

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

PARENTS ON BEHALF OF STUDENT,

v.

BAKERSFIELD CITY SCHOOL
DISTRICT.

OAH CASE NO. 2008070167

DECISION

Administrative Law Judge (ALJ) Gregory P. Cleveland, Office of Administrative Hearings (OAH), State of California, heard this matter in Bakersfield, California, from September 8 to September 12, 2008.

Student was represented by attorney Nicole Misner. Student's mother and father were present during the hearing. Bakersfield City School District (District) was represented by attorney Deborah Unger. On September 9 and 10, 2008, attorney Anahid Hoonanian also represented the District. Dr. Julius Steele, Director of Special Education for the District, was present on behalf of the District for the majority of the hearing. When Dr. Steele was absent Jodi Stewart-Gonzalez, Program Manager for Special Education for the District, attended the hearing on the District's behalf.

Student filed his request for hearing on July 2, 2008. At the hearing, the ALJ received sworn testimony and documentary evidence. Timely closing briefs were filed by both parties, and on September 22, 2008, the record was closed and the matter was submitted for decision.

ISSUES

1. Did the District deny Student a free appropriate public education (FAPE)
2. during the 2006-2007, 2007-2008, and 2008-2009 school years by failing to address in his individualized education programs (IEPs) Student's behaviors which impeded his learning and by failing to include a behavioral intervention plan (BIP) in the IEPs?
3. Did the District deny Student a FAPE for the 2006-2007, 2007-2008, and 2008-2009 school years by failing to implement the IEP in a manner that tracked Student's progress, rendering the IEP goals unattainable?¹
4. Did the District deny Student a FAPE for the 2006-2007, 2007-2008, and 2008-2009 school years by failing to meet Student's functional performance needs in behavior, pragmatics and social skills, by improperly implementing his goals, programs and services in those areas?
5. Did the District deny Student a FAPE during the period from April 13, 2007, through May 31, 2007, and during the 2007-2008 and 2008-2009 school years by offering Student use of a one-to-one aide rather than attendance at school with his dog, Thor?
6. Did the District deny Student a FAPE during the period April 13, 2007, through May 31, 2007, and during the 2007-2008 and 2008-2009 school years, by not providing Student with an education in the least restrictive environment, when it provided Student independent study at home?

CONTENTIONS

Student contends that he was denied a FAPE because his behaviors in school were inappropriate and that the District was unable to extinguish those behaviors through

¹ The ALJ has slightly rephrased the issues for purposes of organization and clarity.

his IEPs during the 2006-2007 and 2007-2008 school years. Student also contends the offer of a FAPE for 2008-2009 school year presents him with the same programs and services which had previously proven unsuccessful in prior years. Student further contends that his dog, Thor, assists him with life and behaviors, and use of Thor is a key component to Student receiving a FAPE. Finally, Student contends he was not educated in the least restrictive environment because he received home study instead of placement in a regular education classroom with his dog, Thor.

The District contends they have provided Student with a FAPE during the 2006-2007 school year, with programs and services that allowed Student to make substantial progress. The District further contends that Student's behaviors cannot be fully extinguished. Next, the District contends that it offered Student an extensive IEP that met all of his needs for the 2007-2008 and 2008-2009 school years while Student's parents kept Student out of school. The District also contends there is no peer-reviewed research which supports the use of dogs to assist the education of students on the autism spectrum. Finally, the District contends that it has legitimate safety concerns that prevent it from allowing Student to bring his dog, Thor, to school.

FACTUAL FINDINGS

JURISDICTION AND BACKGROUND

1. Student is a 13-year-old male eighth-grader who lives with his parents within the District boundaries. He qualifies for special education services under the category of autistic-like behaviors, having been diagnosed at age seven with Asperger's Syndrome. The diagnosis was changed to Autistic Disorder by a team of physicians at the UCLA Neuropsychiatric Hospital during an evaluation conducted in 2002. Student also has been diagnosed with post-traumatic stress disorder as a result of two sexual molestations.

Based upon the molestation history, the UCLA neuropsychiatric team recommended mental health services for Student.

2006-2007 School Year

Unique Needs

2. During the 2006-2007 school year Student's needs were in the areas of behavior, pragmatic speech and social skills. Student did not understand or apply proper language strategies, emotional gradations and non-verbal communication. Due to these needs, Student engaged in behaviors which impeded learning including refusal to do assigned work or complete tasks, making disruptive noises and comments in class, and hitting and inappropriate touching of other students. These same needs and behaviors had been present throughout Student's academic career.

Goals and Objectives

3. A student's IEP must contain a statement of the student's measurable annual goals for both academics and functional performance, which are designed to meet the student's unique educational needs. The IEP must also contain a statement of how progress toward the goals will be measured, and when reports of the student's progress toward the goals will be provided. An educational program offered by a school district must be designed to meet the unique needs of the student, be reasonably calculated to provide the student with some educational benefit, and comport with the student's IEP. An IEP team must also consider whether a child's behavior impedes his or her learning or that of others, and if the team determines that it does, the team must consider the use of positive behavioral interventions and supports, and other strategies to address the behavior.

4. Student began the 2006-2007 school year with an IEP already in place. That IEP was dated March 10, 2006, along with amendments dated May 30, 2006, August 18,

2006, and October 27, 2006. A new annual IEP was drafted on January 24, 2007.

Pragmatic Speech and Social Skills

5. The March 10, 2006 IEP contained five goals for Student, all in pragmatic language and social skills training. The January 24, 2007 IEP combined all of the goals into one social skills goal, using appropriate language skills to communicate in the classroom. Student's expert, Dr. William McAmis, drafted the goals for the March 10, 2006 IEP and concurs with the District's position that the March 10, 2006 IEP goals in social skills and pragmatic language were appropriate to meet Student's needs. Student agrees that the goals themselves were appropriate in order to address his behavioral needs. Dr. McAmis' testimony regarding appropriateness of goals was unrefuted. Based on that unrefuted testimony, the IEP of March 10, 2006, addressed Student's behavioral needs and was reasonably calculated to provide Student with educational progress.

6. The January 24, 2007 IEP included a single social skills goal with programs and services to address Student's overall behavioral needs. The goal called for Student to use appropriate language in communication with his teachers and fellow students. That IEP addressed Student's overall pragmatic speech and social skills needs, because Student's difficulties all revolved around an inability to communicate with others in a socially acceptable manner.

Behavior and BIP

7. Student contends that his 2006-2007 IEP did not address his behaviors which impeded learning, and did not include a BIP. A BIP was in fact in place and incorporated into Student's IEPs for 2006-2007. The behavioral functions and replacement behaviors in the BIP were directed toward teaching Student to follow adult instructions and completing tasks at a desired rate, teaching him how to interact with peers appropriately, and teaching him how to self-regulate behavior so as to not act out physically.

8. In addition to the IEPs, Student also had a revised version of an April 14, 2004 BIP dated February 22, 2006, that was revised again on January 19, 2007. The February 22, 2006 BIP contained the same behavioral functions and replacement behaviors noted in the April 14, 2004 BIP. However, the February 22, 2006 BIP changed some of the strategies and reinforcement schedules for how to implement the replacement behaviors, and added new consequences for problem behaviors.

9. Student had behavioral needs that impeded his learning and the learning of others. Based upon Student's admission that the goals were appropriate and the unrefuted testimony of Dr. McAmis, for the 2006-2007 school year, the evidence established that Student's IEP included a BIP, and set out goals and objectives which addressed Student's unique behavioral, pragmatic speech and social skills needs. Student, Dr. McAmis, and Student's behavior intervention case manager (BICM), Nikki Sherrill, all concurred that the goals were appropriate to address Student's needs during 2006-2007, and no evidence was presented to the contrary.

Placement and Services

10. Student contends that the District offered him appropriate IEP goals, but the services in the areas of social skills and pragmatic language were not implemented in a manner that allowed him to achieve his goals. In particular, Student contends that the District failed to implement his IEP goals in these areas by not tracking his progress on any of his goals, and not keeping data on the antecedents to his behaviors and his replacement behaviors outlined in his BIP.

11. The services in the IEP that would address the pragmatic speech and social skills goals included speech therapy (in pragmatic speech) and individual and group instruction in social skills.

12. Student's behavioral needs were addressed in Student's February 22, 2006 BIP through various methods, including a peer assistant to keep Student on track, posting

of behavioral rules on Student's desk, reinforcers, such as extra computer time or more desirable assignments when Student engaged in proper replacement behaviors. Additionally, the BIP called for Student to be taught age-appropriate play and interaction skills, anger management skills and communication skills. On January 19, 2007, the BIP was revised in order to address behavioral concerns appropriate for a sixth grade student. The most significant change in the BIP was that a one-to-one aide was assigned to sit in close proximity to Student to keep him on task and to remind Student to appropriately interact with others. The aide and Student were to record behavioral events from the day in a daily communication journal, which was to be monitored both at home and at school.

13. As noted above, Ms. Nikki Sherrill was assigned as Student's BICM and she was primarily responsible for implementing the services outlined in the IEP and BIP. As discussed below, Ms. Sherrill and the other District personnel who worked with Student on his behavioral goals attempted to implement the goals, but did not keep track of Student's progress toward his goals.

14. The testimony of Dr. McAmis established that Student had appropriate goals in place for 2006-2007 and that the District's speech pathologist did "an excellent job" of implementing the pragmatic and social skills goals. However, Dr. McAmis also persuasively established that the District failed to comport with the IEP by collecting adequate data on Student's progress to determine the antecedents to Student's bad behaviors and data regarding whether the behaviors were extinguished or replaced. Dr. McAmis' opinion in this regard is persuasive because it is supported by the documentary evidence. In particular, Student's IEPs lack any numerical information on how often Student engaged in replacement behaviors in class, during social skills training or in pragmatic speech sessions, even though the IEPs contained benchmarks with dates and percentages of how often Student relied upon the proper replacement behaviors.

15. As noted above, Student's BIP required that a daily communication journal be kept so as to track Student's progress in re-directing his behaviors. Neither Student's aide nor any other District staff maintained Student's daily communication journal. Student's mother only occasionally received notes from the aide on Student's behaviors. The failure to keep the communication journal denied Student's parents and his service providers adequate opportunity to monitor Student's progress in re-directing behaviors.

16. Dr. McAmis also testified regarding the BIPs used for Student, noting a BIP should be attached to an IEP (the revised BIP of January 17, 2007 was attached to Student's IEP of January 24, 2007) and revised as needed. As noted above, the BIP was revised over time. Dr. McAmis persuasively established that the original and revised BIPs revealed Student did not make measureable progress in extinguishing behaviors that impeded learning because the behaviors that interfered with Student's learning did not change between September 2006, when he personally observed Student, and January 17, 2007, when the BIP was revised.

17. In contrast to Dr. McAmis, Ms. Sherrill testified to her work with Student on his BIP and his IEP goals and the progress he made. Ms. Sherrill's credentials qualified her to work with Student toward achievement of his behavioral and social skills goals. Ms. Sherrill provided Student with social skills training one hour per week and over the course of the training she found Student progressed. One example of such progress was Student's demonstrated ability to use idioms (based on Student's goal for understanding and responding to abstract comments). She did not work on Student's second goal (use of power cards) because she felt Student did not need the power cards based on her observations of Student in social skills group. As the power cards were not used with Ms. Sherrill, she did not know if Student actually made progress on that goal. Ms. Sherrill did observe Student progress on the remaining goals and provided tangible examples of such progress, but her subjective belief alone, without some objective measurement of

progress, does not refute Dr. McAmis' testimony that the lack of BIP tracking as required by the IEP precluded the opportunity for Student's parents to follow his progress throughout the year.

18. Along with Nikki Sherrill, Student also worked on social skills in the 2006-2007 school year with Tamra Stoner and Ritz Faz-Essen. Ms. Stoner has been a program specialist in special education for the District for the past five years. She has a master's degree in special education and a clear credential in special education. Additionally, she has obtained training in social skills at workshops and seminars. In addition to Ms. Sherrill, Ms. Stoner worked on Student's social skills through pragmatic language such as verbalizing emotional status, as well as turn taking in conversation. Like Ms. Sherrill, Ms. Stoner also observed Student progress in reducing disruptive behaviors but kept no tally on how often Student used replacement behaviors. Thus, like Ms. Sherrill, Ms. Stoner observed progress but did not keep sufficient records that objectively measured Student's progress.

19. Rita Faz-Essen is a school psychologist for the District, and has been trained to teach social skills. Based upon her observation of Student in social skills, she felt Student made progress, especially when considered against Student's baseline behaviors. She established that Student had exhibited some progress in understanding body language during role-play activities.

20. Considering the cumulative testimony of Ms. Sherrill, Ms. Stoner, and Ms. Faz-Essen, and the related services logs they provided, it is clear Student's goals and services in the areas of pragmatic language and social skills were not only reasonably calculated to provide Student with educational benefits in those areas, but Student also actually made some progress toward his IEP goals. In particular, Student progressed in using re-directing behaviors that impeded learning, during the 2006-2007 school year.

21. Nonetheless, because of the failure to track Student's progress on his IEP goals, the question is whether such failure materially differed from the IEP requirements. None of the District witnesses who were responsible for implementing these IEP goals could address whether Student actually achieved any of the measurement criteria that were part of Student's goals. For instance, the first goal in the March 10, 2006 IEP called for Student to understand and respond appropriately to abstract comments seventy five percent (75%) of the time by November 2006. No evidence presented indicated that Student actually met that criteria by November 2006, nor did the evidence establish if Student responded appropriately at some lesser percentage. As a second example, in the case of the power card goals, the persons responsible for implementing the goal merely decided the goal was unnecessary and failed to implement it without any data or documentation to support their conclusion.² Had the District tracked progress as required in the IEP, Student's parents and the District personnel could have determined how often Student utilized replacement behaviors instead of engaging in those behaviors that impeded his learning, and therefore determine if modifications of the programs or strategies were needed.

22. Dr. McAmis credibly established that goal measurement judged by data collection was necessary to implement Student's educational program, including determining when Student's bad behaviors occurred and when they were actually replaced by appropriate behaviors. That testimony was particularly convincing due to the fact that Student's goals called for measurement on each short-term objective, and some form of information is in fact needed if one is to determine progress. Thus, while the District

² At the very least, Nikki Sherrill should have requested a new IEP team meeting to present an objective basis for her conclusion that the power card goal did not need to be implemented.

provided Student with goals and services that at the outset were reasonably calculated to provide Student a FAPE, there is no credible evidence that the implementation of those goals was carried out except in a very vague, unmeasured method. The District's evidence of "some progress" made through the services provided, fails to comport with Student's IEP, which set out specific measurements of progress and required tracking of that progress. For the District to have properly implemented the IEP, it should have tracked progress by keeping data on the frequency of Student's behaviors that impeded learning, and how often Student engaged in replacement behaviors. Over time, the District should have been able to determine if Student's behaviors diminished in frequency. If that data had been kept, then the amount of progress could be determined. Without such data, there is no way to determine if Student's progress was more than de minimis. Therefore, the failure to implement the tracking requirements of the IEP must be considered a material failure to implement the IEP.

23. Additionally, since the power card goal was included to meet one of Student's social skills needs, the decision by Ms. Sherrill not to implement the power card goal was a denial of FAPE. As the Behavior Resource teacher and BICM for Student, Ms. Sherrill had primary responsibility to see that the goals were implemented in compliance with Student's IEP. However, by ignoring the power card goal, she did not address the need that gave rise to that goal.

24. For the 2006-2007 school year, Student had a BIP in place, along with IEP goals and services, which were reasonably calculated to deliver a FAPE. However, the implementation of the IEP, particularly the requirement of tracking progress, denied Student a FAPE.

2007-2008

Unique Needs

25. For the 2007-2008 school year, Student's needs remained the same as those discussed above in Factual Finding 2, namely behavior, social skills and pragmatic speech.

Goals and Objectives

26. Student's IEP goal from the January 24, 2007 IEP had a target date of October 2007, with measurement benchmarks set for January, March and June of 2007. The IEPs of September 19, 2007, and October 26, 2007, did not set out any new goals for Student, nor was there any indication that the goal from January 24, 2007, was to be extended beyond October. Therefore, after October 2007, Student did not have any specified goals in effect, even though his behavioral needs still existed. The District offered services including independent study, occupational therapy (O.T.) and speech therapy, all without any specified goal. An IEP that lacks goals does not address a student's unique needs. Even though Student's parents agreed to the January 24, 2007 IEP, Student was denied FAPE during 2007-2008 because most of the school year he had no goals designed to address his unique needs.

Programs and Services

27. During the entire 2007-2008 school year Student remained at home receiving independent study because his parents refused to send Student to school without his dog, Thor. The District had already decided the previous school year that Thor would not be allowed on campus (discussed further below) and so Student did not attend school after April 12, 2007. From April 12, 2007, until the end of the 2006-2007 school year, Student received in-home independent study from the District. The IEP of January 24, 2007, remained in effect, but was amended on April 25, 2007, and May 9, 2007, to

provide Student with independent study.

Behavior and BIP

28. During the 2007-2008 school year Student contends that he was denied FAPE because his behaviors that impeded learning in school were not properly addressed through the IEPs in effect for that school year.

29. At the start of the 2007-2008 school year, Student's parents tried to get Student an inter-district transfer. The District's school year began on August 20, 2007, but Student received no independent study from that date until September 19, 2007. On September 19, 2007, the IEP team members, including Student's mother, signed an IEP amendment to provide Student with in-home independent study while awaiting a final decision on the transfer. The IEP amendment provided Student with five hours per week of in-home instruction in math and language arts, along with speech therapy for forty-five minutes per week and three thirty-minute sessions of O.T. consultation per week. The District's IEP offer for 2007-2008 (if Student returned to school) then provided for attendance at a District middle school, O.T. consultation (to assist with transition to middle school and from home study to school), speech services thirty minutes per week, mental health services, social skills sixty minutes per week, and use of a one-to-one aide. The September 19, 2007 IEP stated that the offer contained supports and services that enabled Student to receive educational benefit. The same offer was made by the District on October 26, 2007, when the inter-district transfer was denied. Student's parents rejected the October 26, 2007 offer but agreed to extend Student's in-home independent study in order to get Student some education while he was held out of class.

Independent Study

30. While Student was at home on independent study he received pragmatic speech services with Barbe Mitchell. During the 2007-2008 school year, she met with

Student once a week for thirty to forty-five minutes (although she did not meet with Student at all for a four-month period from November 2007 through March 2008). Ms. Mitchell's testimony and the end-of-year report she prepared established Student progressed in staying focused, decreasing "fidgets" that took Student off-task, and turn-taking in conversation. However, Ms. Mitchell could not determine whether Student's progress could be expanded beyond therapy, such as in a school setting, due to the fact that Student was not in school, and, like the District staff who worked with Student during the 2006-2007 school year, Ms. Mitchell did not present documentation of measurable progress.

31. While Student was at home, in addition to speech therapy, he received direct instruction from his independent study teacher, Anne Langley. Ms. Langley testified that she worked with Student only on mathematics and language arts. Student also received O.T. services from Deborah Hazel, the District's coordinator of O.T. The services were directed toward teaching Student to use cursive writing.

32. The independent study Student received was not designed to provide Student a FAPE. Jodi Stewart-Gonzalez, the District's program manager for special education, admitted that independent study did not provide Student a substantive FAPE, but instead constituted the District's attempt to offer Student some education while Student was kept at home. This testimony established that for 2007-2008 the District provided Student programs and services that at most were a stop-gap measure, not intended to fully educate Student and certainly not intended to address Student's known behavioral needs. Student had no coursework at all from August 20, 2007, through September 19, 2007, and the coursework he was provided thereafter did not include any instruction in science or social studies. His progress toward his IEP goal prior to October 2007 was not measured, and from October 2007 until an IEP team meeting held on May 12, 2008 (discussed further below), Student received services which were not directed

toward any specified goal. Based upon these facts, the District provided Student with independent study during 2007-2008 which provided him with nothing more than de minimis educational benefit.

2008-2009

Unique Needs

33. For the 2008-2009 school year Student's needs remained the same as those discussed above in Factual Finding 2, namely behavior, social skills and pragmatic speech. Student also had a new need in O.T. due to poor handwriting and a new need in writing expression. Those handwriting and writing needs are not the subject of dispute in the present claim.

34. Student contends that the IEP offer for the 2008-2009 school year is inadequate because it provided the same programs and services which had not provided Student with a FAPE during the previous two school years.

Goals and Objectives

35. On March 28, 2008, Student's annual IEP was convened. As noted above, Student was not attending school at that time. An IEP with drafts of goals was prepared but not signed. The IEP team re-convened on May 12, 2008, and a final draft of the earlier IEP was presented but not agreed upon.

36. The May 12, 2008 IEP offered Student placement at a District junior high school, with services including specialized academic instruction, speech and language services, O.T. consult and individual therapy, mental health services through Kern County Department of Mental Health, a one-to-one aide, social skills, behavior resource teacher consultation, and psychologist consultation. The IEP also included the BIP of January 19, 2007, without revision. That BIP was specifically written to address appropriate behaviors

for a sixth-grade Student, even though Student would be in the eighth grade in school year 2008-2009. The IEP stated the BIP would be revised when Student returned to school, which was a reasonable proposal considering that Student would be returning to both a school environment after being at home since April 13, 2007, and a middle-school environment which was a new experience for Student.³

37. Before the May 12, 2008 IEP team meeting was convened, the District assessed Student. Ms. Mitchell assessed Student in the area of speech and language, Ms. Hazel assessed Student in O.T., and Christie Ludlow, a District school psychologist, conducted a psychoeducational assessment.

38. While the speech and language assessment revealed Student had improved his pragmatic speech, testing at the fifty-third percentile on the Test of Pragmatic Language-2, Ms. Mitchell still recommended three new IEP goals for pragmatic speech to ensure that Student's test performance could be repeated in a more general, real-life environment. There were three pragmatic speech goals all including baselines and benchmarks. Furthermore, while Ms. Mitchell admitted freely that the new goals were very similar to earlier goals found in the IEPs dated March 10, 2006, and January 24, 2007, she credibly explained that even if Student had met the same goals earlier, Student's needs in the area would be different as Student transitioned to junior high school, thus warranting the continuation of the earlier goals.

39. The handwriting and written expression goals were also written with

³ As discussed in Factual Finding 38, the District's speech therapist Beverly Mitchell admitted Student's behavioral/social skills needs in 2008-2009 would be distinctly different than those needs that existed previously, given that the IEP proposed for 2008-2009 called for Student to be placed in a middle school environment for the first time.

baselines and benchmarks. According to Ms. Judi Stewart-Gonzalez, the District's Program Manager for Special Education, the additional goals were added to address Student's social skills needs, his potential transition from home to school, and from elementary school to junior high school. While the District tried to approach Student's needs, the social skills goals were written without any benchmarks or objectives, even though Student had social skills objectives in his previous IEPs. Dr. McAmis persuasively established that one social skills goal was inappropriate because Student had achieved that goal earlier. Both Dr. McAmis and Student's mother established that Student had learned to speak with "scripted responses" at a much younger age, negating the need for a goal calling for Student to use "conversational script." Thus, the IEP goals offered for 2008-2009 included one goal that Student had already mastered, and the two social skills goals lacked any objectives or benchmarks. Therefore, out of the five overall disputed goals in the 2008-2009 IEP, two of those goals provided Student's parents with no basis to determine if Student was making progress. Those same two goals also failed to provide the service providers with guidelines for measuring Student's progress as they worked on the goals with him. The result is the IEP offer for 2008-2009 did not offer a FAPE that addressed Student's unique needs.⁴

Programs and Services

Student's dog Thor and a one-on-one aide

40. Student contends that since April 12, 2007, he has required his dog, Thor, with him in school in order to receive a FAPE. Thor is alleged to be a trained dog that

⁴ Implementation of the 2008-2009 IEP was not an issue presented at hearing.

would provide service to autistic children.⁵ Student also contends that attendance at school with Thor would be a less restrictive environment than attendance at school with the one-to-one aide.

41. In February 2007, Student's parents attended an autism conference put on by a parents group, the Current Autism Network, along with the Kern County Superintendent of Schools. At the conference, the DogWish Foundation had set up a display and Student's parents spoke with Bob Taylor of the DogWish Foundation, asking if a dog could help Student. After the conference, the parents visited the DogWish Foundation facilities with Student. Student was then introduced to Thor, a large German Shepard. Thor had been trained by Mr. Taylor to be a police dog but lacked aggressive tendencies, and so Mr. Taylor determined Thor could be used as an assistant to autistic children.

42. For autistic children, Mr. Taylor trains the dog to be a "side assistant." The dogs are trained in search and rescue, and protection, without acting aggressively or threatening. The dog must learn to respond to the child's needs without verbal commands. For instance, Mr. Taylor testified that a properly trained dog, such as Thor, will sense, through scent, a child's brainwaves when the child is upset and then place its head or paw on the child so as to re-direct the child's focus and calm the child. Although Mr. Taylor is convinced of the value of dog usage by autistic children, he does not know if such use has been endorsed by autism experts, nor is he aware of any peer-reviewed studies endorsing the use of dogs for autistic children. He also has never observed Student with Thor in a school environment.

⁵ As noted in the order following pre-hearing conference, this decision does not determine the status of Thor as a service dog or otherwise. The only issue presented is whether Thor was needed for Student to receive a FAPE.

43. When Mr. Taylor first met Student, he felt Student was insecure and did not want to communicate. He determined Thor would be the right dog for Student and observed an immediate bond when Thor and Student first encountered each other. Thor and Student trained at the DogWish Foundation facilities twice a week, in ninety minute sessions, for six weeks and then Student's parents purchased Thor from Mr. Taylor for \$10,000 on March 2, 2007. Student and Thor trained together for a total of three months. Based on his observations, Mr. Taylor testified that Student and Thor worked as one unit, such that Thor keeps Student calm and focused, so that Thor is a necessary service to Student in school. For reasons discussed below, Mr. Taylor's testimony was not convincing.

44. Student first took Thor to school on April 10, 2007. Before then, Student's parents had advised the school principal of the reasons for Thor's presence and had obtained the principal's permission to allow Thor on campus, but had not requested an IEP meeting to discuss Thor's use as an educational support. When Student attended with Thor, he was accompanied by his adult cousin, Sarah Caughill. Ms. Caughill introduced Thor to the principal and to Student's aide. Once class started, she explained to the class that Thor was not a pet, and that his role was to work with Student. She explained to the class that if they wanted to pet Thor they had to first ask Student, which the children did both in class and at recess. Based on Ms. Caughill's observation, the children at Student's school were excited initially to engage Thor but quickly returned to their normal school day routine. Ms. Caughill testified that all feedback she received regarding Student's behavior that week was positive. She also observed Student receive a "most improved student" award on the third day Thor was present.

45. After the third day Student attended school with Thor, the District's Director of Instructional Services was contacted regarding Thor's presence on a school bus. Thereafter, the Superintendent, Assistant Superintendent, and Director of Instructional Services decided that student safety warranted keeping Thor off the bus and off the school

campus. The District's safety concerns were twofold: first, the District was concerned about the risk of Thor biting another student, and second, that Thor could vomit and create a slip and fall hazard. An additional factor considered was that Thor was not listed as a support or service required by Student's IEP.

46. In response to the District's refusal to allow Thor's presence, Student's parents kept Student home from school. Ms. Caughill prepared and sent letters to the District, signed by herself and Student's classroom aides, all to the effect that Student made significant progress in interaction with his peers during the three days Thor was present. In addition, Student's personal physician, optometrist and psychologist all wrote letters extolling Thor's role in increasing Student's self-confidence, ability to focus, and emotional growth. Additionally, Student's youth pastor testified that he observed positive changes in Student's ability to maintain focus since Student obtained Thor.

47. On April 25, 2007, the IEP team convened to place Student in independent study due to Student's non-attendance at school since April 12, 2007. Student was provided five hours per week of home instruction through the end of the 2006-2007 school year. At a follow-up IEP meeting on May 9, 2007, Student's mother discussed her belief that Thor provided a calming presence for Student which helped Student to focus and de-escalate his behaviors. On May 25, 2007, Dr. Julius Steele, the District's Director of Special Education, followed up the IEP with a letter to Student's parents. In that letter, Dr. Steele expressed the District's willingness to hold another IEP to further discuss the parents' concerns regarding Thor and whether Thor was a needed service or support for Student under the Individuals with Disabilities Education Act (IDEA).

48. All District FAPE offers since October 10, 2007, have been made with the provision that Student attend school without Thor. As explained below, the evidence presented at hearing supports the District's position that Thor is not needed for Student to receive a FAPE.

49. While Mr. Taylor did refer to one study from the University of Phoenix supporting the merits of service assistant canines on children with autism, he did not offer any details on the study, or state whether the study supported canine use in educational settings. Although Mr. Taylor had extensive expertise in training dogs, he did not have any expertise in autism, or any particular knowledge about whether an autistic pupil such as Student needed a dog for educational purposes. As noted above, Mr. Taylor does not know if such usage has been endorsed by autism experts, nor is he aware of peer-reviewed studies endorsing the use of dogs for autistic children. For these reasons, Mr. Taylor's opinions about whether Student needed to bring Thor to school were not convincing.

50. Student also offered the testimony of an examining licensed clinical social worker, Kathy Elder. Ms. Elder is aware of anecdotal articles about the use of dogs for autistic children. She also cited three published studies showing children with emotional or developmental disorders made great strides working with dogs. However, her testimony was devoid of any content supporting the need for dogs with autism or post-traumatic stress disorder in education. Her testimony only pointed to dogs assisting in a therapy environment. Most significantly, Ms. Elder had never observed Student with Thor in an educational setting. Therefore, her testimony was not convincing that Student needs Thor to receive a FAPE.

51. Dr. McAmis cited two peer-reviewed research articles regarding dog usage with autistic children. The first study was "Research and Reflection, Animal Assisted Therapy, in Mental Health Settings" by Debra Phillips-Parshall in Volume 48 of Counseling and Values. Dr. McAmis' testimony indicated that the study paired eight Asperger's Syndrome children with pet dogs. Dr. McAmis explained that the children could talk to the dogs without any judgment from the dog, which led to the children opening up in therapy. Dr. McAmis also was familiar with a published study from Wisconsin in Children's Healthcare volume 31, using forty-four emotionally disturbed children, including some

children with Asperger's Syndrome. The children in the study that were exposed to a dog showed increased social skills. While social skills are a particularly important aspect of Student's unique needs, Dr. McAmis admitted that the results of both studies are anecdotal only, and his testimony regarding research was convincingly refuted by Dr. Ennio Cipani, as discussed below.

52. During school year 2007-2008, Student's home study teacher, Anne Langley, observed Student at home with Thor while she and Student worked on his lessons. Ms. Langley testified that Student initially did have trouble getting off task but got over that problem within two weeks with her help. Thor was present at Student's home but she did not observe Thor helping Student to re-direct himself or calm down. Ms. Langley actually observed Thor as a distraction to Student.

53. Along with Ms. Langley, Student worked at home with Barbe Mitchell, the speech pathologist. When she worked with Student, Thor was usually lying at her feet. Ms Mitchell also observed Thor as a distraction to Student and she did not observe Thor assist Student.

54. Most critical regarding Thor's use in Student's education was the testimony of Deborah Hazel. When Ms. Hazel provided in home O.T. services to Student and when she assessed Student during the 2007-2008 school year, Thor was present. Ms. Hazel observed Student become distracted when he petted Thor, and when Student got off task, she re-directed Student back on task, rather than Thor. Ms. Hazel's observation and testimony is especially credible because she has personal experience raising guide dogs for the blind. In her experience, a person provided a service dog needs a high level of maturity, to tend not only to their own needs, but also the dog's needs. In Ms. Hazel's experience, a person trusted with a service dog would almost always be at least college age due to the required level of maturity. Ms. Hazel also knows of dog use as a therapeutic tool for autistic children, but testified the research on such use is only

anecdotal at present and even in that research, the dogs were not utilized as part of an educational curriculum. Due to Ms. Hazel's experience with service dogs, her testimony was more convincing than that of Ms. Caughill or Student's youth pastor.

55. Along with the observational evidence regarding Thor's use in Student's education, Dr. Ennio Cipani testified regarding empirical scientific evidence on dog usage in education. Dr. Cipani has a Ph.D. in educational psychology and presently serves as a professor of special education for the National University. He testified about the need for educational tools to be tested empirically through the experimental method, relying on experimental groups and control groups. Dr. Cipani related one study by B.J. Freeman from UCLA which revealed a lack of empirical proof supporting dog usage for therapy of autistic kids. Relying upon Dr. Freeman's findings, Dr. Cipani established there is an overall lack of peer-reviewed studies that provide empirical support for dog usage with autistic children. Dr. Cipani's testimony in this regard was unrefuted and was more persuasive than the testimony of Dr. McAmis and Ms. Elder, both of whom referred only to anecdotal studies.

56. Overall, the evidence does not support Student's contention that he needs Thor present with him in school as a program or service in order to receive a FAPE. Student relies on anecdotal evidence only, while the most persuasive evidence comes from the testimony of Ms. Hazel and Dr. Cipani. The testimony of Ms. Hazel and Dr. Cipani established that Student is not mature enough to handle his educational requirements along with his dog, and that empirical evidence has not proven dogs benefit autistic children in education. Thus, the District was not required to provide Thor as a service in Student's IEP or otherwise permit the dog to be on campus.

57. Student's parents had been trying to get Student a one-to-one aide in school ever since the assessment at UCLA in 2002. At present, Student's parents contend that use of the one-to-one aide is more restrictive than attendance at school with Thor.

58. Two District program specialists conducted observations of Student on November 17, 2006, and December 11, 2006. Both of the observations were reported on "Special Circumstance Instructional Assistance Observation Evaluation Forms." Both of the evaluators felt Student would benefit from a one-to-one aide to work with Student on targeted behaviors, but would be more appropriately educated in a smaller more structured environment.

59. Ms. Stewart-Gonzalez testified that the District and Student's parents considered a special day class (SDC) environment for Student after the observations, but everyone agreed Student's academic abilities made such a placement inappropriate for Student as he would not be educated at grade level in the SDC. In light of that decision, the IEP team decided on January 10, 2007, that assignment of a one-to-one aide for Student was appropriate. Every offer of FAPE by the District since January 10, 2007, has included use of a one-to-one aide as a support for Student.

60. Testimony from Ms. Stewart-Gonzalez established that a one-to-one aide is less restrictive than Thor. An aide can back off from Student according to circumstances, whereas Thor would be constantly at Student's side throughout the day. Similarly, a human aide can gauge the extent of re-direction Student needs much more so than Thor can. Similar to Ms. Stewart-Gonzalez's testimony, testimony from Ms. Stoner established that Student's aide started out working close by Student and would move away and come back as needed. The aide tried to allow Student to work as independently as possible. Additionally, Student's own evidence does not support use of Thor instead of an aide. Dr. McAmis testified Student's aide should be faded out as Student learned to utilize proper

replacement behaviors, but if that were true, Student would be more restricted by Thor's presence, than by an aide that fades over time.

61. Based upon the evidence presented, use of a one-to-one aide is less restrictive than having Thor constantly present. Student would have at least some independence from the aide during the school day, but would not be separate from Thor at all.

Least Restrictive Environment

62. A student must be placed in the least restrictive environment (LRE) in which he can be educated satisfactorily. A special education student must be educated with nondisabled peers to the maximum extent appropriate, and may be removed from the regular education environment only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. Whether a student can be mainstreamed in a regular education class is determined by balancing the educational benefits of full-time placement in a regular class, the non-academic benefits of the placement, the effect the student would have on the teacher and children in the regular class, and the costs of mainstreaming the student.

63. Student's situation was somewhat unusual from the typical LRE scenario in that Student has always attended school in a general education classroom with non-disabled peers, which is the placement the District has continued to offer. The only reason he has not been continually educated in such a classroom since April 12, 2007, is because his parents have removed him from school due to the District's refusal to allow Thor's presence at school. While Student has been at home, he has been in a highly restrictive environment removed from all school contact with peers.

64. The District's offer to place Student in a general education classroom for the time period from April 2007 to the present was an offer for placement in the LRE. Instead,

Student's attendance in a highly restrictive environment was a choice made by his parents. While the parents sincerely believe Student cannot be separated from Thor during the school day, the District always remained willing to place Student in a non-restrictive regular education environment. In fact, the IEP notes of September 19, 2007, state that "if at any time parent would like to enroll [Student] in school, FAPE offer is available." While that offer did not provide Student a FAPE (as discussed above), it would provide Student placement in a non-restrictive, regular education classroom. In those same IEP notes it states, "Parent declines FAPE offer and would like ISP (independent study program)-not to exceed 30 days." At that point, the District continued Student's independent study as an attempt to provide Student with some education.

65. Hence, the District offered Student placement in the LRE of a general education classroom with non-disabled peers. The District was not responsible for Student being removed from his LRE, but instead the District tried to educate Student first in a regular education classroom and thereafter, in the environment he was placed in by his parents.

Requested Relief and Remedies

66. When a school district fails to provide FAPE to a student with a disability, the student is entitled to relief that is appropriate in light of the purposes of the IDEA. Compensatory education is a form of equitable relief that may be granted for the denial of appropriate special education services to help overcome lost educational opportunity. The right to compensatory education accrues when the district knows, or should know, that student is receiving an inappropriate education. Compensatory education does not, however, necessarily involve an obligation to provide day-for-day or session-for-session replacement for opportunity or time missed. Both reimbursement and compensatory education issues are equitable issues requiring a balancing of the behaviors of the parties.

67. Student has requested relief for the FAPE violations during the 2006-2007,

2007-2008 school years, and in the offer for 2008-2009. Student proposes remedies in the form of a new BIP, and additional training in pragmatic speech and social skills, one hour per week for two years, with an independent professional.

68. As determined in Factual Findings 7 through 8, 12 through 24, and 36, the undisputed evidence in this case indicates Student had a BIP that was meant to address his behavioral needs, but that BIP has not been revised over the past two years. In order to properly address Student's present needs, especially as he returns to school without Thor, the District must revise the last BIP.

69. As determined in Factual Findings 7 through 39, the District denied Student a FAPE during for school years 2006-2007, 2007-2008 and in its offer for 2008-2009, by failing to implement the IEPs for 2006-2007 and not drafting IEPs that were reasonably calculated to meet Student's unique needs for 2007-2008 and 2008-2009.

70. The evidence established that twelve months of compensatory education in social skills/pragmatic language, one hour per week, will sufficiently remedy the FAPE denial. Student has been provided social skills training during the 2006-2007 and 2007-2008 school years, with competent District employees, including Barbe Mitchell, Tamra Stoner and Rita Faz-Essen. Nonetheless, pursuant to Factual Finding 14 through 23 and 28 through 30, since Student established that the services provided did not adequately meet his unique needs, additional social skills training is warranted to compensate Student. The District employees are competent and able to deliver the services to Student, and the need for an independent professional was not established. While Student requested one hour of services per week for two years, that amount is in excess of what Student actually needs as compensatory services, given that he received previous social skills training. To make up for the inadequacies during the 2006-2007 and 2007-2008 school years, the District shall deliver compensatory education to Student in the form of one hour per week of social skills training for a period of one regular school year, plus an additional three

months of social skills training at one hour per week. The amount of compensatory education therefore comes to twelve months of social skills training, one hour per week. This award constitutes the remedy for the lack of any services from August 20, 2007, until September 19, 2007, along with the lack of services from Ms. Mitchell between November 2007 through March 2008, and the denials of FAPE for the 2006-2007, 2007-2008, and 2008-2009 school years.

CONCLUSIONS OF LAW

BURDEN OF PROOF

1. Student, as the party seeking relief, has the burden of proving the essential elements of his claim. (*Schaffer v. Weast* (2005) 546 U.S. 49 [163 L.Ed.2d 387].)

THE IEP

2. Under the IDEA and corresponding state law, students with disabilities have the right to a FAPE. (20 U.S.C. § 1400 et seq.; Ed. Code, § 56000 et seq.) FAPE means special education and related services that are available to the student at no cost to the parents, that meet the state educational standards, and that conform to the student's IEP. (20 U.S.C. § 1401(9); Cal. Code Regs., tit. 5, § 3001, subd. (o).) California law defines special education as instruction designed to meet the unique needs of individuals with exceptional needs coupled with related services as needed to enable the student to benefit fully from instruction. (Ed. Code, § 56031.) The term "related services" includes transportation and such developmental, corrective, and other supportive services as may be required to assist a child to benefit from special education. (20 U.S.C. § 1402(26).) In California, related services are also referred to as designated instruction and services (DIS). (Ed. Code, § 56363, subd. (a).)

3. Procedural errors in the IEP process do not automatically require a finding of a denial of a FAPE. Procedural violations may constitute a denial of FAPE only if the

procedural inadequacies impeded the child's right to a FAPE, caused a deprivation of educational benefits, or significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of FAPE. (20 U.S.C. § 1415(f)(3)(E); *W.G. v. Board of Trustees of Target Range School District No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.) Procedural errors during the IEP process are subject to a harmless error analysis. (*M.L., et al., v. Federal Way School District* (9th Cir. 2004) 394 F.3d 634, 650, fn. 9 (lead opn. of Alarcon, J.))

4. An IEP is evaluated in light of the information available at the time it was developed; it is not judged in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)⁶ It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*) The focus is on the placement offered by the school district, not the alternative preferred by the parents. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) The evidence must establish an objective indication that the child is likely to make progress. The evidence of progress, or lack thereof, must be viewed in light of the limitations imposed by the child's disability. (*Walczak v. Florida Union Free School District* (2d Cir. 1998) 142 F.3d 119, 130.) Further, the District is required to make a formal offer of FAPE to the student in writing, even though the parents have indicated they will not accept the offer. (*Union School District v. B. Smith* (9th Cir. 1994) 15 F.3d 1519, 1525-1526.)

⁶ Although *Adams* involved an Individual Family Service Plan and not an IEP, the Ninth Circuit Court of Appeal applied the analysis in *Adams* to other issues concerning an IEP. (*Christopher S. v. Stanislaus County Off. of Educ.* (9th Cir. 2004) 384 F.3d 1205, 1212.) Further, District Courts within the Ninth Circuit have adopted its analysis of this issue for an IEP. (*Pitchford v. Salem-Keizer School Dist. No. 24J* (D. Or. 2001) 155 F.Supp.2d 1213, 1236.)

5. When a school district does not perform exactly as called for by the IEP, the district does not violate the IDEA unless it is shown to have materially failed to implement the child's IEP. (Van Duyn v. Baker School District (9th Cir. 2007) 502 F.3d 811, 813.) A material failure occurs when there is more than a minor discrepancy between the services provided to a disabled child and those required by the IEP. (Ibid.)

6. For a school district's IEP to offer a student a substantive FAPE, the proposed program must be specially designed to address the student's unique needs, be reasonably calculated to provide the student with some educational benefit, and comport with the IEP. (20 U.S.C. § 1401(9).) FAPE must provide a threshold "basic floor of opportunity" in public education that "consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction." (Rowley, 458 U.S. at p. 189.) The Rowley court rejected the argument that school districts are required to provide services "sufficient to maximize each child's potential commensurate with the opportunity provided other children." (Id. at pp. 198-200.) The court determined that the IEP must be reasonably calculated to provide the student with some educational benefit.

7. An annual IEP must contain, inter alia, a statement of the individual's present levels of academic achievement and functional performance, including the manner in which the disability of the individual affects his or her involvement and progress in the regular education curriculum. (20 U.S.C. § 1414(d)(1)(A)(i)(I); Ed. Code, § 56345, subd. (a).) The statement of present levels essentially creates a baseline for designing educational programming and measuring future progress. The IEP must also contain measurable annual goals designed to allow the student to be involved in and make progress in the general educational curriculum. (20 U.S.C. § 1414(d)(1)(A)(i)(II); Ed. Code, § 56345, subd. (a)(2).) The IEP must also contain a description "of the manner in which the progress of the pupil toward meeting the annual goals...will be measured and when periodic reports on

the progress the pupil is making...will be provided." (Ed. Code, § 56345, subd. (a)(3).)

BEHAVIOR

8. State and federal law requires school districts to address behavior problems that affect the education of the child with a disability or of other students. An IEP team must consider whether a child's behavior impedes his or her learning or that of others, and if the team determines that it does, the team must consider the use of positive behavioral interventions and supports, and other strategies to address the behavior. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.324(a)(2)(i); Ed. Code, § 56341.1, subds. (b)(1) & (c).) Behavioral interventions should be designed to provide the student with access to a variety of settings and to ensure the student's right to placement in the least restrictive educational environment. (20 U.S.C. § 1414 (d)(3)(B)(i).) An IEP that does not appropriately address behavior that impedes a child's learning denies a student a FAPE. (Neosho R V School. Dist. v. Clark (8th Cir. 2003) 315 F.3d 1022, 1028; County of San Diego v. California Special Educ. Hearing Office (9th Cir. 1996) 93 F.3d 1458, 1467-1468; San Rafael Elem. Sch. Dist. v. Cal. Special Educ. Hearing Office (N.D. Cal. 2007) 482 F.Supp.2d 1152, 1161-1162; Escambia County Bd. of Educ. v. Benton (S.D. Ala. 2005) 406 F.Supp.2d 1248, 1265.)

DID THE DISTRICT DENY STUDENT A FAPE DURING THE 2006-2007, 2007-2008, AND 2008-2009 SCHOOL YEARS BY FAILING TO ADDRESS IN HIS IEPs STUDENT'S BEHAVIORS WHICH IMPEDED HIS LEARNING AND BY FAILING TO INCLUDE A BIP IN THE IEPs?

9. Student contends that the same IEP and BIP strategies and methods had been utilized prior to the 2006-2007 school year without any significant change in Student's behaviors. Contrary to this allegation, the BIP in place for the 2006-2007 school year was drafted to address Student's behavioral issues, and revised over time according to Student's ongoing behavioral needs. While Student contends the behaviors had to be

extinguished for him to receive a FAPE, that is not the correct standard. The correct standard is whether the District provided opportunity to extinguish (or more properly re-direct) the behaviors through the BIP. Under that standard, the IEP and BIP goals were drafted and revised in a manner that addressed Student's behavioral needs during the 2006-2007 school year.

10. Based upon Factual Findings 2 through 9 and Legal Conclusions 1 through 9, the District provided Student a FAPE and had a BIP in place for the 2006-2007 school year, as all goals and services addressed Student's behavioral needs.

11. Based upon Factual Findings 25 through 26 and Legal Conclusions 1 through 8, from October 2007 through May 12, 2008, the District did not provide Student with an IEP that included goals that addressed Student's behavioral needs.

12. Based upon Factual Findings 33 through 39 and Legal Conclusions 1 through 8, for the 2008-2009 school year, the District offered an IEP containing five overall goals in pragmatic speech and social skills with two of those goals lacking objectives for measuring progress. That lack of objectives denied Student a FAPE because Student's parents were presented an offer in which they could not determine any progress toward the goals over time, and further denied the service providers a basis to measure progress.

DID THE DISTRICT DENY STUDENT A FAPE FOR THE 2006-2007, 2007-2008, AND 2008-2009 SCHOOL YEARS BY FAILING TO IMPLEMENT THE IEP IN A MANNER THAT TRACKED STUDENT'S PROGRESS, RENDERING THE IEP GOALS UNATTAINABLE?

13. Based on Factual Findings 10 through 24 and Legal Conclusions 1 through 8, the District did not provide Student with related services adequately implemented to comport with his IEP during the 2006-2007 school years because the BIP and IEPs relied upon during those two school years did not contain statements of the manner of measurement of Student's progress, nor did the District actually measure or report on Student's progress.

14. Based on Factual Findings 27 through 32 and Legal Conclusions 1 through 8, the District provided educational services without any specified goals during the period from October 2007 through May 12, 2008. Therefore, the services provided, while intended to provide Student with some education, were almost meaningless because any progress made due to the services, was not directed toward a goal written to address a particular need. Thus, services provided during 2007-2008 school year did not provide Student a FAPE.

DID THE DISTRICT DENY STUDENT A FAPE FOR THE 2006-2007, 2007-2008, AND 2008-2009 SCHOOL YEARS BY FAILING TO MEET STUDENT'S FUNCTIONAL PERFORMANCE NEEDS IN BEHAVIOR, PRAGMATICS AND SOCIAL SKILLS, BY IMPROPERLY IMPLEMENTING HIS GOALS, PROGRAMS AND SERVICES IN THOSE AREAS?

15. Based on Factual Findings 10 through 24, and Legal Conclusions 1 through 8 and 13, the District did not implement Student's goals in a manner that met his functional performance needs in behavior, pragmatics, and social skills during the 2006-2007 school years because the District did not actually measure or report on Student's progress.

16. Based on Factual Findings 27 through 32 and Legal Conclusions 1 through 8 and 14, the District did not implement Student's goals in a manner that met his functional performance needs in behavior, pragmatics, and social skills during the 2007-2008 school years because the District administered services without specified goals, and offered services designed only to provide Student with de minimis educational benefit.

17. In the matter of *Cave v. East Meadow Union Free School District* (2d Cir. 2008) 514 F.3d 240, the court held that the IDEA's exhaustion of administrative remedies requirement (20 U.S.C. § 1415(l)) requires that questions of whether a service dog should be allowed on a public school campus first be determined through the IEP process. "The purpose of the exhaustion rule is to 'channel disputes related to the education of disabled children into an administrative process that could apply administrators' expertise in the

area and promptly resolve grievances.’ ” (Id. at 514 F.3d p. 245-246, citing to Polera v. Board of Education of Newburg Enlarged City School District (2d Cir. 2002) 288 F.3d 478, 487.) Whether a student can bring a service dog to school was deemed an issue best dealt with through the administrative process because the local and state educational agencies are “uniquely well suited to review the content and implementation of IEPs ... and to determine what changes, if any, are needed.” (Id. at 514 F.3d p. 248, citing Polera, 288 F.3d at 487.)

18. To the extent practicable, peer-reviewed research should support the supplementary aids and services provided to a child within the child’s IEP. (20 U.S.C. § 1414(d)(A)(IV), 34 C.F.R. § 300.320(a)(4), Ed. Code § 56345, subd. (a)(4).) However, providing services that do not rely on peer-reviewed research does not result in an automatic denial of FAPE. (Joshua A. ex rel. Jorge A. v. Rocklin Unified School District (E.D.Cal.) 2008 WL 906243.)

DID THE DISTRICT DENY STUDENT A FAPE DURING THE PERIOD FROM APRIL 13, 2007, THROUGH MAY 31, 2007, AND DURING THE 2007-2008, AND 2008-2009 SCHOOL YEARS BY OFFERING STUDENT USE OF A ONE-TO-ONE AIDE RATHER THAN ATTENDANCE AT SCHOOL WITH HIS DOG, THOR?

19. Based on Factual Findings 42 through 56 and Legal Conclusions 1, 17 and 18, Student does not require the presence of his dog Thor at school in order to receive a FAPE. While Student’s parents sincerely believe Thor calms Student and keeps him focused, their belief is not supported by persuasive empirical evidence that Thor can help with Student’s education. Additionally, the educational professionals who worked directly with Student universally observed no educational benefit to Thor’s presence with Student. The IEP team considered Student’s needs and reasonably concluded Thor was not a necessary service for Student’s successful functioning at school.

20. Based on Factual Findings 57 through 61 and Legal Conclusions 1 and 16 through 19, Student has not proven that use of Thor in class, instead of a one-to-one aide, would allow Student to be educated in the LRE. Quite the contrary, Thor would require constant contact with Student, whereas a human aide can judge when it is appropriate to back off from Student and allow the opportunity for Student to interrelate with his typically developing peers without any interference.

DID THE DISTRICT DENY STUDENT A FAPE DURING THE PERIOD APRIL 13, 2007, THROUGH MAY 31, 2007, AND DURING THE 2007-2008 AND 2008-2009 SCHOOL YEARS, BY NOT PROVIDING STUDENT AN EDUCATION IN THE LRE, WHEN IT PROVIDED STUDENT INDEPENDENT STUDY AT HOME?

21. Federal and state law require a school district to provide special education in the LRE. A special education student must be educated with nondisabled peers "to the maximum extent appropriate," and may be removed from the regular education environment only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services "cannot be achieved satisfactorily." (20 U.S.C. § 1412 (a)(5)(A); 34 C.F.R. § 300.550(b).) In light of this preference, and in order to determine whether a child can be placed in a general education setting, the Ninth Circuit, in *Sacramento City Unified School. Dist. v. Rachel H.* (1994) 14 F.3d 1398, 1403, has adopted a balancing test that requires the consideration of four 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 would have on the teacher and children in the regular class, and (4) the costs of mainstreaming the student.

22. Based on Factual Findings 62 through 65 and Legal Conclusions 1 and 21, Student has not proven that he was denied an education in the LRE when he received independent study at home. Student was placed in the home environment by his parents. During the entire period Student received independent study, the District was willing and

able to place Student in a regular education classroom, but without Thor. Since Thor was not an essential service needed for Student to receive a FAPE, the offer of a regular education classroom satisfied the District's obligation to offer Student an education in the LRE.

Requested Relief and Remedies

23. When a LEA fails to provide FAPE to a student with a disability, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (*School Committee of Burlington v. Department of Education* (1996) 471 U.S. 359, 369-371; 20 U.S.C. § 1415(i)(2)(C)(3).) Based on the principle set forth in *Burlington*, federal courts have held that compensatory education is a form of equitable relief that may be granted for the denial of appropriate special education services to help overcome lost educational opportunity. (*Student W. v. Puyallup Sch. Dist.* (9th Cir. 1994) 31 F.3d 1489, 1496.) The right to compensatory education accrues when the district knows, or should know, that student is receiving an inappropriate education. Compensatory education does not, however, necessarily involve an obligation to provide day-for-day or session-for-session replacement for opportunity or time missed. (*Id.* at p. 1497.) The purpose of compensatory education is to "ensure that the student is appropriately educated within the meaning of IDEA." (*Ibid.*) Both reimbursement and compensatory education issues are equitable issues requiring a balancing of the behaviors of the parties. 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. (*Reid ex rel. Reid v. District of Columbia* (D.D.C. Cir. 2005) 401 F.3d 516, 524.)

24. Based on Factual Findings 68 through 70 and Legal Conclusion 23, Student is entitled to compensatory education in the form of one hour per week of social skills training for a period of twelve months. The District must also revise Student's BIP to accommodate Student's present needs.

ORDER

1. Within 45 days of the date of this decision, the District shall revise Student's BIP to meet Student's present behavioral needs.

2. Within 45 days of the date of this decision, the District shall begin providing Student with one hour per week additional social skills training. The additional social skills training shall extend for twelve months.

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, the District prevailed on issue one for the 2006-2007 school year. Student prevailed on issue one for the 2007-2008 and 2008-2009 school years. Student prevailed on issues two and three for the 2006-2007 and 2007-2008 school years. Implementation was not at issue for 2008-2009 so no party prevailed in that regard. The District prevailed on issues four and five.

RIGHT TO APPEAL THIS DECISION

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

DATED: October 22, 2008

_____/s/_____

GREGORY P. CLEVELAND

Administrative Law Judge

Office of Administrative Hearings