lindamood-Bell maintained on Student's progress was the series of weekly checklists created by Student's consultants subjectively rating Student's skills as N, I, P or PP. Dr. Murray questioned the validity of reassessment using the same tests within such a short period, but asked what other team members thought of the 400-600 hours recommendation for Lindamood-Bell lessons. Ms. Zinn responded that she was already working on the language development skills identified by Ms. Perry, but that Student did cooperate better and produced longer sentences in the one-on-one environment of the speech room, and recommended that Student's speech services be changed to three individual 30-minute session per week, rather than two individual and one group session. Student's advocate then informed the IEP team, for the first time, that student was receiving an additional three hours of private speech therapy each week. However, Parents did not produce progress reports from DG Therapy or the Whittier Area Parents' Association.

98. Parents informed the team that they would begin pulling Student from school every day at noon (a loss of over two instructional hours per day) for Student to attend Lindamood-Bell sessions. The team brought the school counselor, who did class scheduling, into the meeting to discuss how this would affect Student's participation in general education electives on the exploratory wheel, which were only available third period (before noon) and sixth period (after noon). Placement of Student in third period electives, and moving his occupational therapy and speech services to the mornings, would effectively have left little or no time in Mr. Rojas' classroom for core academics.

99. Student's occupational therapist, Vanessa (Colonna) Lew, reported that Student was showing progress on his writing goal, although he still needed visual prompts to maintain correct letter size and spacing. Ms. Lew expressed concern that Student had sensory processing issues that interfered with his ability to identify his

arousal state. After a team discussion, including input from Ms. Patterson, concerning a revision of Student's sensory goal to give him access to a sensory choice board with examples of visual, auditory and tactile sensory input, the team decided to leave the goals as written. Ms. Lew recommended that Student's individual services remain at 30 minutes per week, but recommended an increase in consultation with Student's teacher to 30 minutes per month. Ms. Lew did not believe that Student needed further assessment to determine his visual motor, fine motor or sensory needs.

100. Student's adaptive physical education teacher, Mr. Estrella, reported that Student had a smooth transition to middle school adapted physical education, although he needed the assistance of his one-on-one aide to stay in designated areas. Student was on target to meet the first benchmark for his dribbling goal, but not for meeting his physical fitness/sit-ups goal. Mr. Estrella recommended continuing to offer Student five days per week in adapted physical education.

101. Mr. Garcia joined the meeting after Mr. Estrella's report. Parents agreed that it was more appropriate for Student to be in Mr. Rojas' SBC class for core academics, with adapted physical education, occupational therapy and speech sessions, rather than attempting to schedule including Student into mild/moderate and general education electives, in light of Parents' intention to shorten Student's school day. All team members agreed that Student should be removed from the mild/moderate and general education classes, and placed in Mr. Rojas' SBC class throughout the school day.

102. The team re-addressed Parents' request for Lindamood-Bell services, and Dr. Murray, Ms. Zinn and Mr. Rojas all opined that Student did not require Lindamood-Bell services to make meaningful progress on his goals. Mr. Rojas strongly believed that the skills described by Ms. Perry were adequately addressed by instruction in his SBC classroom, and that the loss of hours of daily classroom instruction would jeopardize Student's progress. Ms. Zinn could not determine from the Lindamood-Bell test report

what language or communication goals were being addressed, or what expressive, receptive or pragmatic skills were being addressed, and could not recommend service hours without that information. District team members declined to recommend Lindamood-Bell services.

103. The October 22, 2013 IEP amended Student's June 12, 2013 IEP to offer: placement in an SBC classroom; one-on-one aide support for six hours per day; behavior supervision of the aide for three hours per month through November 30, 2013, and two hours per month after; individual speech therapy for 30 minutes three times per week; individual occupational therapy for 30 minutes per week; occupational therapy consultation for 30 minutes per month; and adapted PE five times per week. The IEP included a projected start date for services and modifications and, the anticipated frequency, location and duration of services and modifications.

104. Parents were sent the modified and additional goals discussed in the meeting (initiating conversations, prepositional concepts, describing, labeling emotions, decreasing prompts, independence using a schedule and requesting permission to leave an area). Parents reviewed the proposed goals and consented to implementation of the June 2012, 2013 IEP as amended.

#### Change in Student's Schedule

105. On December 2, 2013, Parents began pulling Student out of school at noon to attend Lindamood-Bell sessions in the afternoon. Student's occupational therapy and speech services were rescheduled for morning sessions only. Mother picked Student up at the SBC community outing locations on Thursdays.

106. As a result of leaving school early, Student missed lunch with typical peers, as well as fifth and sixth period social studies, science and math lessons in Mr. Rojas' class, and social activities with eighth grade students on Friday afternoon. Student was still able to participate in Where Everyone Belongs, as Wednesday was a short day and

lunch took place before noon. Student also missed instructional time in the SBC classroom when he attended speech and occupational therapy sessions, which were moved to the mornings.

107. Student continued to thrive during the time he was in Mr. Rojas' class. Student was a good reader, he could decode, write simple sentences using sight words, could add and subtract using touch math, knew his coins and a dollar bill, navigated in the community with close adult supervision, was independent using the bathroom and expressed his needs in one to two word sentences. Student could expand his speech and use complete sentences with prompting and visual support, and showed great improvement in his social skills with playing games and taking turns. Student continued to struggle with working on classroom assignments for consistent periods, and he became tired and less cooperative towards the end of each week. Student's absences also increased after he started being pulled out of school for Lindamood-Bell, and these absences, which totaled 28 days, or almost six weeks of instructional time, were a source of frustration to Mr. Rojas. Mr. Rojas believed that the lost hours of daily classroom instruction, in conjunction with Student's excessive absences, adversely impacted Student's educational progress.

108. Ms. Raridon supervised Student's one-on-one aide. She collected data on some maladaptive behaviors that Student was experiencing in middle school. It was the opinion of Ms. Raridon, Ms. Lew and Mr. Rojas that most of these behaviors were sensory based or attention seeking. Ms. Raridon developed a positive behavior intervention plan to decrease maladaptive behavior and increase attention, and Ms. Lew developed a sensory diet to support self-regulation for attention, that Mr. Rojas and Student's aide implemented throughout the school day. Over the course of the school year, Student's maladaptive behaviors of touching others, self-touching, aggression,

tantrums (rare) and property damage (rare), were extinguished or greatly reduced, and Student's attention increased.

109. During the 2013-2014 school year, Ms. Zinn (through December 2013) and Heather Way (after October 2013) worked with Student. Ms. Way earned her master's in audiology and speech science in 2003, and provided speech services to students for 10 years pursuant to a credential waiver prior to obtaining her speech pathologist license in October 2013. Both Ms. Zinn and Ms. Way have training and experience in alternative and augmentative communication and assistive technology. Ms. Zinn and Ms. Way were familiar with Student, and their testimony was informative and persuasive. Their opinions regarding Student's needs, progress, and the services required to meet Student's needs were given great weight.

110. Ms. Zinn and Ms. Way used a variety of techniques to elicit language from Student, including pictures, manipulatives to represent people or animals, visual cues, and prompting. They worked with Student on all of his language/communication goals, which addressed expressive language, perseveration (putting a topic in the "done box"), reciprocal communication, and self-advocacy. All of Student's goals addressed language processing, which requires a person to comprehend what is being said and respond in a way that demonstrates understanding. His goals also addressed communication skills, language comprehension, expressive language and pragmatic (social) language. Student's aide came to the speech sessions with Student, and Ms. Zinn and Ms. Way collaborated with Mr. Rojas on a weekly basis to ensure that Student was working on his communication goals throughout the day. Ms. Zinn and Ms. Way worked with Student at Where Everyone Belongs as a group speech session, to reinforce and generalize his communication skills. Ms. Zinn was adamant that Student did not need alternative and augmentative communication services, or assistive technology, during the 2013-2014 school year because Student was verbal, and when prompted and focused could express

himself and verbally relay information in a way that people could understand. Student was more than willing to communicate in speech sessions and with peers during Where Everyone Belongs lunches.

111. On January 13, 2014, Ms. Watts wrote to District that Student's current one-on-one aide was often absent resulting in Student having untrained substitute aides, did not walk with Student to community outings, and did not keep Student safe in the locker room. Although Mr. Estrella was always in the boys' locker room with his students, and the aide drove to the community outings and met Student there, District assigned a male aide trained in ABA to Student.

112. Parents privately funded individuals trained in ABA to accompany Student to Lindamood-Bell sessions. Ms. Patterson observed Student's Lindamood-Bell sessions in February 2014, with the understanding that as the lessons became more difficult, Student engaged in increased stereotypy and protest behaviors. Ms. Patterson understood that once the aides were in place, some behaviors decreased, some stayed the same, and one may have increased.

113. Ms. Patterson observed Student in school in March 2014. She saw that snack time was organized so that the students could participate in games with typical peers. She observed Student engaged in structured play with a peer, engaging in turn taking, and his one-on-one aide provided direction and modeling under the direction of Ms. Riordan, who was accompanying Ms. Patterson.

114. In anticipation of Student's triennial IEP review, District mailed Parents an assessment form requesting consent to assess Student in the areas of academic achievement, health, intellectual development, language and speech, motor development, social/emotional, adaptive behavior, alternative and augmentative communication/assistive technology and functional behavior. Mother signed the consent form on February 11, 2014.

### Third Lindamood-Bell Test

115. On March 17, 2014, Lindamood-Bell administered the same battery of tests to Student for the third time. Student had by then completed almost 300 hours of Talkies. Student showed no progress. Student continued to score at or below the first percentile, except for one fifth percentile score in spelling somehow achieved with a *lower* standard score than previously obtained and no gain in the number of correct responses. Student was able to complete an auditory conceptualization test, but had zero correct responses. Student gave more correct responses than he previously had on one unscored informal writing test. Despite this lack of progress, Lindamood-Bell staff concluded that Student would benefit from further Lindamood-Bell instruction and recommended that Parents enroll Student for another 400-500 hours. Parents did not immediately share this test report with District, although they were aware that District was conducting triennial assessments.

116. Ms. Patterson prepared a new behavior assessment for Student's medical insurer on April 10, 2014. The report was essentially the same April 2012 report, with a few revisions. The goals for Student were unchanged from her November 10, 2012, report, as Student had not received ABA services and her proposed goals had not yet been introduced. The report did not include observations at school or recommendations for Student's school program. In addition to home hours, Ms. Patterson recommended 10 hours of behavior intervention services at Lindamood-Bell and noted that Student was frequently observed having tantrums and being aggressive during Lindamood- Bell sessions.

### Triennial Assessments

117. In March 2014, District contacted Darlene Hanson at Whittier Area Parent's Association to request that they assess Student for speech and language, augmentative

communication and assistive technology. At that time, for the first time, District was informed that Student was receiving services there.

118. Student's speech and language assessment was performed by master's degree externs Lizeth Torres and Nicole Eslamboli, who were qualified to administer the tests given Student, under the supervision of Darlene Hanson. Ms. Hanson is a highly qualified speech and language pathologist. She received her license in 1986 and has worked for her entire career with nonverbal students and alternative and augmentative communication. She has worked as a speech language pathologist in public schools for over 10 years, with a focus on children with autism. Ms. Torres reviewed Student's June 12, 2013 IEP and interviewed Parents, but did not access Whittier Area Parent's Association's file on Student's services.

119. Ms. Hanson chose assessments to determine Student's expressive and receptive language, and his overall functional communication. Where required, Student was prompted for attention to task only, which did not invalidate test results. Student was observed in the classroom and Mr. Rojas, Student's aide and Mother were interviewed to gather informal information. Ms. Torres and Ms. Eslamboli tested Student's functional communication, receptive language skills, nonverbal communication, expressive language skills, and on use of alternate modes of communication. Student was administered the One Word Picture Vocabulary Test-4, and he scored below the first percentile. An attempt was made to administer the Expressive One Word Picture Vocabulary Test-4, but a score could not be obtained, and Ms. Hanson opined that sufficient information regarding Student's expressive language was gathered through informal and non-standardized tests. Student was tested for alternative methods of communication on low-tech devices (static displays, white board, communication board) and a high-tech device (iPad with Proloquo2Go software). Student was able to visually track, identify and discriminate icons from a field of 12-16

choices on both low- and high-tech devices. Student was able to choose answers to WH questions from a screen with a field of four. Student was able to complete tasks independently as well as with a facilitator. Ms. Hansen concluded that Student was able to communicate his wants and needs verbally, but presented with significant receptive and expressive language impairment. She concluded that Student could augment his expressive and social communication with the use of an augmentative communication device, and proposed a goal that Student use the device independently with support at the elbow. She recommended the iPad device with Proloquo2Go. In her report, she recommended 180 minutes of speech services, but this was a typographical/mathematical error, and she had intended to recommend the same level of services Student was currently receiving, or 90 minutes per week, with the addition of training in alternative and augmentative communication on the iPad.

120. In April 2014, District school psychologist Kathie Thompson conducted a psychoeducational assessment of Student. Ms. Thompson has been a school psychologist for 28 years with District. She assesses 20-25 students with severe autism each year, and has assessed approximately 350 students with severe autism over the past 15 years. Ms. Thompson was familiar with Student because she had visited Mr. Rojas' classroom and participated in Where Everyone Belongs lunches on a weekly basis. She reviewed the records in Student's file, including Dr. Gunn's July 2012 report, Ms. Patterson's November 2012 report, and the Lindamood-Bell August 29, 2013, test summary. Her copy of Dr. Gunn's report was illegible and she could not read the test scores. She was able to read his conclusions and recommendations, however, and did not feel it was necessary to obtain the test scores to conduct her assessment. Ms. Thompson observed Student in Mr. Rojas' classroom, where she met Dr. Gunn doing an observation, and at lunch. Ms. Thompson administered a variety of standardized test

instruments to Student. Ms. Thompson obtained developmental scales responses from Parents and Mr. Rojas. She did not speak to Ms. Patterson or anyone at Lindamood-Bell.

121. Ms. Thompson attempted to administer a subtest of the Wechsler Nonverbal Scale of Ability to test Student's cognitive ability, but he did not understand some of the tasks and had difficulty sustaining attention, and so she could not report valid scores. She was able to measure Student's cognitive abilities with the Southern California Ordinal Scales, and measured Student's adaptive functioning and social emotional functioning with Scales of Independent Behavior rating scales using responses provided by Parents and Mr. Rojas. The Ordinal Scales were designed to assess severely impaired students with autism, and Ms. Thompson opined that it provided sufficient information to measure Student's cognitive level. She found that Student had mastered tasks at the two to four-year-old level, and had skills in the four to seven-year old level. She administered subtests of the Woodcock Johnson academic tests by walking Student through the test, and obtained information regarding Student's academic functioning for academic planning purposes, but no valid scores due to the assistance provided. She did not test Student for auditory processing, as she did not believe that Student was able to listen to and repeat the long lists of sentences required. She obtained information on Student's executive functioning, language functioning and processing, attention skills and behavior from the Scales of Behavior, Student's records and observation, and it was her professional opinion that separate testing in those areas was not necessary to identify Student's needs. She did not test Student for hyperactivity. Student had a history of sensory issues and attention issues that were a natural consequence of his autism, and she did not see hyperactivity as an issue. Ms. Thompson reported that Student had mastered skills at the preconceptual thought (two to four years) cognitive level, with emerging skills at the intuitive thought (four to seven) cognitive level. Student had functional independence (a combination of motor, social

interaction and communication, personal living and community living skills) comparable to a three year old, which is consistent with the preconceptual thought level. She concluded that Student would need extensive support due to his very limited functional independence.

122. In March and April 2014, Ms. Nguyen performed an occupational therapy assessment of Student. She was well trained and experienced in administering the tests used, and administered them as consistently with publisher instructions as she could. She reported when her assistance invalidated scores. She also reviewed Student's records, and interviewed Mr. Rojas, Parents, the occupational therapist at DG Therapy, and Ms. Lew. She observed Student for two hours in adapted physical education and Mr. Rojas' classroom, observed him during testing, administered standardized tests, and reviewed work samples. She administered a variety of assessment tools, including tests of visual motor integration, motor coordination and fine manual control, and Student scored very low to below average on all tests administered. She assessed Student's fine motor and gross motor skills, and found them functional to access the classroom. Ms. Nguyen used the Sensory Processing Measure, a rating scales, to determine which parts of Student's sensory system have the most impact on Student's ability to access his education. She found that Student had sensory processing difficulties in the areas of tactile (touch), proprioceptive (muscles/joints) and vestibular (head acceleration/gravity) Ms. Nguyen concluded that Student had moderate to severe deficits in fine motor and visual motor integration skills, particularly in writing, and sensory processing difficulties, and made recommendations for addressing both.

123. In April 2014, Ms. Raridon conducted a functional behavior assessment of Student. Ms. Raridon was trained and experienced in conducting functional behavior assessments. A functional behavior assessment is not standardized, and Ms. Raridon assessed Student's functional behavior through collection of data and observation over

a six week period. Ms. Raridon reviewed records, sent a variety of questionnaires to Parents to gather information on in-home behavior, and observed Student in Mr. Rojas' classroom once a week for 20-60 minutes each time. With the input of school staff, she identified problem behaviors of inappropriate self-touching, inappropriate touching of others, aggression, self-injury and tantrums, and collected data on those behaviors. Tantrum behavior had not occurred since September 2013 in Mr. Rojas' classroom, and aggression and self-injury were reported as rare, and none of these behaviors occurred during data collection. Self-touching occurred an average of nine times per day, and inappropriate touching of others occurred nine times during the data collection period. Ms. Raridon concluded that Student's self-touching was sensory seeking, as Student did not look at others and was easily redirected, and that his inappropriate touching of others was attention seeking, and made recommendations on addressing both behaviors, including increased social interaction skills and use of replacement behaviors.

124. In April 2014, Mr. Estrella conducted an adapted physical education assessment using the Competency Test for Adapted Physical Education to test Student for locomotor, sport, gymnastics and fitness skills, and the Adapted Physical Education Assessment Scale to test perceptual motor function, object control skills, locomotor skills, physical fitness skills and Body Mass Index. These tests identified Student's gross motor skill needs, which at the middle school level were primarily in the areas of ball control and physical fitness. Mr. Estrella recommended adapted physical education five days per week to work on proposed goals in these areas.

125. The uncontroverted and credible testimony of the District personnel who performed the triennial assessments showed that all standardized tests given to Student were appropriate, administered according to test instructions to the extent possible, administered by qualified personnel and were not biased.

## Private Whittier Area Parent's Association Progress Report

126. After one year of services, Whittier Area Parent's Association reported to Parents on April 1, 2014, that Student had not met any of his facilitated communication goals, and recommended that the same goals be continued. Student made progress in using speech, gestures, typing and pointing to communicate, but required moderate to maximum verbal prompting and physical support from his therapist hand over hand or at the wrist or elbow when pointing or typing. The cohesiveness and length of Student's typed responses increased when his therapist provided him with increased physical support. Student's therapist would provide physical support for his arm with "backward resistance and pull back," essentially pushing and pulling Student's arm or hand as Student directed it over the keyboard. It was difficult for Student to type out a whole thought as well as stay attentive to a given topic. The speech pathologist, Katharine Anawalt, identified Student's speech and language needs as more communication independence, less prompting, learning to type independently, and being more attentive.

127. Ms. Anawalt earned a bachelor's degree in psychology in 2006, and a master's degree in communication disorders in 2012. She received her speech and language pathologist license in 2013. While an undergraduate in 2004, she learned the proprietary Rapid Prompting Method for communicating with children with autism, and has since that time had extensive experience as a rapid prompting tutor and demonstrator. Ms. Anawalt had been with Whittier Area Parent's Association since February 2013, and was Student's therapist for four months in 2013. In her opinion, Student is severely impacted by his autism, which gets in the way of his communicating his full thoughts. She observed that Student's speech improved as early as September and October 2013, and that he was using speech more reliably. Ms. Anawalt opined that Student's language and communication goals in the June 2013 IEP addressed Student's

needs, although she might have written them differently, and that Student's facilitated communication services were educationally necessary. Ms. Anawalt appeared nervous while testifying, and was unable to give dates or details about the important event of acquiring her professional license the previous year, adversely impacting her credibility. Ms. Anawalt was also only recently licensed as a speech pathologist, her experience was almost exclusively in one proprietary method of alternative communication, and her opinions regarding Student's speech and language, alternative and augmentative communication, and assistive technology needs were given less weight than those of Ms. Haney, Ms. Zinn, Ms. Way, and Ms. Hanson.

#### Dr. Gunn's 2014 Assessment

128. In March and April 2014, Dr. Gunn performed another neuropsychological evaluation of Student.

129. New documents provided by Parents to Dr. Gunn included Student's June 12, 2012 IEP, Ms. Patterson's November 2012 behavior report, Student's June 12, 2013 IEP, the August 2013 Lindamood-Bell test summary, DG Therapy's September 2013 occupational therapy progress report, miscellaneous notes from Student's school-based speech pathologists, and Student's October 22, 2013 IEP.

130. Dr. Gunn observed Student at Doty Middle School as Student left Mr. Rojas' classroom to go to speech therapy. Student spontaneously greeted Dr. Gunn by name. During speech therapy, Student engaged in echolalia, but the speech therapist was able to elicit appropriate and accurate statements from Student in response to questions. Back in Mr. Rojas' classroom, the occupational therapist and aide worked with Student on tracing and writing. Student read his Edmark lesson, both independently and with prompts, and answered multiple choice comprehension questions. Student was given regular breaks to lay on the carpet or sit on a yoga ball, and although he was often inattentive and distractible, he was easily redirected.

131. Dr. Gunn found that Student's autism prevented him from taking many of the tests that he would typically include in his comprehensive evaluation. Student again scored below the first percentile on tests of expressive and receptive language, and Dr. Gunn concluded that Student had delayed language skills. Student scored at or below the first percentile on every test of academic achievement administered. Dr. Gunn determined that Student was delayed in his visual perceptual skills and executive functioning. Dr. Gunn compared responses from Parent, a consultant at Lindamood-Bell, Mr. Rojas, and Student's school aide, and determined that Student very likely had autism, although some of Student's symptoms of autism were reported to be less severe. Dr. Gunn found that Student had delayed to low average sensorimotor functioning and non-typical sensory processing. Student was also delayed across all tests of adaptive functioning. His qualitative observation of Student was that Student was less symptomatic of autism, but that Student's language remained delayed, as he continued to echo phrases, script and repetitively used phrases, but less so than during the 2012 evaluation. Student also used complete sentences with prompting, and no longer needed modeling. Dr. Gunn changed his placement recommendation to the District SBC class with an aide, although he commented that he would like to see more one-on-one teaching. He recommended 20 hours of ABA therapy in the home or community rather than at Lindamood-Bell, a 30-minute per week increase in group speech therapy, that Student only receive occupational therapy from someone certified in sensory integration, and that Student be reassessed in one year. Dr. Gunn was surprised and thrilled with Student's progress. Parents attributed Student's progress to the Lindamood-Bell program, and throughout his report, Dr. Gunn did as well.

132. Also in April, Mr. Rojas and Carrie Redfox, a counselor in charge of scheduling, arranged for Student to visit the general education art class. During the first

visit Student worked on his iPad and the second time he refused to complete a classroom task for his aide and had to be taken out of the classroom.

April 22, 2014 IEP

133. On April 22, 2014, District convened Student's triennial review IEP team meeting. All relevant District team members attended. Parents attended with their advocate, Ms. Watts, and Ms. Patterson. The meeting lasted approximately five hours. Parents were given advance notification of the meeting early enough to ensure an opportunity to attend, including the purpose, time, location and who would be in attendance. Parents were provided with a copy of procedural safeguards.

134. Ms. Thompson reported on her assessments results and Mr. Rojas reviewed Student's present levels and performance in the classroom. Student had mastered Edmark lesson 72 with comprehension, and responded accurately to questions on stories from mastered vocabulary from a field of two choices. Student's penmanship was very good and he was able to copy four sentences from the board. He was reading 103 sight words from the Dolch list (words that cannot be sounded out phonetically). Student met his academic goals in vocabulary, reading comprehension, spelling and math, and had made partial progress on another math goal (subtraction with carrying). Mr. Rojas proposed new goals to increase Student's sight word vocabulary, reading comprehension, double-digit subtraction with carrying, ability to combine coins to a higher value, and ability to write simple sentences when given four vocabulary words. He also proposed attention goals for Student to increase attention to task to 15 minutes and to ask for help appropriately (raising his hand before shouting out).

135. Ms. Hanson reviewed her speech and language, alternative and augmentative communication and assistive technology assessment, and Ms. Way reviewed Student's progress on his language and communication goals. Ms. Way reported that Student met his goal of answering WH questions, particularly in more

accurately distinguishing between who, what and where, and his goals to appropriately ask for help and use pronouns correctly. Student made good progress on his other goals. Student could comment naturally without carrier phrases, and could stay on topic although he could not hold off bringing up a topic of perseveration for 60 minutes. He used pronouns correctly with some verbal or visual prompting, could describe items by feature although not by class and function, and understood a number but not all prepositional concepts. Student labeled pictures of the emotions of others with 100 percent accuracy and was able to identify his own internal states, although he would only label happy and sleepy. Ms. Way proposed goals on the use of carrier phrases to be more precise, labeling and expressing basic emotions, maintaining a conversation on a topic of interest for two minutes, and demonstrating understanding of prepositional concepts. Ms. Hanson proposed her augmentative communication goal to learn use of an augmentative communication device (iPad).

136. Ms. Raridon reported on the functional behavior analysis, noting that Student's maladaptive behaviors had decreased over the course of the school year, and that Student was easily redirected from the behaviors targeted in the assessment. Ms. Raridon proposed strategies to address each function of behavior, including clear and consistent behavioral expectations, reduced unstructured time, antecedent manipulation to avoid triggering behaviors, increased prompting during likely times of maladaptive behavior, exposure to a variety of social settings, and continued data collection. She also proposed a behavior intervention plan to be included in Student's IEP to document these approaches. Student met his goal to focus and stay on task, and made progress on others, including initiating and engaging in interaction with others, independently following a schedule, and staying engaged with peers in a game without prompting. Ms. Raridon proposed goals for Student, and after input from Ms. Patterson and team discussion, the goals were revised to have Student independently engage with a peer in

a leisure activity for 15 minutes, use a replacement behavior instead of inappropriately touching peers, and follow a schedule independently.

137. Ms. Nguyen reviewed the occupational therapy assessment. Student's school-based occupational therapist, Vanessa Lew, reported that Student had made progress on improving self-regulation and in his visual motor goal, and proposed a goal that combined his sensory and visual motor needs by having Student improve attention to a fine motor task, such as writing, by engaging in a sensory motor activity just prior to that task.

138. Ms. Redfox told the team that the next change in exploratory wheel classes would take place on May 5, 2014, and recommended that Student attend one of the general education elective classes.

139. The team adopted the proposed goals in vocabulary (200 words), reading comprehension (who, what, where and when), subtraction (two-digit with grouping), money (combine coins to \$1), writing (four simple sentences), asking for help (without prompts), communication (initiate conversation), independence (follow 5-item schedule), social interaction (independently attend to tasks for 20 minutes), visual motor and sensory (copy 5-6 sentences from visual model), expressive language (comment on surroundings, label and express emotional state, stay on topic for two minutes), receptive language (prepositional concepts), sit-ups, running, dribble basketball, speech (use iPad to express an idea), leisure skills (engage in activity with peer for 15 minutes) and physical interaction (reduce inappropriate touching). Each goal built upon the previous progress, and each goal described how Student's progress on those goals would be measured, and procedures for determining whether the instructional objectives were achieved.

140. The April 22, 2014 IEP offered Student the following program: placement in the SBC classroom with one period of a general education elective three days per

week; a one-on-one aide for six hours per day; behavior intervention services (aide supervision) for 120 minutes per month; occupational therapy one time per week for 50 minutes with 60 minutes per year of consult; speech therapy consisting of individual 30 minutes sessions three times per week and a group session of 30 minutes once a week (social skills class); adapted physical education one period five times per week; and seven hours of augmentative communication consult. The April 22, 2014 IEP included a projected start date for services and modifications and the anticipated frequency, location and duration for those services and modifications.

141. For the 2014 extended school year, the April 22, 2014 IEP offered: placement in the SBC classroom 210 minutes per day;<sup>9</sup> a one-on-one aide 210 minutes per day; behavior intervention services (aide supervision) 90 minutes per month; occupational therapy one time per week for 32 minutes; speech therapy consisting of individual 20 minute sessions two times per week and a group session 20 minutes once a week (social skills class); adapted physical education consisting of 35 minutes sessions four times per week; and seven hours of augmentative communication consult.

142. The April 22, 2014 IEP documented Student's present levels of performance as reported. The IEP included statements of the specific services to be provided, the extent to which the Student could participate in regular educational programs, and the program modifications or supports for school personnel that would be provided to Student to allow him to advance appropriately toward attaining his annual goals, be involved and make progress in the general education curriculum, to participate in extracurricular activities and other nonacademic activities, and be

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<sup>9</sup> A typographical error states 2010 minutes per week, but the IEP team, including Parents, understood that the offer was for 210 minutes per day.

educated and participate in activities with other children with disabilities and nondisabled children.

143. Parents did not consent to any portion of the April 22, 2014 IEP.

#### Fourth Lindamood-Bell Test

144. On September 8, 2014, Lindamood-Bell tested Student with the same battery of tests for a fourth time, after 466 hours of instruction (441 in Talkies and 25 in Seeing Stars). Student continued to score at or below the first percentile on all tests, and showed no progress.

#### DISTRICT'S EXPERT

145. At hearing, Dr. Robert Patterson provided expert testimony for District. Dr. Patterson is an extremely well qualified psychologist, and has been a licensed educational psychologist since 1984, a nationally certified school psychologist since 1989, and a licensed psychologist since 1990. He is a graduate of the Applied Behavior Institute and was a behaviorist for 10 years. He has decades of experience in assessing the educational needs of students with disabilities. For the past 20 years he has assessed an average of one student with moderate to severe autism every one and a half to two months. Dr. Patterson is familiar with the Edmark and Lindamood-Bell programs. Dr. Patterson did not assess Student, but he reviewed all the records put into evidence by Student, including assessments by District in 2011 and 2014, Dr. Gunn's 2012 and 2014 assessments, Ms. Patterson's 2012 and 2014 assessments, the Lindamood-Bell testing, and the progress reports of DG therapy and Whittier Area Parent's Association. His testimony in all areas was thoughtful, informative and persuasive, and accorded great weight. His interpretations of the results of Student's psychological testing as it relates to a student with severe autism were given greater weight than that of Dr. Gunn. His opinions regarding the efficacy of the Talkies program for Student, based upon his

knowledge of the program and the Talkies materials admitted into evidence, were given greater weight than that of Ms. Perry. Due to his greater knowledge, training and experience in ABA methodology, Dr. Patterson's opinions regarding the appropriateness of ABA programs for Student were given greater weight than those of Dr. Gunn.

146. In Dr. Patterson's opinion, Student had severe cognitive delays and significant learning challenges. He opined that Student's progress would be slow, regardless of what program used, but that Student's educational records showed that he was making slow but steady progress in academics, communication, attention and behavior. He explained that intensive ABA programs are usually recommended for children two to four years old with average intelligence, and best practice would weigh against starting an intensive ABA program for a child in middle school. He noted that the question of whether autism was curable was very controversial in the field of autism research. He explained that Edmark is a reliable program and scientifically shown to work for students with cognitive delays. He opined that it was functional, practical and the Edmark lessons learned would serve Student well as he grew up and went into the world. Dr. Patterson has been following Lindamood-Bell's programs since the original program inception about 40 years ago. The "LIPS" program is researched based, but the other programs, including Talkies, are not, and have not been shown by scientific peer-reviewed research to be effective in teaching reading or language development to children, let alone children with severe autism. He was adamant and persuasive that the series of Lindamood-Bell testing summaries did not demonstrate any progress by Student in any of the skills tested.

## LEGAL CONCLUSIONS

### INTRODUCTION – LEGAL FRAMEWORK UNDER THE IDEA<sup>10</sup>

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et seq.; 34 C.F.R. § 300.1 (2006) et seq.<sup>11</sup>; Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that all children with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17; Cal. Code Regs., tit. 5, § 3001, subd. (p).<sup>12</sup>) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other

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<sup>10</sup> Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

<sup>11</sup> All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

<sup>12</sup> Title 5, California Code of Regulations, sections 3000 et seq., were substantially revised effective July 1, 2014. As all the events and actions at issue in this matter pre-date that revision, the references in this decision are to the pre-July 2014 regulations.

developmental, corrective, and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a) [In California, related services are also called designated instruction and services].) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic, and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d); Ed. Code, § 56032.)

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

desired to do so.] (*Mercer Island*.) Although sometimes described in Ninth Circuit cases as “educational benefit,” “some educational benefit,” or “meaningful educational benefit,” all of these phrases mean the *Rowley* standard, which should be applied to determine whether an individual child was provided a FAPE. (*Id.* at p. 950, fn. 10.)

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

## 2012-2013 SCHOOL YEAR

### Issue 1(a) - Team Meetings for Lack of Anticipated Progress

5. Student contends that between May 2, 2012, and June 12, 2012, District was required to convene an IEP team meeting because Student was not making anticipated progress, that is, Student was not on target to meet all goals. District contends that Student was making progress and annual meetings were appropriate.

6. An IEP team must review a student’s IEP at least annually to review the pupil’s progress, to determine whether the annual goals are being achieved, and revise

the IEP as appropriate, taking into account among other matters, whether there is a lack of expected progress toward the annual goals. (34 C.F.R. § 300.324(b)(1)(ii)(a); Ed. Code, § 56341.1, subd. (d)(1).) The IEP team shall also meet whenever the student “demonstrates a lack of anticipated progress.” (Ed. Code, § 56343, subd. (b).) To the extent possible, a school district shall encourage the consolidation of reassessment meetings or other IEP team meetings. (20 U.S.C., § 1414(d)(3)(E).)

7. The IDEA imposes many procedural obligations on school districts when scheduling and conducting IEP team meetings but, as a practical matter, districts must also identify attendees, contact each individual, schedule around work and family schedules, and accommodate the personal and professional obligations of all team members. Where, as here, the IEP team includes multiple service providers and student advocates, arranging an IEP team meeting can be a massive undertaking. The IDEA recognizes the procedural and logistical realities of scheduling and conducting IEP team meetings and encourages school districts to avoid multiple meetings where one meeting would suffice. The period of claims reached by this due process proceeding begins May 2, 2012, and an IEP team meeting to review Student’s progress was scheduled for June 12, 2012, just over one month later. District had no obligation to, and was discouraged by federal law from, holding another IEP team meeting between May 2 and June 12, 2012, for the same purpose. Further, Student was making good progress from May 2 through June 12, 2012. By June 12, 2012, Student met most of his academic goals and two language goals, and made progress on the others. In essence, Student is contending that the Education Code required District to hold an IEP team meeting just because Student had made progress on, but was not on target to completely achieve, his academic goal to respond to WH questions and his visual motor goal to improve writing mechanics.

8. However, Student's interpretation of California law to require District to convene an IEP team meeting every time Student missed an objective or was not on target to meet a goal, as a *per se* lack of "anticipated" progress, is unreasonable and inconsistent with the IDEA. First, both the IDEA and California law require IEP review of annual goals, not the objectives listed to achieve those goals. Second, the California legislature mandated review for lack of progress, without reference to whether objectives were met, and the legislature is presumed to have meant exactly what it said. (*In re Dannenberg* (2005) 34 Cal.4th 1061, 1081.) Third, the IDEA does not contemplate that all annual goals will be achieved. It expressly provides that one of the purposes of the annual IEP review is to determine whether annual goals are being achieved and *revise* the IEP to address any lack of expected *progress toward* those goals. (34 C.F.R. § 300.324(b)(1)(ii)(A).)

9. No one test exists for measuring the adequacy of educational benefits conferred under an IEP. (*Rowley, supra*, 458 U.S. at pp. 202, 203 fn. 25.) A student may derive educational benefit under Rowley if some of his goals and objectives are not fully met, or if he makes no progress toward some of them, as long as he makes progress toward others. A student's failure to perform at grade level is not necessarily indicative of a denial of a FAPE, as long as the student is making progress commensurate with his abilities. (*Walczak v. Florida Union Free School Dist.* (2nd Cir. 1998) 142 F.3d 119, 130; *E.S. v. Independent School Dist, No. 196* (8th Cir. 1998) 135 F.3d 566, 569; *In re Conklin* (4th Cir. 1991) 946 F.2d 306, 313; *El Paso Indep. School Dist. v. Robert W.* (W.D.Tex. 1995) 898 F.Supp.442, 449-450; *Perusse v. Poway Unified School Dist.* (S.D. Calif. July 12, 2010, No. 09 CV 1627) 2010 WL 2735759.)

10. Here, Student was making progress on all of his goals, and by June 12, 2012, had met many of them. Student's slow but steady progress was commensurate

with his abilities. The evidence did not support a finding that an IEP team meeting was required between May 2 and June 12, 2012, due to lack of anticipated progress.

11. Student failed to prove by a preponderance of the evidence that he was denied a FAPE by the District's failure to conduct an IEP team meeting between May 2, 2012, and June 12, 2012.

#### Issue 1(b) - Need for Additional Assessment

12. Student contends that District did not assess Student sufficiently to identify all his areas of need prior to the June 12, 2012 IEP team meeting. Student argues that he continued to present at substantially the same levels of deficits in language, communication and behavior warranting reassessment. Student contends that had District conducted comprehensive assessments it would have acquired data and information for the June 12, 2012 IEP team to make appropriate adjustments to Student's program. District responds that Student's needs were identified and Student was making progress, and additional assessment was not required.

13. Special education law references "initial evaluations" (20 U.S.C. § 1414(a)(1)(A); 34 C.F.R. § 300.301; Ed. Code, § 56320), and "reevaluations." (20 U.S.C. § 1414(a), (c); 34 C.F.R. § 300.303; Ed. Code, § 56381, subd. (a)(1).) "An initial evaluation is the first complete assessment of a child to determine if the child has a disability under the IDEA, and the nature and extent of special education and related services required. Once a child has been fully evaluated. . . any subsequent evaluation of that child would constitute a reevaluation." (71 Fed.Reg. 46640 (Aug. 14, 2006).) California law refers to a reevaluation as a "reassessment." (Ed. Code, § 56381.)

14. A district must conduct a reassessment if it "determines that the educational or related service needs, including improved academic achievement and functional performance, of the child warrant a reevaluation," or if the student's parents or teacher request a reassessment. (20 U.S.C. § 1414(a)(2)(A)(i); see also Ed. Code, §

56381, subd. (a)(1).) A reassessment shall occur not more frequently than once a year, unless the parent and the district agree otherwise, and shall occur at least once every three years, unless the parent and the district agree, in writing, that a reassessment is unnecessary. (20 U.S.C. § 1414(a)(2)(B); Ed. Code, § 56381, subd. (a)(2).)

15. A school district's failure to conduct appropriate assessments, or to assess in all areas of suspected disability, may constitute a procedural denial of a FAPE. (*Park v. Anaheim Union High School District* (9th Cir. 2006), 464 F.3d 1025, 1031-1033.) 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).)

16. A school district's determinations regarding special education are based on what was objectively reasonable for the district to conclude given the information the district had at the time of making the determination. A district cannot "be judged exclusively in hindsight" but instead, "an IEP must take into account what was, and what was not, objectively reasonable...at the time the IEP was drafted." (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149 (*Adams*), citing *Fuhrmann v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041 (*Fuhrmann*).)

17. The weight of the evidence established that Student was making meaningful progress on his academic, communication, social emotional, and behavior's goals prior to the June 12, 2012 IEP team meeting, and reassessments were not warranted due to lack of progress, nor were they requested by Parents or Student's teachers.

18. In May 2011, District completed a comprehensive triennial psychoeducational evaluation that assessed Student in the areas of cognitive ability, academic achievement, communication, adaptive behavior, daily living and socialization.

District's psychoeducational assessment identified Student's functional cognitive abilities at the preconceptual thought level typical of two to four year olds, and identified delays in language, communication, socialization, attention, daily living skills and adaptive behavior. Goals were written to address these needs, and by June 2012 Student met most goals and made progress on others.

19. The evidence did not show that District had failed to identify any of Student's needs prior to the June 12, 2012 IEP team meeting. Notably, both of the independent assessments obtained by Parents not long after this IEP team meeting were consistent with District's evaluation of Student's needs. Dr. Gunn's results in the July 2012 neuropsychological assessment of Student were consistent with those of the 2011 triennial psychoeducational assessment reported to the team. Dr. Gunn was unable to determine Student's cognitive ability, but found delays in language, academics, behavior, socialization and adaptive functioning. Dr. Gunn assessed Student's sensory processing and found the same sensory issues as the District's 2011 triennial occupational therapy report. Similarly, Ms. Patterson's November 10, 2012, behavior assessment found delays in communication, social interaction, social emotional skills, and adaptive behavior. This is not a case of private assessments describing a different child from the one identified in District's assessments. Although these private assessments were not completed before the June 12, 2012 IEP team meeting, or presented to the IEP team for consideration, they are strong evidence that the results of Student's triennial assessment and the opinions of Student's teachers and providers had provided the team with accurate information on Student's needs in June 2012 to develop annual goals and an appropriate educational program.

20. Student did not produce a speech and language expert to testify that Student had speech and language needs not identified by District prior to June 12, 2012, or to contradict the testimony of Ms. Haney that Student's language and

communication needs were appropriately addressed by the June 12, 2012, goals. Dr. Gunn testified generally concerning Student's language and communication, but he is not a speech and language pathologist and deferred to Student's speech therapy provider for "treatment planning" in his July 2012 report. Dr. Gunn's testimony on Student's language and communication needs was given less weight than that of District's highly qualified speech and language pathologists, Ms. Haney, Ms. Zinn, Ms. Way, and Ms. Hanson. Student's language was assessed in 2011, and at that time needs were identified in the areas of receptive, expressive and pragmatic (social) language. As of 2012, no further language or communication assessment was required, particularly when professionals familiar with Student's needs and present levels of performance attended the IEP team meeting.

21. Student did not produce an expert in alternative and augmentative communication, or assistive technology, or any other evidence that supported a need for those services in June 2012. Ms. Anawalt did not begin working with Student until April 2013, and did not address the June 12, 2012 IEP at hearing. Ms. Anawalt made it clear that Whittier Area Parent's Association was providing a supplemental means to address Student's known communication delays, and her testimony did not establish that Student had unidentified communication needs as of the June 12, 2012 IEP team meeting. The fact that Student was assessed for alternative and augmentative communication and assistive technology in 2014, and offered services in both areas at that time, does not create an inference that Student had unidentified and unaddressed needs in these areas two years earlier in June 2012. (See *Sioux Falls School Dist. v. Koupal* (S.D. 1994 S.D.) 526 N.W.2d 248, 252), *cert. denied* 515 U.S. 1143 (1995).) As of June of 2012, Student was making progress on his communication, expressive language and pragmatic language goals without access to additional assistive and augmentative communication strategies, and without higher level assistive technology than the choice

boards and keyboards used by Student. Ms. Haney, a speech pathologist certified in assistive technology and trained in the use of alternative and augmentative communication, persuasively explained that Student did not need alternative and augmentative communication or assistive technology at the time of the June 12, 2012 IEP, and that it was appropriate to develop annual goals expanding on Student's verbal language in addressing his communication delays.

22. Student's behavior and sensory processing needs were identified prior to the June 12, 2012 IEP team meeting. The IEP expressly referenced Student's need for a sensory diet, and his limited focus and need for frequent prompting, and Ms. Nguyen presented on Student's sensory seeking behavior and sensory strategies. The IEP wrote a goal for behavior and attending. Although Student was exhibiting increased distractibility and decreased ability to attend for extended periods at the time of the June 12, 2012 IEP team meeting, particularly as to fine motor tasks such as writing, he was not exhibiting maladaptive behaviors, and his focus and attention was being addressed by the classroom staff with prompts for redirection.

23. At the IEP team meeting of June 12, 2012, Parents informed the IEP team that they were obtaining a private neuropsychological assessment of Student for a possible neurological basis for the increased physical activity seen in the home. This statement did not constitute a parental request for a functional behavior assessment, before or at the June 2012 IEP team meeting.

24. In sum, Student failed to meet his burden of establishing by a preponderance of the evidence that Student was denied a FAPE because District should have performed psychoeducational, language and speech, assistive and augmentative

communication, assistive technology or functional behavior assessments prior to the June 12, 2012 IEP team meeting.<sup>13</sup>

25. Even had assessments or reassessments in these areas been warranted or requested, 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. As discussed in the analysis of Issues 1(c) through (g), below, the evidence did not demonstrate that the IEP of June 12, 2012, denied Student a FAPE.

#### Issue 1(c) - Consideration of Parent Concerns

26. Student contends that the June 12, 2012 IEP team did not take Parents concerns into account, essentially because it did not make substantive changes to Student's program, depriving them of a meaningful opportunity to participate in the development of Student's IEP. District contends that Parents' concerns were considered, and Parents were provided a meaningful opportunity to participate in development of Student's IEP.

27. 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 (*N.L.*); *Fuhrmann, supra*, 993 F.2d at p. 1036 [parent who has an opportunity to discuss a proposed IEP and

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<sup>13</sup> Student's complaint does not allege that Student required additional occupational therapy assessments in any year.

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

28. Both parents attended the June 12, 2012 IEP team meeting, and were accompanied by an attorney who addressed the team. Parents were informed of Student's problems, discussed with the team a possible neurological basis for Student's distractibility, brainstormed with the team on goals and services, and requested that Student be retained for a second year in fifth grade. Parents not only had an opportunity to disagree with the IEP team's initial recommendation and request that Student be retained in fifth grade, they successfully persuaded the team to do so. Parents also expressly signed on the IEP document that they had been given an opportunity to participate in development of Student's IEP.

29. The weight of the evidence established that Parents were afforded an opportunity to, and did, meaningfully participate in, the development of Student's IEP at the June 12, 2012, team meeting. Student did not meet his burden of establishing that he was denied a FAPE because Parents' concerns were heard and considered by the IEP team.

#### Issue 1(d) - Predetermination

30. Student contends that District made recommendations and offered services that were predetermined, denying Parents the opportunity to meaningfully participate in the development of Student's June 12, 2012 IEP. Student argues that District staff attended the meeting with the agenda of maintaining the "status quo." District contends that it did not procedurally violate the IDEA by predetermining Student's IEP or by denying Parents the opportunity to meaningfully participate in the IEP process. District contends that its offer of a FAPE incorporated goals, placement and services that resulted from active collaboration by all IEP team members, including Parents and their advocates.

31. An education agency's predetermination of an IEP seriously infringes on parental participation in the IEP process, which constitutes a procedural denial of FAPE. (*Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2004) 392 F.3d 840, 858.)

Predetermination occurs "when an educational agency has made its determination prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives." (*H.B., et al. v. Las Virgenes Unified School Dist.* (9th Cir. 2007) 239 Fed.Appx. 342, 344 (*H.B.*); see also, *Ms. S. ex rel G. v. Vashon Island Sch. Dist.* (9th Cir. 2003) 337 F.3d 1115, 1131 (*Vashon Island*) ["A school district violates IDEA procedures if it independently develops an IEP, without meaningful parental participation, then simply presents the IEP to the parent for ratification."].)

32. No evidence was offered that District team members met before the June 12, 2012, meeting to discuss the terms of Student's IEP, or entered into agreements regarding Student's IEP outside of Student's IEP meetings. District team members clearly considered different placement options, as the offer was changed from promotion to middle school to retention in elementary school. Teachers and service providers met informally to discuss Student's progress and program throughout the 2011-2012 school year, but went into the June 12, 2012, with open minds. Not every meeting to discuss programming for the student or the progress he is making needs to be an IEP team meeting, subject to parental notice and participation. School district personnel may meet informally and engage in conversations on issues such as teaching methodology, lesson plans, coordination of service provision or potential services or placement, so long as they come to an IEP team meeting with an open mind. (See, e.g., *Busar v. Corpus Christi Independent School Dist.* (1995 5th Cir.) 51 F.3d 490, 494, fn. 7, *cert. denied* 516 U.S. 916 (1995); *R.S. and S.L. v. Miami-Dade County School Bd.* (2014 11th Cir.) 757 F.3d 1173, 1188-1189.)

33. Student's contention that he was denied a FAPE because District team members sought to offer the "status quo" at the June 12, 2012, meeting seems particularly disingenuous, in that Parents advocated at that meeting for the "status quo" of Student being retained in his existing fifth grade SBC classroom.

34. The weight of the evidence established that Student's program had not been predetermined by the District team members, and Student failed to meet his burden of showing that he was denied a FAPE on this basis.

#### Issue 1(e) - Completeness of June 12, 2012 IEP Document

35. Student contends that District failed to include complete information in the June 12, 2012 IEP document. Specifically, Student argues that the IEP failed to include goals to address all of Student's identified needs, including a dressing goal, and did not specify details regarding the specialized instruction and services to be provided. District contends that the IEP document is sufficiently complete.

36. 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).)

37. An annual IEP must contain a statement of measurable annual goals designed to: (1) meet the individual's needs that result from the individual's disability to enable the pupil to be involved in and make progress in the general curriculum; and (2)

meet each of the pupil's other educational needs that result from the individual's disability. (20 U.S.C. § 1414(d)(1)(A)(i)(II); 34 C.F.R. § 300.320(a)(2)(i); Ed. Code, § 56345, subd. (a)(2).) Annual goals are statements that describe what a child with a disability can reasonably be expected to accomplish within a 12-month period in the child's special education program. (Letter to Butler, 213 IDELR 118 (OSERS 1988); Notice of Interpretation, Appendix A to 34 C.F.R., part 300, Question 4 (1999 regulations).)

38. In addition, the IEP must include "appropriate objective criteria, evaluation procedures, and schedules for determining, on at least an annual basis, whether the annual goals are being achieved," and a statement of how the student's progress toward the goals will be measured. (Ed. Code, § 56345, subd. (7), (9); 20 U.S.C. § 1414(d)(1)(A)(i)(III).) An examination of an IEP's goals is central to the determination of whether a student has received a FAPE. In *Adams*, the court stated: "[W]e look to the [IEP] goals and goal achieving methods at the time the plan was implemented and ask whether these methods were reasonably calculated to confer ... a meaningful benefit." (*Adams, supra*, 195 F.3d at p. 1149.)

39. As discussed at Issue 1(b), Student's needs were identified and goals written to address those needs. Ms. Walls, a highly qualified special education teacher with extensive experience in teaching students with autism, testified persuasively that the goals written by the June 12, 2012 IEP team appropriately addressed educational needs exhibited by Student in the 2012-2013 school year. Ms. Nguyen testified persuasively that Student's fine motor and visual motor needs were appropriately addressed with the visual motor skills goal. Ms. Haney testified persuasively that the language/communication goals written by the June 12, 2012 IEP team addressed Student's speech and language needs, and appropriately targeted language processing, language comprehension, expressive language, and pragmatic language.

40. The weight of the evidence established that the June 12, 2012 IEP goals were measurable, and addressed the full range of Student's needs, with each goal typically addressing multiple skill deficits. The frequency and duration of services offered to enable Student to make progress on his goals were also stated in the IEP. The sole exception was the frequency and duration of services offered for the extended school year 2012, addressed at Issue 1(f).

41. Student produced no persuasive evidence that he required a dressing goal to address his educational needs in June 2012. Student was able to take care of his own toileting needs, including pulling up his pants. Student was being retained in elementary school and there was no showing that Student was required to dress out for physical education at Rio Hondo. Student was unable to tie his own shoes, but there was no evidence that Student had problems with his shoes becoming untied during the school day, or that this need could not be adequately accommodated with the assistance of school staff.

42. The IDEA mandates that special education and related services, and supplementary aids and services, be based upon peer-reviewed research to the extent practicable. (20 U.S.C. § 1414(d)(1)(A)(i)(IV); 34 C.F.R. 300.320(a)(4).) The phrase "to the extent practicable" means that supports and services should be based on peer-reviewed research to the extent that it is possible, given the availability of peer-reviewed research. (71 Fed. Reg. 46,665 (Aug. 16, 2006).) The IDEA does not require the IEP to include the particular instructional methodology. (*Id.*) IEP teams are not required to have a discussion on the research-based methods offered, or to provide documentation of those methods, as the U.S. Department of Education has determined that such a requirement is unnecessary and would be unduly burdensome to the IEP team. (*Id.*) The California law relied upon by Student to contend that Student's IEP required a "statement of the special education and related services and supplementary aids and

services, based upon peer-reviewed research to the extent practicable, to be provided to the pupil," that is Education Code, section 56345, subd. (a)(4)), merely mirrors the IDEA's substantive requirement that special education and services offered to a student be based upon peer-reviewed research to the extent practicable, and does not add a procedural requirement that the instructional methodologies be written into the IEP document itself.

43. The weight of the evidence established that the June 12, 2012 IEP included goals appropriately written to address all of Student's needs, the frequency and duration of services was specified, and District was not required to specify details of the specialized instruction and services to be provided upon peer reviewed research to the extent practicable. Student did not meet his burden of proving that he was denied a FAPE because the June 12, 2012 IEP document was incomplete.

#### Issue 1(f) - Services Offered and Provided

44. Student contends that the services and placement offered in the June 12, 2012 IEP were substantively inappropriate. Specifically, Student argues that his progress had been stagnant or minimal in 2011-2012 and that the Summer 2012 extended school year program resulted in regression. Student contends he also required intensive one-on-one instruction or ABA supported instruction, a one-on-one aide, alternative and augmentative communication and assistive technology services, and an increase in speech and language and occupational therapy services. District contends that the services offered were appropriate.

45. For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer of educational services and/or placement must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. (*Gregory K. v. Longview School*

*District* (9th Cir. 1987) 811 F.2d 1307, 1314 (*Gregory K.*); 20 U. S.C. § 1401(9).) A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. (*Ibid.*) The IEP need not conform to a parent's wishes in order to be sufficient or appropriate. (*Shaw v. Dist. of Columbia* (D.D.C. 2002) 238 F.Supp.2d 127, 139 [The IDEA does not provide for an "education . . . designed according to the parent's desires"], citing *Rowley, supra*, 458 U.S. at p. 207; see also *Miller v. Bd. of Education of the Albuquerque Public Schools* (D.N.M. 2006) 455 F.Supp.2d 1286, 1307-1309; *aff'd on other grounds, Miller v. Bd. of Education of the Albuquerque Public Schools* (10th Cir. 2009) 565 F.3d 1232.)

46. Applying the *Rowley* standard, the weight of the evidence established that the June 12, 2012 IEP was designed to meet Student's unique needs and reasonably calculated to provide Student with educational benefit.

47. As discussed at Issue 1(a), Student made good progress between May 2 and June 12, 2012. Student met most of his May 24, 2011, annual goals and made progress on all of them. This progress was not minimal. Dr. Patterson persuasively opined that because Student's cognitive abilities were at the preconceptual thought level (per District's 2011 triennial assessment) and Student had significant learning challenges, his progress would be slow. Ms. Mathews, a program specialist with extensive credentials in teaching students with autism and other disabilities, also persuasively explained that children learn at different rates, and may be making substantial progress even if benchmarks or annual goals are not met, particularly if other factors such as behaviors or missed instruction interfere with learning. Student's behaviors were not interfering with his education by the end of the 2011-2012 school year. The IEP team expressly noted that Student's frequent absences were impacting his academic progress. The totality of this evidence supported, rather than weighed against, continuation of Student's existing program.

48. As discussed at Issues 1(b) and 1(e), Student's needs were identified by the June 12, 2012 IEP team and goals written to address those needs. The weight of the evidence did not establish that Student required intensive one-on-one instruction to obtain educational benefit. District's SBC classrooms had eight to ten children and three to four adults, for a student to adult ratio of two- or three-to-one. Student made good progress with this ratio of instructional assistance, and did not require one-on-one instruction to receive educational benefit. Although Parents contend Student could have made better progress in 2012-2013 with one-on-one instruction, the IDEA does not require District to maximize Student's performance. (*Gregory K., supra*, 811 F.2d at p. 314.) Student's subsequent lack of documented progress in the Lindamood-Bell program despite 466 hours of one-on-one instruction, and his progress in the 2011-2012, 2012-2013 and first half of the 2013-2014 school years without it, was also persuasive evidence that Student does not need, and did not need in June 2012, one-on-one instruction.

49. The weight of the evidence did not demonstrate that District should have offered Student a one-on-one aide in his June 12, 2012 IEP. Student obtained educational benefit during the 2011-2012 school year in the small, structured SBC classroom with the support of Ms. Williamson and her classroom aides, without the support of a one-on-one aide. At the time of the June 12, 2012 IEP team meeting, Student's behaviors had decreased to the point that they did not interfere with his classroom participation.

50. The weight of the evidence did not establish that Student required ABA methodology as an element of his June 12, 2012 IEP. As discussed at Issue 1(e), an IEP is not required to include the particular instructional methodologies that will be utilized in instruction. (71 Fed. Reg. 46,665 (Aug. 14, 2006).) As long as a school district provides an appropriate education, methodology is left up to the district's discretion. (*Rowley, supra*,

458 U.S. at p. 208.) This rule is applied in situations involving disputes regarding choice among methodologies for educating children with autism. (See *Adams, supra* 195 F.3d at 1149; *Pitchford v. Salem-Keizer School District* 155 F.Supp.2d 1213, 1230-32 (D. Ore. 2001); *T. B. v. Warwick School Commission* (1st Cir. 2004) 361 F.3d 80, 84 (*T.B.*.) Courts are ill-equipped to second-guess reasonable choices that school districts have made among appropriate instructional methods. (*T.B., supra*, 361 F.3d at p. 84.) In any event, Ms. Walls implemented ABA methodologies and designed her SBC classroom to focus on ABA techniques for teaching students with autism, and she and her already well-trained staff received further ABA training from Ms. Raridon during the 2012-2013 school year, demonstrating that Student already received the benefit of ABA support in the classroom without a one-on-one ABA-trained aide.

51. The weight of the evidence did not demonstrate that the June 2012 IEP team should have offered Student alternative and augmentative communication services, high-tech assistive technology or increased speech and language and occupational therapy services. As discussed at Issue 1(b), the IEP team appropriately focused on Student's verbal skills, and Student did not need alternative communication or high-tech assistive technology to receive educational benefit. The June 12, 2012 IEP team did increase Student's speech services to include 30 minutes per week of small group instruction, and Ms. Haney persuasively testified that the level of speech services offered was sufficient to meet Student's needs. In fact, Student met or made progress on his language and communication goals and Ms. Wall observed an increase in Student's ability to maintain conversational turns and self-correct on the use of pronouns. The June 12, 2012 IEP team also increased Student's occupational therapy services to include 30 minutes of consultation to Student's teacher two times per year, which Ms. Nguyen testified persuasively was sufficient to meet Student's occupational

therapy needs. Student produced no expert witnesses to contradict the opinions of Ms. Haney or Ms. Nguyen.

52. The weight of the evidence established that the June 12, 2012 IEP offered Student sufficient special education and services to meet his needs and enable him to receive educational benefit. Accordingly, Student failed to meet his burden of proving that he was denied a FAPE for failure to offer sufficient special education and services.

#### Issue 1(g) - Appropriate Placement in Least Restrictive Environment

53. Student contends that the placement offered in the June 12, 2012 IEP was not an appropriate placement in the least restrictive environment. District contends that Student's placement was appropriate and the least restrictive environment.

54. 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, 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 least restrictive environment; (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 least restrictive environment, 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.)

55. To provide the least restrictive environment, 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 (*Daniel R.R.*)]; 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 general education was the least restrictive environment for an aggressive and disruptive student with attention deficit hyperactivity disorder and Tourette's Syndrome].)

56. If it is determined that a child cannot be educated in a general education environment, then the least restrictive environment 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>14</sup> (*Daniel R.R., 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;

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<sup>14</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.)

and instruction using telecommunication instruction in the home or instructions in hospitals or institutions. (Ed. Code, § 56361.)

57. Here, applying the *Rachel H.* factors to the facts, shows that Student could not have been satisfactorily educated in a regular education environment. Student had cognitive abilities at the preconceptual thought level, or kindergarten to first grade level, and could not be expected to receive educational benefit in classes taught at the fifth grade level. Although Student could arguably have received non-academic benefit in a regular classroom from exposure to language modeling by typical peers, the evidence established that Student had severe attention and communication deficits that significantly interfered with his ability to absorb language through casual modeling. According to Ms. Patterson, instruction too far above a student's developmental level causes frustration, and can result in maladaptive behavior such as aggression, protest and tantrums. Student exhibited increased distractibility when performance expectations were above his developmental level, and a regular classroom placement would have adversely impacted Student's teacher and classmates, both in terms of distracting behaviors and the need for constant attention. There was no evidence that cost was a factor in the IEP team's decision that Student could not have been satisfactorily educated in a regular classroom. In conclusion, each of the four *Rachel H.* factors weighed in favor of a placement outside of the regular classroom.

58. Once it has been determined that education in the regular classroom cannot be achieved satisfactorily, the inquiry turns to whether the child has been mainstreamed to the maximum extent appropriate. (*Daniel R.R., supra*, 874 F.2d at p. 1050.) Here, the evidence demonstrated that the June 12, 2012 IEP offer of the SBC classroom with integration into the general education classroom was also the least restrictive environment for Student.

59. The evidence established that Student was receiving educational benefit from placement in an SBC classroom, and was afforded opportunities to interact with the typically developing peers in general education during assemblies, recess, lunch and Social Squad, as well as during two days per week in general education physical education. During Social Squad, Student not only interacted with typically developing peers, but participated in a facilitated program to learn social skills and communication with typical peers. Student argues that he needed one-on-one instruction in a clinic setting at Lindamood-Bell for part of the school day, but that was a much more restrictive setting in which Student would not interact with other children, let alone typically developing peers, and as discussed at Issue 1(f), Student did not require one-on-one instruction.

60. The evidence showed that Student received non-academic benefit from the offered placement. Student benefitted behaviorally in the SBC classroom, which provided structure, routine, visual supports and where the teacher and staff were trained in ABA and other methodologies to teach students with severe autism. In the SBC classroom, sensory strategies could be implemented to enable Student to attend and focus that were not available in general education, such as being squeezed and hugged, getting lots of attention, and being able to bounce on the therapy ball or sit at a desk on the therapy ball. The embedded SBC focus on socialization, behavior and communication, including Social Squad, provided Student with improved skills to interact with typical peers during assemblies, recess, lunch, Social Squad and general education physical education. There was abundant evidence that this level of integration with typical peers sufficiently provided Student with educational benefit, and no persuasive evidence that Student required additional integration into general education during the 2012-2013 school year.

61. Student had opportunities to interact with typical peers during general education physical education classes, and there was no evidence that Student's behaviors interfered with the general education students in that class, weighing in favor of this level of mainstreaming.

62. Regular education offered Student little in the way of academic or other benefits, and was likely to lead to increased frustration and resulting maladaptive behaviors. On the other hand, special education in the SBC classroom was an environment in which Student was making progress. Balancing the benefits of a program that was only marginally beneficial and somewhat detrimental against the benefits of a program that was clearly beneficial, the weight of the evidence established that placement in the SBC classroom was more appropriate. In conclusion, Student's placement in an SBC classroom, with two days of integration into general education PE, and opportunities to interact with typical peers at snack, lunch, recess and assemblies, was the least restrictive environment in which Student could be satisfactorily educated.

63. The weight of the evidence established that the placement offered in the June 12, 2012 IEP was the least restrictive environment for Student. Therefore, Student did not meet his burden of proving that he was denied a FAPE because the placement offered in the June 12, 2012 was too restrictive.

## 2012-2013 SCHOOL YEAR

### Issue 2(a) - Team Meetings for lack of Anticipated Progress

64. Student contends that his levels of performance were stagnant during the 2012-2013 school year, as demonstrated by his failure to advance in the Edmark program according to the benchmarks in his reading and vocabulary goals and experienced regression during Summer 2012, triggering District's duty to call an IEP team making and make adjustments to Student's program prior to the June 12, 2013 IEP

team meeting. District contends that Student was making progress and annual meetings were appropriate.

65. Legal Conclusions 1-4 and 6-9 are incorporated herein by reference.

66. District conducted an IEP team meeting to review Student's progress on June 12, 2013, which was exactly one year after the June 12, 2012, annual review. Therefore, District's review of Student's progress on the annual goals in the June 12, 2012 IEP was timely.

67. The weight of the evidence demonstrated that Student was making good progress during the 2012-2013 school year, and additional IEP team meetings to adjust Student's program for lack of progress were not required. He met a reading and math goal, his social skills goal of taking turns, and his goal of greeting others appropriately. Student could attend and focus in a small group setting for three minutes, and although this was for less than the five minutes written into Student's social emotional goal, it was good progress from Student's June 2012 level when he could only maintain attention and focus for three minutes in a one-on-one setting. Over the course of the 2012-2013 school year Student's tantrum behaviors disappeared, he perseverated less on topics, had increased attention to task and could participate in longer conversational exchanges. Ms. Walls, Ms. Raridon, and Ms. Hindman testified persuasively and uniformly that this was good progress for Student. This progress was made despite Student's extensive absences and missed instructional time.

68. Student takes issue with Ms. Walls' interpretation of the goals incorporating the Edmark reading program. However, Ms. Walls testified persuasively that she reasonably interpreted Student's reading goals as referencing the Edmark program, but not requiring Student's progress to match the Edmark lessons referenced in parenthesis in those goals. She appropriately focused on teaching Student comprehension of each new word, rather than moving forward simply because Student

could recognize the word and read it in a sentence. There was abundant evidence that Student had good reading skills, but difficulty with reading comprehension, and both Ms. Walls' focus on word understanding and her interpretation of the reading goals appropriately addressed Student's needs. In light of this, and Student's good progress in all other areas, the District was not required to hold an IEP team meeting prior to June 12, 2013, to review a lack of anticipated progress by Student through Edmark lessons.

69. Student also argues that an IEP team meeting should have been called when Student experienced regression over Summer 2012. Ms. Walls testified persuasively that Student's regression over Summer 2012 was no more than is typically seen in students with autism, and that Student readily recouped the skills lost between the end of the summer program and the start of the 2012-2013 school year. Therefore, District was not obligated to conduct an IEP team meeting due to Student's summer regression.

70. Here, the weight of the evidence established that Student was making progress on all of his goals, and by June 12, 2013, had met most of them. Accordingly, Student failed to prove by a preponderance of the evidence that he was denied a FAPE by the District's failure to conduct an IEP team meeting prior to June 12, 2013, or between June 12 and June 25, 2013.

#### Issue 2(b) - Need for Additional Assessments

71. Student contends that District did not assess Student sufficiently to identify all his areas of need prior to the June 12, 2013 IEP team meeting. Student argues that he continued to present at substantially the same levels of deficits in language, communication and behavior and required additional services to meet his needs. Student also argues that District was on notice that Student had unidentified needs upon receipt of the assessment reports from Dr. Gunn and Ms. Patterson. District

contends that Student's needs were accurately identified and he did not require further assessment.

72. Legal Conclusions 1-4, 13-16 and 21 are incorporated herein by reference.

73. The evidence did not show that District had failed to identify any needs of Student prior to June 12, 2013, warranting reassessment prior to Student's three-year triennial assessment in 2014.

74. Student argues that the assessment reports of Dr. Gunn and Ms. Patterson, identified a "need" for individualized instruction. However, for purposes of clarification, the recommendations by Dr. Gunn and Ms. Patterson for one-on-one ABA therapy in a clinic or home setting constituted recommendations on *instructional methodology* and *educational settings*. Individualized ABA instruction is not a "need" but a suggestion as to the type and location of specialized instruction.

75. As discussed at Issue 1(b), Dr. Gunn's neuropsychological assessment results were consistent with those of the District's 2011 psychoeducational assessment. Ms. Patterson's behavior assessment did not identify any needs not addressed by Student's June 12, 2012 IEP (which had not been provided to her by Parents), and proposed similar goals to address those same needs. Ms. Patterson's assessment was seven months old in June 2013 and did not take into consideration over half a year of instruction on academic, communication and behavior goals. The Lindamood-Bell April 2013 testing summary provided to the June 12, 2013 IEP team did no more than confirm what IEP team members already knew, that Student had significantly delayed cognitive abilities and attention issues due to his autism that impacted his academic performance and his ability to participate in standardized tests. None of these documents demonstrated a need to reassess. As they were provided to District on the day of the IEP team meeting, they also could not have triggered a duty to reassess Student prior to June 12, 2013.

76. Student was making good progress on goals to address his delays in language, communication, socialization, attention, daily living skills and adaptive behavior, and had met most of those goals. The weight of the evidence did not establish that a psychoeducational reassessment was required prior to the June 12, 2013 IEP in these areas.

77. Student did not produce a speech and language expert to testify that Student had speech and language needs not identified by District prior to June 12, 2013, or to contradict the testimony of Ms. Zinn and Ms. Way that Student was making good progress on his speech and language goals. Parents had not yet informed District that Student was receiving private speech or occupational therapy and, if they had, DG Therapy did not identify any needs of Student that were not being addressed or specific to home and community. The assessments by Dr. Gunn and Ms. Patterson recommended a speech and language reassessment but did not identify any unaddressed needs, and their opinions were given less weight than those of the licensed speech pathologists who testified that Student did not require another speech and language assessment to identify his needs prior to June 2013. Ms. Patterson's opinion was even less persuasive on this point because she did not have a copy of the June 12, 2012 IEP, or Student's 2011 triennial speech and language assessment, when she made her recommendation. To the extent Ms. Perry from Lindamood-Bell testified as to language development and Student's language needs, she is neither a licensed psychologist nor a licensed speech language pathologist, and her opinions on those issues were given very little weight.

78. Ms. Anawalt did not begin working with Student at Whittier Area Parent's Association until April 2013, and Parents did not inform the June 12, 2013 IEP team that Student was receiving facilitated communication services. As discussed in Issue 1(b), the fact that Student was assessed for alternative and augmentative communication and

assistive technology in 2014, and offered services in both areas at that time, does not by itself create an inference that Student had unidentified and unaddressed needs in these areas in June 2013. Student was making progress on his communication, expressive language and pragmatic language goals without access to additional alternative and augmentative communication strategies, and without assistive technology.

79. Student's behavior needs had been identified by the June 12, 2012 IEP team, and District staff were working with Student on maintaining attention and focus through his social/emotional goal. Ms. Hindman worked with Student on his sensory processing needs during occupational therapy sessions. Ms. Walls regularly took data on Student's behavior, attention to task and perseverance on topics, and testified that she did not see any need for further behavior support. Ms. Patterson's assessment report did not identify any new behavior needs. Dr. Gunn did not diagnose Student with hyperactivity or ADHD. Student was making progress on his behavior and attention goals.

80. The weight of the evidence did not demonstrate that Student had any unidentified language, communication, alternative and augmentative communication or assistive technology needs, or that reassessments were needed in any of these areas to guide the June 2013 IEP team. The weight of the evidence did not demonstrate that Student had unidentified behavior needs, or that a functional behavior reassessment was necessary to gather information for the June 12, 2103 IEP team to address all of Student's behavioral needs.

81. As discussed above, the reports from Dr. Gunn, Ms. Patterson or Lindamood-Bell, which were not received until the June 12, 2013 IEP team meeting, provided information consistent with District's own assessments and observations of District staff on Student's needs. These reports did not constitute a parental request for psychoeducational, functional behavior, or speech and language assessments.

82. Student failed to meet his burden of establishing by a preponderance of the evidence that the District committed a procedural violation by failing to perform reassessments prior to the June 12 or June 25, 2013 IEP team meetings. Further, even had assessments or reassessments in these areas been warranted or requested, 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. (Ed. Code, § 56505, subd. (f)(2).) As discussed in the analysis of Issues 2(c) through (g), below, the evidence did not demonstrate that the IEP of June 12, 2013, denied Student a FAPE.

#### Issue 2(c) - Consideration of Parents' Concerns

83. Student contends that the June 12 and June 25, 2012 IEP teams did not take Parents' concerns into account, because the assessment reports by Dr. Gunn and Ms. Patterson were not reviewed by the team, and because although the Lindamood-Bell testing summary was reviewed at the meeting, District did not adopt its recommendation for individualized instruction. District contends that Parents' concerns were considered, the private reports reviewed, and Parents provided with an opportunity to meaningfully participate in the development of the IEP.

84. Legal Conclusions 1-4, 15 and 27 are incorporated herein by reference.

85. Both Parents attended the June 12 and June 25, 2012 IEP team meetings, and were accompanied by their advocate, Ms. Watts, and Ms. Patterson at both meetings. At the June 12, 2013 IEP, Parents heard the presentations by Ms. Walls and Student's service providers. Parents and Ms. Patterson actively participated in the discussion of proposed goals, and both Ms. Shaked and Ms. Hindman agreed to prepare additional language and occupational therapy goals based upon these discussions. Ms. Patterson presented her recommendations for Student to attend mild/moderate and

general education classrooms with a one-on-one ABA trained aide, and the meeting was adjourned and reconvened to provide Parents and Ms. Patterson with an opportunity to observe middle school classrooms, which they did. When the meeting was reconvened, Parents and Ms. Patterson engaged in a detailed discussion with the IEP team concerning creation of a unique hybrid program in which Student would attend a combination of SBC, mild/moderate and general education classrooms. The team adopted the hybrid program. The team did not increase Student's occupational services or fund a Lindamood-Bell program as requested by Parents, but only after discussion and consideration of many opinions, including that of Ms. Hindman. In sum, Parents were informed of Student's problems, attended the IEP team meetings, expressed disagreement regarding some of the IEP team's conclusions, and requested revisions in Student's IEP.

86. District's refusal to fund the Lindamood-Bell program over Summer 2013 does not establish that District did not give adequate consideration to the request. Dr. Murray had an opportunity to review the testing summary and properly advised the team to decline to fund the program for a lack of information showing that Student needed the Lindamood-Bell services because Student's reading goals could be addressed in the District's extended school year program without one-on-one instruction.

87. Dr. Murray also had an opportunity to review Dr. Gunn's July 2012 neuropsychological report at the June 12, 2013, meeting and before the June 25, 2012 IEP team meeting. As discussed at Issue 2(b), Dr. Gunn's July 2012 report did not identify any new needs of Student and his recommendations were about setting and methodology. Ms. Patterson's report made very different recommendations on instructional methodology and instructional setting, and the weight of the evidence

demonstrated that significant discussions took place to address parental concerns regarding placement.

88. Simply because District did not give Parents what they wanted does not mean that Parents were denied an opportunity to participate in the development of Student's IEP at the June 12 and June 25, 2013 IEP team meetings. Student did not meet his burden of establishing that he was denied a FAPE for lack of opportunity of Parents to participate in the IEP team meetings.

#### Issue 2(d) - Predetermination

89. Student contends that District made recommendations and offered services that were predetermined, denying Parents the opportunity to participate in the development of Student's June 12, 2013 IEP. Student argues that District staff attended the meeting with the agenda of maintaining the "status quo." District contends that it did not predetermine Student's IEP.

90. Legal Conclusions 1-4, 15, 31 and 32 are incorporated herein by reference.

91. No evidence was offered that District team members met before the June 12 or 25, 2013 IEP team meetings to discuss the terms of Student's IEP or entered into agreements regarding Student's IEP outside of the IEP meetings. District team members clearly considered different placement options as the meeting adjourned for Parents and Ms. Patterson to view various programs and the team developed a detailed hybrid program with the input of Parents and Ms. Patterson. Team members met with other team members informally to discuss Student's progress and program throughout the 2012-2013 school year, but went into the June 12 and June 25, 2013 IEP team meetings with open minds.

92. The weight of the evidence established that Student's program had not been predetermined by the District team members and that District team members attended the June 12 and 25, 2013 IEP team meetings with open minds. Student did not

meet his burden of proving by a preponderance of the evidence that he was denied a FAPE because the program offered in the June 12, 2013 IEP was predetermined and Parents were denied an opportunity to meaningfully participate.

Issue 2(e) - Completeness of June 12, 2013 IEP Document

93. Student contends that District failed to include complete information in the June 12, 2013 IEP document. Specifically, Student argues that the IEP failed to include goals to address all of Student's identified needs, including a shoe-tying goal, did not specify details regarding the specialized instruction and services to be provided upon peer reviewed research to the extent "possible," and did not specify the details of District's offer for the 2013 extended school year program.

94. Legal Conclusions 1-4, 15, 36-38 and 42 are incorporated herein by reference.

95. 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. (*Union, supra*, 15 F.3d at p. 1526.)

96. 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*).

97. As discussed at Issue 2(b), Student's needs were identified for the June 2013 IEP team and goals were written to address those needs. Academic goals were written in vocabulary, reading comprehension, spelling and math in direct response to Ms. Walls' reports of Student's present levels of performance. Goals were written to increase Student's attention to task and his behavior needs to ask for help when needed and maintain personal space. Language/communication goals addressed Student's expressive language and pragmatic needs, and spelling and visual motor goals addressed Student's fine motor and visual motor needs. Mr. Estrella wrote goals to work on Student's gross motor skills and increase his physical fitness. Many of these goals addressed multiple areas of need. Student did not establish that the goals written by the June 12, 2013 IEP team did not address Student's educational needs.

98. Each of these goals built upon the skills Student had acquired during the 2012-2013 school year, and increased the complexity of the task or demonstration of the skill. The increase in difficulty was small, but the goals were appropriately directed to Student's developmental levels. District team members testified persuasively that the special education and related services offered for the academic school year were designed to enable Student to make progress on his goals, and their frequency and duration was specified in the IEP.

99. Student produced no persuasive evidence that Student required a shoe-tying goal to address his educational needs in June 2013. There was some evidence that Student was unable to tie his shoes, but there was no evidence that this ability was necessary for Student to obtain educational benefit and could not be accommodated with the assistance of school staff, particularly the one-on-one aide.

100. The weight of the evidence established that the June 12, 2013 IEP goals were measurable and addressed the full range of Student's needs at that time, and that

the special education and services offered for the academic school year were sufficiently described.

101. However, the evidence also established that District failed to make a specific offer for special education and related services for the 2013 extended school year. The IEP document merely offered "ESY." Unlike in prior school years, where Student would remain in the same placement with proportional services, Student was going into a unique hybrid program at the middle school level. The IEP did not specify if some or all of the different components of the hybrid program would be available, which components would be available, or whether an ABA-trained aide with supervision would be provided for part or all of the school day. At hearing, District team members did not sufficiently clarify the offer for the extended school year, and Father convincingly stated that he was unclear on what the summer program would look like. Dr. Murray wrote a letter to Parents describing the summer program on July 31, 2013, but by then the program was over. This confusion over what was included in the extended school year offer, and whether Parents understood what was offered, is precisely the type of situation alluded to in *Union*, where the lack of a clear IEP raises troublesome factual disputes about what placement and services were offered (at least until the July 31, 2013, letter). The weight of the evidence established that District did not make a clear offer for a 2013 extended school year program at the June 25, 2013 IEP team meeting, or in the June 12, 2013 IEP document.

102. Without a formal, specific offer of extended school year services from District, Parents were not alerted to the need to consider seriously whether the proposed summer placement was appropriate, and could not determine whether to reject or accept the placement. District's own failure to clarify the offer until after the 2013 extended school year was over suggests that it did not intend to offer a program for serious consideration by Parents because Parents had already announced at the June

12, 2013 IEP team meeting their intention to send Student to Lindamood-Bell, and in fact had already enrolled Student on June 24, 2013. However, per *Anchorage*, District's duty to offer placement was not contingent upon Parents' cooperation, and per *Union*, Parents' perceived unwillingness to accept a District summer placement did not excuse District's obligation to include a description of the special education and related services offered to Student for the 2013 extended school year.

103. Student met his burden of establishing by a preponderance of the evidence that the June 12, 2013 IEP was incomplete as to the offer of extended school year services offered for Summer 2013, such that Student was denied a FAPE. The remedy for that denial of FAPE is discussed at the end of this decision.

#### Issue 2(f) - Appropriateness of Services Offered

104. Student contends that the services and placement offered in the June 12, 2013, IEP were substantively inappropriate. Specifically, Student argues that his progress had been stagnant or minimal in 2012-2013 school year, but District continued to offer substantially the same program when Student needed intensive one-on-one instruction or ABA supported instruction, a one-on-one aide, alternative and augmentative communication and assistive technology services, and an increase in speech and language and occupational therapy services. District contends that the services offered were substantively appropriate.

105. Legal Conclusions 1-4, 45, 48 and 50 are incorporated herein by reference.

106. The weight of the evidence established that the June 13, 2012 IEP, with the exception of the offer for 2013 extended school year, was designed to meet Student's unique needs and reasonably calculated to provide Student with educational benefit.

107. As discussed at Issues 2(b) and 2(e), Student's needs were identified for the June 12, 2013 IEP team and goals written to appropriately address those needs.

108. Student made slow but steady progress with Edmark and other programs and methodologies utilized by Ms. Walls. Ms. Patterson, an experienced behaviorist with experience working with students with severe autism, recommended that Student have the support of an ABA-trained one-on-one aide throughout the day to provide consistent behavior support across school settings, particularly during mainstreaming. The aide, supervised by a District board certified behavior analyst, provided consistency in behavior interventions, including redirection for attention and focus, and accompanied Student throughout the school day to provide reinforcement of skills and concepts learned in the SBC classroom, speech therapy and occupational therapy. These services, and the speech and occupational therapy services discussed below, were appropriate and reasonably calculated to enable Student to make progress on his goals and obtain educational benefit.

109. The weight of the evidence failed to demonstrate that Student required individualized instruction in reading and language development beyond the individualized speech and language services offered. Student made progress in reading with the individualized and small group Edmark instruction provided in the SBC classroom. Dr. Gunn's July 2012 recommendation for individualized clinic-based instruction, and for increased speech therapy, was given far less weight than that of Ms. Walls and language pathologists, Ms. Zinn and Ms. Way, who testified that the individualized speech services offered were sufficient to address Student's language and communication needs. Ms. Zinn and Ms. Way persuasively stated that the fact that Student was receiving private speech therapy in 2013 did not change their opinion that the service level offered was appropriate for Student to make meaningful progress on his speech goals. Although Ms. Patterson had excellent behaviorist credentials, she was not a speech language pathologist, and her opinions regarding Student's need for individualized instruction to address Student's language and communication delays was

given far less weight. The opinion of Ms. Perry on Student's need for individualized instruction in language development and communication was given no weight as she lacks any credentials to teach children with disabilities, particularly credentials in autism or moderate/severe disabilities, and is not a speech language pathologist.

110. For these same reasons, Student failed to demonstrate that he required Lindamood-Bell's individualized instruction or methodology to make progress on his language and communication goals in June 2013. In addition, the Talkies, Verbalizing and Visualization and Seeing Stars programs are not based on peer-reviewed research, and have not been shown to be effective in teaching students with severe delays in cognitive functioning. The Lindamood-Bell documents provided to the IEP team did not indicate whether, or how, its program would address Student's language or communication needs. In fact, the June 12, 2013 IEP team had one post-Talkies progress report (176 hours through April 2013) that demonstrated the Lindamood-Bell programs were ineffective for Student.

111. The weight of the evidence did not establish that Student required a program in Parents' preferred methodologies of individualized ABA or Lindamood-Bell instruction as elements of his June 12, 2013 IEP. As long as a school district provides an appropriate education, methodology is left up to the district's discretion. (*Rowley, supra*, 458 U.S. at p. 208.)

112. The weight of the evidence did not demonstrate that the June 2013 IEP team should have offered Student alternative and augmentative communication services, high-tech assistive technology or increased speech and language and occupational therapy services. As discussed at Issue 2(b), the IEP team appropriately focused on Student's verbal skills, and Student did not need alternative communication or high-tech assistive technology to receive educational benefit. Ms. Anawalt opined that the facilitated communication services Student was receiving at Whittier Area

Parent's Association were educationally necessary. However, Ms. Zinn and Ms. Way persuasively testified that the level of speech services offered in the IEP was sufficient to meet Student's needs during the 2013-2014 school year, and Student subsequently met or made progress on his language and communication goals. Also, Ms. Anawalt had worked less with Student than Ms. Zinn or Ms. Way, and had only one year of experience as a speech language pathologist when she testified at hearing. The testimony of Ms. Zinn and Ms. Way regarding Student's alternative and augmentative communication needs, and assistive technology needs, in June 2013 was accorded much greater weight.

113. The weight of the evidence did not establish that District should have increased the amount of occupational therapy services to include a weekly hour of occupational therapy in a clinic setting. District was unaware that Student was receiving private occupational therapy in June 2013, and the goals of the private occupational therapy were to help Student function better at home and in the community, not at school. Ms. Lew's testimony that the level of occupational therapy services offered was sufficient to meet Student's needs and enable him to make meaningful progress on his goals was uncontradicted and persuasive.

114. The weight of the evidence established that the June 12, 2013 IEP team offered Student sufficient special education and related services to meet his unique needs and enable him to receive educational benefit. Accordingly, Student failed to meet his burden of proving that he was denied a FAPE for failure to offer appropriate special education and services in the June 12, 2013 IEP.

#### Issue 2(g) - Appropriate Placement in Least Restrictive Environment

115. Student contends that the placement offered in the June 12, 2012 IEP was not appropriate because Student required individualized Lindamood-Bell instruction

and home ABA services. District contends that Student was offered an appropriate placement in the least restrictive environment.

116. Legal Conclusions 1-4, 54-56 and 58 are incorporated herein by reference.

117. The persons in the June 12 and 25, 2013 IEP teams were knowledgeable about Student, the meaning of the evaluation data, and the placement options, and took into account the requirement that Student be educated in the least restrictive environment. Here, applying the *Rachel H.* factors to the facts, shows that Student could not have been satisfactorily educated in a regular education environment, and was not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum. Student had cognitive abilities at the preconceptual and intuitive thought level, or kindergarten and first grade levels, and could not be expected to receive educational benefit in classes taught at the sixth grade level. Student had severe attention and communication deficits that significantly interfered with his ability to absorb language through casual modeling of typical peers. Student exhibited frustration through noncompliance and maladaptive behaviors when performance expectations were above his developmental level, and a regular classroom placement would have adversely impacted Student, his teacher, and his classmates. There was no evidence that cost was a factor in the IEP team's decision that Student could not have been satisfactorily educated in a regular classroom, and in fact, the June 25, 2013 IEP team offered a full-day aide to accompany Student in the SBC across environments. In conclusion, each of the four *Rachel H.* factors weighed in favor of a placement outside of the regular classroom.

118. The weight of the evidence established that the June 12, 2013 IEP mainstreamed Student to the maximum extent appropriate in light of the continuum of program options. As discussed at Issue 2(f), placement in the SBC classroom for core academics provided Student with the low student-to-adult ratio of instruction under

which Student had made progress throughout the 2012-2013 school year, and where he could focus on his academic goals. Placement in the SBC classroom also gave Student access to sensory equipment to regulate his arousal state and increase focus and attention. The SBC classroom also offered opportunities to interact with typical peers at snack, recess, lunch and in Where Everyone Belongs social skills classes. District's mild/moderate and general education middle school classes had large classes and were on grade level curriculum, with mild/moderate class materials modified to a third to fourth grade reading level. Placement in these less restrictive classrooms for core curriculum would have been well beyond Student's kindergarten to first grade academic level.

119. In June 2013, Student was reasonably expected to receive non-academic benefits from placement in the mild/moderate and general education classrooms for electives and physical education. The inclusion in mild/moderate and general education classes was supported by a one-on-one, ensuring consistent support across environments for redirection, attention, and facilitation of language and social interactions. These less restrictive classrooms would provide opportunities to generalize the skills learned by Student in the SBC classroom, speech therapy and the Where Everyone Belongs program. Ms. Patterson, an experienced behaviorist with experience with students with severe autism, recommended Student be included in mild/moderate and general education classrooms with the support of an aide to benefit from modeling language and behavior, and Ms. Walls' supported the recommendation. Additional supervision to support the aide was also built into the IEP for the first three months of the 2013-2014 school year. A 30-day review was included in the IEP offer to adjust the program as necessary after Student had been given an opportunity to familiarize himself with middle school in general, and his unique program in particular. On this evidence, the mild/moderate and general education classes offered a less restrictive environment

than the SBC classroom in which Student could appropriately receive non-academic benefit.

120. The weight of the evidence established that District's June 12, 2013, offer of core academics in the SBC classroom, with electives in mild/moderate classes and general education and general education physical education, was the least restrictive environment for Student.

121. Placement for part of the day in a clinical setting at Lindamood-Bell for several hours each day would not stand up to scrutiny under *Daniel R.R.* for maximizing Student's mainstream opportunities. Student could be satisfactorily educated in the SBC classroom, and if removed from that classroom, Student would miss important instructional time with credentialed teachers, including reinforcement of lessons learned in class. Student would also be isolated in a clinic program, one of the most restrictive settings, without access to peers at his developmental level or typical peers. Isolation in a Lindamood-Bell program would deprive Student of important non-academic benefits, such as opportunities to learn to speak and communicate with peers in the classroom and on the playground. At hearing, the educators and behaviorists were in agreement that Student's language and communication skills were best worked on in the school setting, where Student experienced opportunities to engage in functional communication and socialization as well as peer modeling. The weight of the evidence did not establish that Lindamood-Bell programming would educate Student in his least restrictive environment.

122. The weight of the evidence did not establish that Student required home ABA services to meet his annual goals. Ms. Patterson's report recommended home services for Student to work on his behaviors in the home and community. There was no persuasive evidence that Student required home ABA services to make meaningful educational progress.

123. The weight of the evidence established that the June 12, 2013 IEP offered Student appropriate placement reasonably calculated to enable Student to make educational progress in the least restrictive environment. Therefore, Student did not meet his burden of proof that he was denied a FAPE because the placement offered in the June 12, 2012 IEP was inappropriate or too restrictive.

## 2013-2014 SCHOOL YEAR

### Issue 3(a) and District's Issue 4 - Assessments

124. In Issue 4, District contends that its 2014 triennial assessments were appropriate and therefore Student is not entitled to independent educational evaluations at public expense. Student disagrees, and at Issue 3(a) contends that the psychoeducational assessment in particular was not properly conducted because the assessor had preconceived ideas regarding Student's functioning and ability level. Student further contends that these low expectations led her to dispense with standardized measures and fail to seek out comprehensive information on Student's autism behaviors. Student also contends that the assessor was required to, but did not, assess executive functioning skills or interview Parents, Student's private occupational therapy and speech providers, or Lindamood-Bell consultants.

125. A state or local educational agency must conduct a full and individual initial assessment before the initial provision of special education and related services to a child with a disability. (20 U.S.C. § 1414(a); 34 C.F.R. § 300.301; Ed. Code, § 56320). After a child has been deemed eligible for special education, reassessments must be performed if warranted by the child's educational or related service's needs. (20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1)).

126. A local educational agency must assess a special education student in all areas of suspected disability including, if appropriate, health and development, vision,

hearing, motor abilities, language function, general intelligence, academic performance, communicative status, self-help, orientation and mobility skills, career and vocational abilities and interests, and social/emotional status. (20 U.S.C. § 1414(b)(3)(B); 34 C.F.R. § 300.304(c)(4); Ed. Code, § 56320, subd. (f).) A local educational agency must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent. (20 U.S.C. § 1414(b)(2)(A); 34 C.F.R. § 300.304(b)(1).) No single measure or assessment shall be the sole criterion for determining whether a child is a child with a disability. (20 U.S.C. § 1414(b)(2)(B); 34 C.F.R. § 300.304(b)(2); Ed. Code, § 56320, subd. (e)). Assessments must be sufficiently comprehensive to identify all of the child's special education and related service needs, whether or not commonly linked to the disability category of the child. (34 C.F.R. § 300.304(c)(6).) The local educational agency must use technically sound testing instruments that demonstrate the effect that cognitive, behavioral, physical, and developmental factors have on the functioning of the student. (20 U.S.C. § 1414(b)(2)(C); 34 C.F.R. § 300.304(b)(3).) The IEP team must consider the assessments in determining the child's educational program. (34 C.F.R. § 300.324(a)(1)(iii)).

127. The assessments used must be: (1) selected and administered so as not to be discriminatory on a racial or cultural basis; (2) provided in a language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally; (3) used for purposes for which the assessments are valid and reliable; (4) administered by trained and knowledgeable personnel; and (5) administered in accordance with any instructions provided by the producer of such assessments. (20 U.S.C. § 1414(b) & (c)(5); Ed. Code, §§ 56320, subds. (a) & (b), 56381, subd. (h).)

128. Individuals who are both "knowledgeable of the student's disability" and "competent to perform the assessment, as determined by the school district, county

office, or special education local plan area", must conduct assessments of students' suspected disabilities. (Ed. Code §§ 56320, subd. (g); 56322; see 20 U.S.C. § 1414(b)(3)(B)(ii).) The determination of what tests are required is made based on information known at the time. (See *Vasheresse v. Laguna Salada Union School Dist.* (N.D. Cal. 2001) 211 F.Supp.2d 1150, 1157-1158 [assessment adequate despite not including speech/language testing where concern prompting assessment was deficit in reading skills].)

129. The personnel who assess the student shall prepare a written report that shall include, without limitation, the following: (1) whether the student may need special education and related services; (2) the basis for making that determination; (3) the relevant behavior noted during observation of the student in an appropriate setting; (4) the relationship of that behavior to the student's academic and social functioning; (5) the educationally relevant health, development and medical findings, if any; (6) if appropriate, a determination of the effects of environmental, cultural, or economic disadvantage; and (7) consistent with superintendent guidelines for low incidence disabilities (those effecting less than one percent of the total statewide enrollment in grades K through 12), the need for specialized services, materials, and equipment. (Ed. Code, § 56327.) The report must be provided to the parent at the IEP team meeting regarding the assessment. (Ed. Code, § 56329, subd. (a)(3).)

130. A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by LEA, subject to the following conditions. If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either (i) file a due process complaint to request a hearing to show that its evaluation is appropriate; or (ii) ensure that an independent educational evaluation is provided at public expense, unless

the agency demonstrates in an impartial hearing under the IDEA that the evaluation obtained by the parent did not meet agency criteria. (34 C.F.R. § 300.502(a)(3)(i).)

131. As an initial matter, the April 2014 triennial assessments were properly conducted. All District personnel involved were qualified to conduct the assessments. Student was assessed using a variety of assessment instruments, ranging from standardized tests to observation, in order to determine his unique needs. The assessment instruments were appropriate given Student's history of speech and language delay. The assessments were not racially, sexually, or culturally biased, were given in Student's primary language of English, and were valid for the purpose for which they were used. Each assessor identified which assessments could not be completed, or were presented in such a manner that the scores were not obtained or not valid, and indicated the limited purposes for which such test results could be used. Parents were provided with a comprehensive report that explained all of the assessments, the results, and which included recommendations for Student's education. The reports were discussed at an IEP team meeting that was attended by all necessary people and in which parents fully participated.

132. Student called no experts in the fields of occupational therapy or adapted physical education to contradict the results of the occupational therapy or adapted physical education assessments, or to persuasively criticize the assessment instruments or methods utilized. Criticisms by Student's experts outside their areas of expertise as to what areas should have been tested, or what instruments should have been used, were given little or no weight. Ms. Anawalt, Student's speech expert, did not identify any deficiencies in Ms. Hanson's assessment. Ms. Patterson did not address or criticize Ms. Raridon's functional behavior assessment at hearing, and actively participated in developing Student's program based upon Ms. Raridon's report at the April 22, 2014 IEP team meeting. Dr. Gunn was critical of Ms. Thompson for not assessing Student in

several areas, such as executive functioning, but Dr. Gunn's own April 2014 assessment, which did test in additional areas, did not uncover any new information concerning Student that would have been material to the IEP team's development of Student's program for Summer 2014 and the 2014-2015 school year.

133. No evidence was presented that Mother and Father actually requested that District pay for independent education evaluations at public expense following the April 22, 2014 IEP team meeting, but such requests were made as remedies in Student's due process filing. District timely filed for a due process hearing to defend its assessments within two weeks of Student's complaint seeking evaluations as remedies.

134. The evidence established through the credible testimony of Ms. Thompson, Ms. Nguyen, Ms. Hanson, Mr. Estrella and Ms. Raridon that they each administered assessment materials in the language and a form most likely to yield accurate information on what Student knew and could do academically, developmentally and functionally, except where it was not feasible to do so. Ms. Thompson had the same difficulty as Dr. Gunn in administering cognitive tests. Ms. Nguyen and Ms. Hanson testified persuasively that there are no standardized tests of sensory processing or use of alternative or augmentative communication devices, respectively, and that they used non-standardized and informal measures which, based upon their professional education, training and experience in their respective fields, provided accurate and sufficient information on Student for purposes of educational planning.

135. Each assessor explained why they chose the assessment tools they did, and that the assessment tools, whether normed tests or scales, were used for their intended purpose, valid and reliable, and administered by trained and knowledgeable personnel in accordance with any instructions provided by the producer of the assessment. Ms. Thompson, a credentialed school psychologist, administered the tests

of Student's intellectual and emotional functioning. The tests and assessment materials were tailored to assess specific areas of educational need, and not merely designed to provide a single general intelligence quotient. Tests were selected and administered to best ensure that they accurately reflected the factors they were designed to measure, and not Student's impaired sensory, manual or speaking skills, except where those skills were the factors the test purported to measure. The IEP team looked at all of the assessment reports, and no single measure or assessment was used as the sole criterion for determining an appropriate educational program for Student. Student was assessed in all areas of suspected disability.

136. Ms. Thompson did not report Student's scores, and instead presented the results of her assessment in a narrative, but Student cites no statute, regulation or case law requiring that assessment tool scores be reported. Student presented no persuasive evidence that Ms. Thompson had preconceived notions regarding Student's abilities or low expectations that interfered with her ability to conduct an appropriate assessment. Ms. Thompson's results were consistent with those of Dr. Gunn's April 2014 assessment. Ms. Thompson testified that it is her custom and practice in the circumstances presented, where valid scores could not be obtained but could be used for educational planning purposes, not to report scores in her report, and there was no evidence that reported scores would have changed the IEP team's consideration of the triennial psychoeducational assessment results or provided the team with material additional information.

137. Ms. Thompson, Ms. Hanson, Ms. Nguyen, and Ms. Raridon testified persuasively that they obtained sufficient information upon which to base their assessments. Each of them contacted Parents for information on Student, and Ms. Nguyen contacted the occupational therapist at DG Therapy. Although Parents would have preferred that these assessors also contact Lindamood-Bell staff, there was no

credible or persuasive evidence that such additional information was necessary to complete the assessments. The assessors were only required to consider information provided by Parents (see 34 C.F.R. § 300.304(b)(i1)), and were not required to seek out and speak to every service provider. More importantly, Student presented no evidence, persuasive or otherwise, that information gathered from these additional sources would have changed assessment results, or provided information about Student that was not already known or presented to the April 22, 2014, team.

138. The weight of the evidence established that the April 22, 2014 IEP team had accurate, reliable or sufficiently comprehensive triennial assessment information before it to appropriately and fully consider whether Student had additional unique needs that needed to be addressed at that meeting. Therefore, all of District's triennial assessments, including the psychoeducational assessment, were appropriate and Student is not entitled to independent education evaluations at public expense.

#### Issue 3(b) - Consideration of Parent Concerns

139. Student contends that the October 22, 2013, and April 22, 2014, IEP teams did not take Parents' concerns into account, because the District team members did not give meaningful consideration to privately funded assessment reports by Dr. Gunn and Ms. Patterson, the Lindamood-Bell testing summaries, or Parents' concerns regarding Student's academics, behavior and communication. District contends that Parents' concerns and reports were taken into consideration, and Parents were afforded an opportunity to meaningfully participate in development of Student's IEP.

140. Legal Conclusions 1-4, 15 and 27 are incorporated herein by reference.

141. Both Parents attended the October 22, 2013 IEP team meeting, and were accompanied by their advocate Ms. Watts, Ms. Patterson, and Ms. Perry from Lindamood-Bell. The discussion of Ms. Patterson's report and recommendations took almost an hour. Several goals were revised or added because of those discussions. Ms.

Perry also presented to the IEP team and the team specifically addressed Parents' request for individualized Lindamood-Bell instruction. Dr. Murray, Mr. Rojas, and Ms. Zinn informed the team that the activities and strategies employed by Lindamood-Bell were already employed in the SBC classroom and speech therapy, and that Student did not need Lindamood-Bell lessons to make progress on his goals. The weight of the evidence established that the October 22, 2013 IEP team gave meaningful consideration to Ms. Patterson's assessment, and to the information contained in the Lindamood-Bell assessment and Ms. Perry's presentation.

142. As discussed at Issue 1(b) and 2(b), Dr. Gunn's report did not identify any new needs of Student, and Dr. Gunn's recommendations were part of the discussion at the June 25, 2013 IEP regarding placement. Student's IEP team was under no obligation to review Dr. Gunn's report at every IEP team meeting. Even if Dr. Gunn's report had not been reviewed, the fact remains that its recommendation for intensive ABA therapy was contrary to both Ms. Patterson's recommendation for school-based instruction, and to Parents' request for Lindamood-Bell, which is not a program of intensive ABA therapy. The report was therefore not material to a meaningful consideration of Parents' concerns.

143. The October 22, 2013 IEP team considered Parents' opinions that Student should be returned to the SBC classroom, rather than attending a mild/moderate classroom or a general education elective classroom, to give Student more time to work on attention, behavior and social skills to increase his ability to succeed in those educational environments. Parents' concerns regarding Student's academics, behavior and communication skills were discussed and, with Ms. Patterson's input, goals were revised and added to strengthen the skills Student would need outside of the SBC classroom.

144. At the April 22, 2014 IEP, Parents were present with Student's advocate and Ms. Patterson and heard triennial assessment reports, progress on goals, and reports of performance in the classroom and during service sessions. Goals were developed, and a program of special education and related services was determined after careful deliberation in a process that took over five hours.

145. The weight of the evidence established that Parents were afforded an opportunity to, and did, participate in the development of Student's IEP at the October 22, 2013 and April 22, 2014 IEP team meetings. Student did not meet his burden of establishing that he was denied a FAPE because Parents' concerns were not considered by District.

#### Issue 3(c) - Predetermination

146. Student contends that District made recommendations and offered services that were predetermined at the IEP team meetings of October 22 and April 22, 2013, essentially because it did not offer Student Lindamood-Bell services for part of Student's school day. District contends that it did not procedurally violate the IDEA by predetermining Student's IEP or by denying Parents the opportunity to meaningfully participate in the IEP process. District contends that its offer of a FAPE incorporated goals, placement and services that resulted from active collaboration by all IEP team members, including Parents and their advocates.

147. Legal Conclusions 1-4, 15, 31 and 32 are incorporated herein by reference.

148. As discussed at Issue 3(b), the October 22, 2013 IEP team considered, at that meeting or prior meetings, Parents' privately funded assessments and testing. As discussed regarding Issues 3(b) and 3(e), District members of both the October 22, 2013 and April 22, 2014 IEP teams collaborated with Parents and their advocates to design a program reasonably calculated to enable Student to make educational progress.

149. No evidence was offered that District team members met before the October 22, 2013 or April 22, 2014 IEP team meetings to discuss the terms of Student's IEP, entered into agreements regarding Student's IEP outside of Student's IEP meetings, or offered Student one placement without considering alternatives. Both IEP team meetings lasted for many hours and involved extended discussions on Student's needs, proposed goals, services and placement. Student's teacher and service providers collaborated and met informally to discuss Student's progress and program throughout the 2013-2014 school year, but went into the October 22, 2013 and April 22, 2014 IEP team meetings with open minds.

150. The weight of the evidence established that Student's program had not been predetermined by the District team members, and that District team members, including the triennial assessors, attended the October 22, 2013 and April 22, 2014 IEP team meetings with open minds. Student did not meet his burden of proving by a preponderance of the evidence that he was denied a FAPE because the programs offered in the October 22, 2013 or the April 22, 2014 IEP's were predetermined.

#### Issue 3(d) - Completeness of October 22, 2013 and April 22, 2014 IEP's

151. Student contends that District failed to include complete information in the October 22, 2013 and April 22, 2014 IEP documents. Specifically, Student argues that the IEP's failed to include goals to address all of Student's identified needs and did not specify details regarding the specialized instruction and services to be provided. District contends that the IEP's met all statutory requirements.

152. Legal Conclusions 1-4, 15, 36-38, 42, 95 and 96 are incorporated herein by reference.

153. Student's teachers and service providers reported on Student's present levels of performance. As discussed at Issue 2(b) and 2(e), Student's needs were identified and goals written to address those needs at the June 12, 2013 IEP team

meeting. Those goals were annual goals, and most were retained as written at the October 22, 2013 IEP team meeting to be in effect until Student's triennial review in Spring 2014. Some goals were revised or added to the IEP at the October 22, 2013 IEP team meeting, after thoughtful discussions with Parents and Student's advocates, and taking into consideration concerns about working on Student's attention, behavior and communication skills to enable him to be successful in integrating into general education classrooms after the triennial IEP. Parents did not notify District until the October 22, 2013 IEP team meeting that Student was receiving private speech and occupational therapy, and the uncontradicted testimony of Ms. Zinn, Ms. Way and Ms. Lew was that Student did not need more speech or occupational therapy than was offered in October 2013 to make meaningful progress on his goals. The weight of the evidence did not demonstrate that Student exhibited unidentified needs that needed to be addressed beyond the revised/additional goals between June 12, 2013, and October 22, 2013. The June 12, 2013 IEP goals, as revised on October 22, 2013, were measurable, addressed the full range of Student's needs on October 22, 2013, and were reasonably calculated to enable Student to obtain educational benefit.

154. The goals in the April 22, 2014 IEP were developed after comprehensive reports on Student's triennial assessment results and Student's progress on annual goals, and documented in the IEP after hours of careful discussion. District IEP team members testified persuasively in their areas of expertise that the goals written into the IEP addressed all of Student's areas of need identified in the assessments and progress reports. The April 22, 2014 IEP goals were measurable, addressed the full range of Student's needs on April 22, 2014, and were reasonably calculated to enable Student to obtain educational benefit.

155. As discussed at Issue 2(e), Student produced no persuasive evidence that Student required a shoe-tying goal to address his educational needs in June 2013, and the same holds true for October 2013 and April 2014.

156. As discussed at Issue 1(e), nothing in the IDEA or Education Code required District to provide details of the particular instructional methodologies in the IEP's of October 22, 2013 or April 22, 2014. District team members testified persuasively that the special education and related services offered in both IEP's were designed to enable Student to make progress on his goals, and their beginning date, frequency and duration was specified in the IEP.

157. The weight of the evidence established that the October 22, 2013 and April 22, 2014 IEP documents included goals appropriately written to address all of Student's needs, and District was not required to specify details of the specialized instruction and services to be provided upon peer reviewed research to the extent practicable. Student did not meet his burden of proving that the October 22, 2013 or April 22, 2014 IEP documents were incomplete for failure to include appropriate goals or statements of instructional methodology.

#### Issue 3(e) - Services Offered and Provided

158. Student contends that the services offered in the October 22, 2013 and April 22, 2014 IEP's were inappropriate such that he was denied a FAPE. Specifically, Student argues that: (i) District had data that his progress had been stagnant for two years but continued to offer the same unsuccessful program; (ii) the October 22, 2013 IEP required but lacked a behavior support plan; and (iii) Student needed intensive one-on-one instruction in the Lindamood-Bell program. Student also contends that District failed to provide the services called for in the June 12, 2013 IEP because the one-on-one aide did not accompany him in the boys' locker room or while walking to community outings, and Student was removed from his general education class prior to the 30-day

review IEP. District contends that the services offered were appropriate to meet Student's needs.

159. Legal Conclusions 1-1, 45, 48 and 50 are incorporated herein by reference.

160. The weight of the evidence established that the October 22, 2013 IEP was designed to meet Student's unique needs and reasonably calculated to provide Student with educational benefit. As discussed at Issue 5, below, the April 22, 2014 IEP was also designed to meet Student's unique needs and was reasonably calculated to provide Student with educational benefit such that it constituted a FAPE.

161. As discussed at Issues 3(b) and 3(d), Student's needs were identified and goals developed at the June 12, 2013 IEP for the 2013-2014 school year, and revised and expanded at the October 22, 2013, IEP team meeting to work on those skills Student needed to succeed in a general education classroom. Mr. Rojas, Ms. Raridon, Dr. Murray, Ms. Zinn and Ms. Way all experienced educators or therapists educated, trained and experienced in working with students with autism, opined that the goals in the June 12, 2013 IEP, as revised and expanded by the October 22, 2013, amendment, were appropriate, measurable, and addressed Student's unique needs. Student did not call any experts who identified educational needs not addressed by the goals in the June 12, 2013 IEP, as revised by the October 22, 2013 IEP. Ms. Patterson was critical of the October 22, 2013 IEP for not having a behavior intervention plan, and had some suggestions for improved use of ABA methodologies in the classroom and therapy rooms, but was not critical of the revised and expanded IEP goals, which were drafted at her request and with her input.

162. Mr. Rojas, Ms. Raridon, Dr. Murray, Ms. Zinn and Ms. Way each testified within their area of expertise that the services offered in the October 22, 2013 IEP were reasonably calculated to enable Student to make progress on his goals and gain educational benefit, and addressed Student's needs in language, communication,

occupational therapy, social skills and behavior. Again, Student did not present any persuasive evidence to the contrary.

163. Also, as discussed at Issues 1(a), 2(a) and 5, below, Student had made progress on his annual goals from year to year, and his progress was not stagnant. Student's stagnation contention fails to acknowledge that Student had severe cognitive delays and faced significant learning challenges as a result of his autism, particularly with inattention, which necessarily resulted in slow progress. Student cannot be expected to make gains commensurate with his typically developing peers, and the unfortunate consequence is that he is falling behind those peers in academic and nonacademic skills even as he is making adequate progress on his own skills. Student also missed the equivalent of nearly six weeks of instruction during the 2012-2013 school year, which would adversely impact his ability to make progress on his goals. Lastly, District documented that Student was achieving more and more difficult and complex goals, written at Student's developmental level, and making progress in all areas of need. Lindamood-Bell has been unable to document any progress in the Talkies program in Summer 2013 or the second half of the 2013-2014 school year. Parents' insistence on attributing Student's improvements in language and communication to an unproven program that does not fall within the recommendations of either of Student's private assessors, and cannot objectively demonstrate progress in its program after over 400 hours, is puzzling and unreasonable.

164. As to Student's contention that the October 22, 2013 IEP required a behavior intervention plan, an IEP team must consider whether a child's behavior impedes his learning or that of others. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i)(2006); Ed. Code, § 56341.1, subd. (b)(1).) A school district must develop and implement a behavior support plan if the IEP team finds that the child's behavior impedes his own learning or the learning of others. (34 C.F.R. § 300.324(a)(2)(i)(2006).)

165. Neither Congress, the U.S. Department of Education, nor any statute or regulation has created substantive requirements for the behavior intervention plan contemplated by the IDEA. (*Alex R. v. Forrestville Valley Community Unit Sch. Dist. #221* (7th Cir. 2004) 375 F.3d 603, 615.) The IEP team must consider the use of positive behavioral interventions and supports, and other strategies, but the implementing regulations of the IDEA do not require the team to use any particular method, strategy or technique. (71 Fed. Reg. 46,683 (Aug. 14, 2006).)

166. Although failure to develop a behavior support plan where required can deny a FAPE, the lack of a written or formal plan, specifically called a behavior support plan, is not a per se denial of FAPE. (*Neosho R-V School District v. Clark* (8th Cir. 2003) 315 F.3d 1022, 1028; *E.H. v. Board of Education of Shenendehowa Central School District* (2d Cir. 2009) 361 Fed.Appx. 156, 160 (cert. denied (2010) 559 U.S. 1037, 130 S.Ct. 2064).) In California, the IEP team must consider the use of positive behavioral interventions and supports, and other strategies to address the behavior. (Ed. Code, § 56341.1, subd. (b)(1).) In October 2013, a behavior intervention was “the systematic implementation of procedures that result in lasting positive changes in the individual’s behavior.” (Cal. Code Regs., tit. 5, § 3001, subd. (d).) It included the design, evaluation, implementation, and modification of the student’s individual or group instruction or environment, including behavioral instruction, to produce significant improvement in the student’s behavior through skill acquisition and the reduction of problematic behavior. (*Ibid.*)

167. The weight of the evidence showed that, from September 2013 through April 2014, Student engaged in maladaptive behaviors that interfered with Student’s learning and the learning of others, including inappropriate touching of others, inappropriate self-touching, tantrums, aggression and property destruction. Ms. Raridon developed ABA interventions for these behaviors as part of her supervision of Student’s behavior aide, and Mr. Rojas’ SBC classroom provided a small class size, structure, and a

positive behavior point system that rewarded Student for completion of class assignments and appropriate behavior. Mr. Rojas worked with Student on his social emotional, behavior and communication goals, and Student was learning to use words to ask for help and to take a break to self-regulate, and responding appropriately to redirection. Student made significant and cumulative improvements in his behavior over the course of the 2013-2014 school year. Mr. Rojas' implementation of the classroom positive behavior system constituted behavioral instruction designed to produce significant improvement in the student's behavior through skill acquisition and the reduction of problematic behavior. As such, it constituted systematic implementation of procedures that result in lasting positive changes in Student's behavior and appropriate behavior intervention. Therefore, any lack of a written behavior support plan in the IEP did not result in a denial of a FAPE.

168. For the reasons given at Issue 2(f), Student did not require intensive one-on-one instruction to obtain educational benefit at the end of the 2012-2013 school year, and the same evidence supports a finding that Student did not require one-on-one instruction at the beginning of the 2013-2014 school year. In addition, Student had a one-on-one ABA-trained aide for six hours per day for behavior support, and the aide and supervision services were left in place at the October 22, 2014 IEP team meeting despite Student's change of placement into the SBC classroom for all academic periods. At all times, Student's behavior services in school were supervised by a board certified behavior analyst, a level of education and training not expressly required by law. Ms. Patterson, who attended the October 22, 2013 IEP team meeting to advocate for Student, recommended a school-based program with a class of ten to 20 students and a dedicated one-on-one aide for behavior support. The weight of the evidence did not establish that Student required one-on-one instruction to make progress within the meaning of *Rowley*.

169. The weight of the evidence also did not support placement at Lindamood-Bell for one-on-one instruction in reading and language development in the October 22, 2013 IEP. Lindamood-Bell had not demonstrated any progress in its program. Dr. Gunn's April 23, 2014, report was not available to the October 22, 2013 or April 22, 2014 IEP teams, but if it had been available, Dr. Gunn had changed his written recommendation to placement in Mr. Rojas' SBC classroom, rather than a clinic setting. Ms. Patterson recommended a school-based program with supervised ABA behavior support. Ms. Perry's testimony that Student required Lindamood-Bell services to address his reading and language deficits was neither credible nor persuasive given her lack of any relevant professional credentials and the demonstrated ineffectiveness of that program.

170. The weight of the evidence established that the October 22, 2013 IEP offered Student sufficient special education and services to meet his unique needs and enable him to receive educational benefit. Accordingly, Student failed to meet his burden of proving that he was denied a FAPE for failure to offer sufficient special education and services in the October 22, 2013 IEP.

171. To the extent Student contends he was denied a FAPE because his aide did not accompany him into the bathroom and Student was removed from his general education class prior to the 30-day review IEP, Student failed to meet his burden of proof on either ground.

172. 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.* 5/1 (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.)

173. As to when the change in placement occurred, the evidence showed that Student was removed from Mr. Becker’s general education classroom at Parents’ request at the October 22, 2013 IEP team meeting, with the team’s agreement that Student would be placed in the SBC class until Student’s triennial IEP review to strengthen his behavior, communication and socialization skills. The testimony of the witnesses on when Student was removed from Mr. Becker’s class was varied and inconsistent, and many were forthcoming about a lack of recall. The October 22, 2013 IEP documents discussion of Student’s current placement in Mr. Becker’s class, and is a contemporaneous memorialization of Student’s then-current placement. The weight of the evidence established that Student was not removed from Mr. Becker’s class until after the October 22, 2013 IEP, and therefore District did not fail to implement the June 12, 2013 IEP by removing Student from Mr. Becker’s class prior to the October 22, 2013 IEP.

174. On the issue of District’s failure to provide an aide in the boys’ locker room or on travel to community outings while Student had a female aide, the weight of the evidence did not establish that this constituted a material failure to implement Student’s June 12, 2013 IEP. Substantial evidence established that Student was well supervised in the boys’ locker room by responsible adult males, including Mr. Estrella, particularly after Student was transferred into Mr. Estrella’s adapted physical education class. This evidence outweighed Father’s speculative testimony that Student was inadequately supervised in the boys’ locker room when he did not have a one-on-one aide with him. Although it was established that Student’s female aide drove to meet Student at the community outings, there was no evidence that Student was not adequately supervised

by Mr. Rojas, his classroom aides and other adults during the walk to community outing locations, or that Student was involved in any incidents during these supervised walks.

175. Student was well supervised in the boys' locker room and when the SBC classroom walked to community outings. There was no evidence that Student missed important individualized instruction during these brief interludes, or had behaviors at these times that that could not be appropriately addressed by available special education staff. The loss of these few minutes of one-on-one aide assistance when alternate trained special education staff members were available is neither material, nor significant as contemplated in *Van Duyn*. Therefore, the lack of an aide at these times did not result in a denial of a FAPE.

#### Issue 3(f) - Appropriate Program in the Least Restrictive Environment

176. Student contends that District failed to offer an appropriate placement in the least restrictive environment in the October 22, 2013 and April 22, 2014 IEP's. District contends that it offered an appropriate placement in the least restrictive environment.

177. Legal Conclusions 1-4, 54-56 and 58 are incorporated herein by reference.

178. The October 22, 2013 IEP team members were knowledgeable about Student, the meaning of the evaluation data, and the placement options, and took into account the requirement that Student be educated in the least restrictive environment. Here, applying the *Rachel H.* factors to the facts, shows that Student could not have been satisfactorily educated in a regular education environment, and was not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum. Student had cognitive abilities at the preconceptual and intuitive thought, or kindergarten and first grade, levels, and could not be expected to receive educational benefit in classes taught at the sixth grade level. Student had severe attention and communication deficits that significantly interfered with his ability to absorb language through casual modeling of typical peers, and he

exhibited frustration through noncompliance and maladaptive behaviors when performance expectations were above his developmental level. A regular classroom placement would have placed unreasonable expectations on Student, with instruction far removed from his developmental level, adversely impacting Student, his classmates and his teacher. There was no evidence that cost was a factor in the IEP team's decision that Student could not have been satisfactorily educated in a regular classroom, and in fact, the October 22, 2013 IEP team offered a full-day aide to accompany Student in the SBC classroom. In conclusion, each of the four *Rachel H.* factors weighed in favor of a placement outside of the regular classroom.

179. District's October 22, 2013, offer of the SBC classroom with related services was the least restrictive environment for Student. District's October 22, 2013 IEP offer removed Student from the mild/moderate classroom for science or history and from the general education classroom for an elective. All of the available information about Student's present levels at the time showed that Student's behavior, communication and socialization skills needed to be stronger before he could receive the anticipated nonacademic benefit from those placements. Instead, District offered an SBC placement that was particularly tailored to Student's unique needs and where all his goals and services could be implemented. The SBC classroom provided Student with a highly structured classroom routine that reduced Student's anxiety, and socialization, behavior and communication supports to assist Student on his revised and expanded goals to strengthen precisely those skills. Given the nature and number of goals, and the structure of District's SBC program, and Student's failure to obtain nonacademic benefit from the mild/moderate and keyboarding classrooms when he attended those classes, Student's placement offer was appropriate to meet his unique needs and enable him to receive educational benefit.

180. The evidence established that Student was not receiving academic benefit from the mild/moderate or keyboarding classrooms. The curriculum of Mr. Garcia's class was at the sixth grade level, with materials modified to the third to fourth grade reading level, but Student was functioning at the kindergarten to first grade level. Mr. Garcia, although a credentialed teacher of students with mild to moderate disabilities, opined that he could not successfully modify the ancient civilizations curriculum five to six grade levels in order for Student to learn the curriculum for that class. Mr. Becker observed that Student had good keyboarding skills, but was often working with his aide on his own separate assignments from those of his classmates. Student was at a functional level that made him unable to comprehend the material and unable to interact with typical students on the material presented.

181. The evidence also showed that Student did not gain nonacademic benefit from the mild/moderate or general education classes. Student's communication abilities adversely impacted his ability to interact in Mr. Garcia's classroom, and no talking was allowed in Mr. Becker's class, restricting opportunities for Student to interact with typical peers. Student needed regular sensory breaks, and the mild/moderate classroom and general education classrooms did not provide the sensory equipment used by Student to increase his attention. In the SBC classroom, sensory strategies could be implemented to enable Student to attend and focus that were not available in the mild/moderate or general education classrooms. The embedded SBC focus on socialization, behavior and communication, including Where Everyone Belongs social skills classes, provided Student with improved skills to interact with typical peers, and there was substantial evidence that Student did not have the behavior, communication or social skills to benefit non-academically from the mild/moderate and general education classes.

182. There was no evidence that Student's behaviors significantly interfered with the mild/moderate or general education students. Although Student's behaviors,

such as tapping his pen on the desk, could be distracting, the real concern presented to the October 22, 2013 IEP team was Student's lack of ability and opportunities for social interaction in these classes, and not a negative impact on his classmates. District did not put on any evidence that cost was a factor in the decision on whether or not to integrate Student, particularly as District maintained Student's behavior aide in the SBC program.

183. A school district does not need to provide every conceivable supplementary aid or service to assist the child (See generally *Rowley, supra*, 458 U.S. at p. 176.) The IDEA does not require regular education instructors to devote all or most of their time to one student, or to modify the regular education program beyond recognition. If a regular education instructor must devote all of his or her time to one student, he or she will be acting as a special education teacher in a regular education classroom. (*Daniel R.R., supra*, 874 F.2d at p. 1049-1-50.) Here, Mr. Garcia explained that he could not modify the regular education curriculum sufficiently for Student to learn any of the information normally taught in his class. Similarly, Student worked on his own projects in Ms. Becker's keyboarding class, and could not have been expected to prepare a resume or learn the other business skills taught in that class. District attempted to expose Student to less restrictive classrooms, but appropriately determined at the 30-day review IEP that Student needed to acquire more skills prior to benefitting from general education placements. District provided the maximum appropriate exposure to typical peers, held a timely review of Student's benefit in those placements, and adjusted Student's placement as appropriate. Per *Daniel R.R.*, District fulfilled its obligation under the IDEA to mainstream Student to the maximum extent appropriate.

184. As discussed at Issue 2(g), Student could be satisfactorily educated in a school-based program, and nothing changed between June 2013 and October 13, 2013,

to warrant adding a restrictive home or clinic based component to Student's educational program.

185. In conclusion, the balance of academic and nonacademic factors weighed heavily in favor of Student's removal from the mild/moderate and general education classrooms, and in favor of Student's placement in an SBC classroom. Therefore, the October 22, 2013 IEP mainstreamed Student to the maximum extent appropriate.

186. The October 22, 2013 IEP team offered Student placement in the least restrictive environment. Therefore, Student did not meet his burden of proving that he was denied a FAPE because the placement offered in the October 22, 2013 IEP was too restrictive. The placement in the April 22, 2014 IEP is discussed at Issue 5, below.

Issue 5 - Did the District offer Student a FAPE in the Least Restrictive Environment in the IEP of April 22, 2014?

187. District contends that the IEP of April 22, 2014, offered Student a FAPE in the least restrictive environment. Student disagrees, and contends that his progress had been stagnant for two years, but District continued to offer the same unsuccessful program, when Student needed intensive one-on-one instruction in the Lindamood-Bell program.

188. In a District filed case, the District has the burden of proof to establish by a preponderance of evidence that it complied with the IDEA and California law. First, the District must prove that it has complied with the procedures set forth in special education law. (*Rowley, supra*, 458 U.S. at p. 176.) Second, the District must prove that the IEP developed through such procedures addressed the student's unique needs and was reasonably calculated to enable the student to receive some educational benefit in the least restrictive environment. (*Id.* at p. 201; *Park v. Anaheim Union High School District* (9th Cir. 2006) 464 F.3d 1025, 1031; *Mercer Island, supra*, 575 F.3d at p. 1034.)

189. To comply with the procedural requirements of the IDEA and state law in the development of the pupil's IEP, school districts must include parents in the development of the IEP. (20 U.S.C. § 1414 (d)(1)(B)(i); 34 C.F.R. § 300.322; Ed. Code, §§ 56341, subd. (b)(1), 56342.5.) Parents must be given advance notification of the meeting, including the purpose, time, location and who will be in attendance, early enough to ensure an opportunity to attend. (34 C.F.R. § 300.322 (2006); Ed. Code, § 56341.5.) Parents must be provided procedural safeguards. (Ed. Code, § 56500.1.) School district IEP teams are required to include Student's representative or parent; a regular education teacher if a pupil is, or may be, participating in regular education; a special education teacher; a representative of the school district who is qualified to provide or supervise specially designed instruction, is knowledgeable about the general education curriculum and is knowledgeable about the available resources; a person who can interpret the instructional implication of assessment results; and other individuals, including the person with special needs, where appropriate. (34 C.F.R. §§ 300.321(a)(5),(6) (2006); Ed. Code, § 56341, subd. (b).)

190. In developing the IEP, the IEP team shall consider the strengths of the child, the concerns of the parents for enhancing the education of their child, the results of the initial evaluation or most recent evaluation of the child, and the academic, functional and developmental needs of the child. (20 U.S.C. § 1414(d)(3)(A).) The IEP must include a statement of the present performance of the pupil, a statement of measurable annual goals designed to meet the pupil's needs that result from the disability, a description of the manner in which progress of the pupil towards meeting the annual goals will be measured, the specific services to be provided, the extent to which the student can participate in regular educational programs, the projected initiation date and anticipated duration, and the procedures for determining whether the instructional objectives are achieved. (20 U.S.C. § 1414 (d)(1)(A)(i),(ii); 34 C.F.R. §

300.320(a)(2),(3) (2006); Ed. Code, § 56345, subds. (a)(2), (3).) The IEP also must include a statement of the program modifications or supports for school personnel that will be provided to the pupil to allow the pupil to advance appropriately toward attaining the annual goals; be involved and make progress in the general education curriculum and to participate in extracurricular activities and other nonacademic activities; and be educated and participate in activities with other children with disabilities and nondisabled children. (34 C.F.R. § 300.320(a)(4)(i), (ii), (iii) (2006); Ed. Code, § 56345, subds. (a)(4)(A), (B).) Only the information set forth in 20 United States Code section 1414(d)(1)(A)(i) must be included in the IEP and the required information need only be set forth once. (20 U.S.C. § 1414(d)(1)(A)(ii); 34 C.F.R. § 300.320(d) (2006); Ed. Code, § 56345, subds. (h) & (i).)

191. The weight of the evidence established that District complied with all procedural requirements for the conduct and development of the April 22, 2014 IEP.

192. Parents were given advance notification of the April 22, 2014 IEP team meeting, including the purpose, time, location and who would attend, early enough to ensure an opportunity for Parents to attend with Student's advocate and behaviorist. Parents were provided with a copy of procedural safeguards. All required District personnel were in attendance, including Student's teacher and service providers, and the persons who conducted the triennial assessments were available to interpret assessment results.

193. The April 22, 2014 IEP team considered Student's strengths, Parents' concerns for enhancing the education of their child, the results of the triennial assessments, and Student's academic, functional and developmental needs. As discussed at Issue 3(d), the April 22, 2014 IEP included a statement of Student's present levels of performance, measurable annual goals designed to meet Student's needs, a description of the manner in Student's progress on those goals would be measured, the

specific services to be provided, the extent to which the Student could participate in regular educational programs, the projected initiation date and anticipated duration, and the procedures for determining whether the instructional objectives are achieved. The April 22, 2014 IEP also included a statement of the program modifications or supports for school personnel that would be provided to Student to allow him to advance appropriately toward attaining the annual goals; be involved and make progress in the general education curriculum and to participate in extracurricular activities and other nonacademic activities; and be educated and participate in activities with other children with disabilities and nondisabled children.

194. Legal Conclusions 1-4, 45, 48, 50, 54-56 and 58 are incorporated herein by reference.

195. The weight of the evidence established that the April 22, 2014 IEP was designed to meet Student's unique needs and reasonably calculated to provide Student with educational benefit.

196. Student's needs were identified by the assessment report, the reports on Student's progress on annual goals, and the reports of Student's performance across school settings. The assessors, Mr. Rojas, and Student's school-based service providers were all present at the meeting to answer questions, provide clarification and propose goals to meet Student's unique needs to the team for discussion. Parents, Student's advocate and Ms. Patterson were present to ensure that Parents' concerns were presented to the team and included in the discussion. The meeting lasted for five hours, and goals were reviewed, revised and adopted after thorough discussion. Goals were developed in all Student's areas of need, including reading, spelling, writing, math, language and communication, visual motor, sensory, attention and behavior. As discussed at Issues 2(f), 2(g) and 3(e), the recommendations for one-on-one instruction at Lindamood-Bell, which were ongoing, did not constitute identification of unknown or

unaddressed needs, but simply recommendations on methodology and setting for addressing the needs already identified by the IEP team.

197. District members of the April 22, 2014 IEP team each testified within their area of expertise that the goals developed in the April 22, 2014 IEP were appropriate to meet Student's unique educational needs, and address the full range of Student's educational needs. They also testified persuasively that the April 22, 2014 IEP was reasonably calculated to enable Student to make progress on his goals and, again, Student did not present any persuasive evidence to the contrary. Ms. Raridon testified persuasively that the behavior support plan attached to the April 22, 2014 IEP appropriately addressed Student's behaviors in the school setting, and the aide and supervision services adequately supported that plan. Therefore, the goals and services developed at the April 22, 2014 IEP team meeting were reasonably calculated to enable Student to receive educational benefit as required by *Rowley*, and therefore appropriate.

198. Mr. Rojas, Ms. Nguyen, Ms. Way and Ms. Raridon testified persuasively that Student had made progress on his annual goals during the 2013-2014 school year, and his progress was not stagnant. Student made gains commensurate with his developmental level and taking into account his disability and significant challenges. As discussed, Parents' insistence that Student's demonstrated progress in the school setting was only possible with the support of daily one-on-one Lindamood-Bell lessons was based on unpersuasive, anecdotal evidence that was contrary to the documented lack of progress shown by Lindamood-Bell's own testing.

199. For the reasons discussed at Issue 3(e), Student did not require intensive one-on-one instruction to obtain educational benefit in Summer 2014 or the 2014-2015 school year. Student was offered the small, structured SBC classroom for most of the school day which had a small student to adult ratio to allow Student to make good progress in 2014-2015. In addition, he was offered a one-on-one ABA-trained aide, with

supervision from a board certified behavior analyst, for six hours per day to assist him with attention and behavior. The individualized aide support offered would stay with student throughout the school day, in the SBC class, during service sessions, and in the general education elective class. Student did not present persuasive evidence that Student required individualized instruction beyond that offered in Mr. Rojas' classroom and during therapy sessions to access the curriculum and make progress on his goals.

200. The weight of the evidence established that the April 22, 2014 IEP offered Student sufficient special education and services to meet his unique needs and enable him to receive educational benefit. Accordingly, Student failed to meet his burden of proving that he was denied a FAPE for failure to offer sufficient special education and services in the April 22, 2014 IEP.

201. The persons in the April 22, 2014 IEP team were knowledgeable about Student, the meaning of the evaluation data, and the placement options, and took into account the requirement that Student be educated in the least restrictive environment. Here, as previously discussed at Issues 1(g) and 2(g), applying the *Rachel H.* factors demonstrates that Student could not have been satisfactorily educated in a regular education environment, and was not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum. Student had cognitive abilities at the preconceptual and intuitive thought levels, and could not be expected to receive educational benefit in classes taught at the seventh grade level. Student had severe attention and communication deficits that significantly interfered with his ability to absorb language through casual modeling of typical peers. Student exhibited frustration through noncompliance and maladaptive behaviors when performance expectations were above his developmental level, and a regular classroom placement would have adversely impacted Student, his teacher, and

his classmates. These *Rachel H.* factors weighed in favor of a placement outside of the regular classroom.

202. As to whether, per *Daniel R.R.*, District maximized Student's mainstreaming opportunities, the evidence established that the April 22, 2014 IEP offered Student an educational program in the least restrictive environment. Student was not receiving academic benefit from the mild/moderate or general education elective classes. The curriculum was five or six years above Student's developmental grade level of kindergarten to first grade, and not capable of reasonable modification to teach Student the knowledge or skills presented in those classes. Student was unable to comprehend the material at his functional level, and unable to interact with typical students on the material presented.

203. However, Student gained some, if nominal, benefit from general education classes, which Ms. Patterson viewed as a motivational tool and an opportunity to model the behavior of typical peers. Student had shown progress in his language, communication, socialization and behavior skills during the 2013-2014 school year, and with the concurrence of Parents and Ms. Patterson, the team reasonably calculated that Student would receive non-academic benefit from its offer of general education elective classes for one period three times per week. The team determined that less rigorous classes, such as art, would be chosen, and would provide more opportunities for socialization than core academic classes. The team reasonably rejected inclusion in mild/moderate academic elective classes, as beyond Student's developmental level, regardless of the modifications or support provided. The limited amount of mainstreaming offered was less likely to overwhelm Student, and would not significantly impact his instructional time for core academics in the SBC classroom.

204. There was evidence that Student's behaviors and communication skills had improved sufficiently to warrant another attempt to integrate him into a general

education elective for part of the week, which District offered in the April 22, 2014 IEP. District also offered Student a full-time behavior aide whether he integrated into general education classes or not. This inclusion in a limited amount of general education classes maximized Student's mainstreaming opportunities, and added to the involvement with typical peers already embedded in the SBC program at snack, recess, lunch and the Where Everyone Belongs social skills classes.

205. The extended school year program offered in the April 22, 2014 IEP specifies the same placement and services as the 2014-2015 school year, but proportionally reduced to account for the shorter school day, including the aide and supervision. For the same reasons given above, the extended school year program provided placement in the least restrictive environment.

206. In sum, District demonstrated that it followed all required procedures, and that the April 22, 2014 IEP as a whole offered Student a FAPE in the least restrictive environment.

## REMEDY

207. As discussed at Issue 2(e), Student met his burden of demonstrating that he was denied a FAPE by District's failure to make a clear and specific offer of a four-week extended school year program for Summer 2013. Student did not prevail on any other issue raised. Accordingly, as an equitable remedy, Student is entitled to reimbursement for four weeks of the Lindamood-Bell program that Parents funded during the 2013 extended school year.

208. Under federal and state law, courts have broad equitable powers to remedy the failure of a school district to provide a FAPE to a disabled child. (20 U.S.C. § 1415(i)(1)(C)(iii); Ed. Code, § 56505, subd. (g); see *School Committee of the Town of Burlington, Massachusetts v. Dept. of Education* (1985) 471 U.S. 359, 369 [105 S.Ct. 1996, 85 L.Ed.2d 385] (*Burlington*)). This broad equitable authority extends to an ALJ who

hears and decides a special education administrative due process matter. (*Forest Grove School Dist. v. T.A.* (2009) 557 U.S. 230, 244, n. 11 [129 S.Ct. 2484, 174 L.Ed.2d 168].)

209. In general, when a school district fails to provide a FAPE to a student with a disability, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (*Burlington, supra*, 471 U.S. at p. 369-371.) Parents may be entitled to reimbursement for the costs of placement or services that they have independently obtained for their child when the school district has failed to provide a FAPE. (*Id.*, *Student W. v. Puyallup School District* (9th Cir. 1994) 31 F. 3d 1489, 1496 (*Puyallup*.) An award to compensate for past violations must rely on an individualized assessment, just as an IEP focuses on the individual student's needs. (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.) The award must be "reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place." (*Ibid.*) Remedies under the IDEA are based on equitable considerations and the evidence established at hearing. (*Burlington, supra*, 471 U.S. at p. 374.) The conduct of both parties must be reviewed and considered to determine whether relief is appropriate. (*Puyallup, supra*, 31 Fed.3d at p.1496.)

210. As remedies for District's' violations, Student requested, among other things, that Parents be reimbursed for their out of pocket costs for tuition paid to Lindamood-Bell for the entire Summer of 2013 and mileage reimbursement for transportation to the Lindamood-Bell offices.

211. District offers several reasons why Student is not entitled to the remedies requested. First, Parents caused the harm themselves by enrolling Student in Lindamood-Bell lessons before the June 25, 2013, reconvening of the June 12, 2013 IEP. Second, Student failed to prove that Lindamood-Bell services were appropriate. Districts therefore urges that no reimbursement for Lindamood-Bell be awarded.

212. District declined to fund Student's placement in a Lindamood-Bell program for Summer 2013 on June 12, 2013, and Parents gave District notice of their intent to enroll Student at Lindamood-Bell at that time. District had an opportunity to address Parents' concerns prior to Student's enrollment at Lindamood-Bell on June 24, 2013, by providing Parents a clear written offer of placement and services for the summer of 2013. However, District did not, leaving Parents in limbo. District did not specify its summer 2013 program at the June 25, 2013, meeting, despite having another opportunity to do so. As District failed to timely offer Students an extended school year program for summer 2013, the equities in this case balance in favor of ordering District to reimburse Parents for the cost of Students' tuition at Lindamood-Bell for four weeks of summer 2013, the equivalent number of weeks that District's extended school year program was in session, and reimbursement for transportation costs.

213. While there was very little evidence that the Lindamood-Bell program provided any noticeable benefit to Student, he received four weeks of some sort of individualized academic instruction. Parents had been told by Ms. Perry that the Talkies program would assist Student with language development, a clear area of need and one in which Student could be expected to regress if not addressed during the summer. Parents are not educators, and the fact that Student made no progress and suffered significant regression during summer 2013 does not take away from the fact that at the time, Parents believed Lindamood-Bell would provide beneficial instruction to Student. Parents did not have the benefit of follow-up testing prior to enrolling Student at Lindamood-Bell in June 2013, and could not have known, as was shown at hearing, that Student would not receive educational benefit from Talkies instruction. The evidence established that Mother or another adult was required to stay with Student at Lindamood-Bell during Summer 2013 because Student's behaviors were too extreme. In light of this fact, mileage reimbursement will be limited to one round-trip per day. There

was no evidence of significant regression in speech and language or visual motor skills during Summer 2013, and no reimbursement is awarded for Parents' medical insurance co-payments for the few speech and occupational therapy sessions Student attended during Summer 2013. Parents will be awarded \$2,180.00 per week for four weeks of Lindamood-Bell instruction during summer 2013, for a total of \$8,720 in program reimbursement, and \$604.80 (\$0.56 per mile x 54 miles x 20 trips) for the cost of mileage in transporting Student for four weeks to and from Lindamood-Bell.

## ORDER

1. Within 60 days of this Decision, District shall reimburse Parents a total of \$9,324.80.
2. All of Students' other requests for remedies are denied.
3. District may implement the April 22, 2014 IEP without Parents' consent.

## PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, District prevailed on all issues except Issue 2(e). Student prevailed on Issue 2(e) only.

## RIGHT TO APPEAL THIS DECISION

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h). Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd. (k).)

Dated: December 3, 2014

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ALEXA J. HOHENSEE

Administrative Law Judge

Office of Administrative Hearings