BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
SPECIAL EDUCATION DIVISION
STATE OF CALIFORNIA

In the Matter of: STUDENT, Petitioner, v. FREMONT UNIFIED SCHOOL DISTRICT, Respondent.	OAH CASE No. N2006050433

DECISION

Charles Marson, Administrative Law Judge, Office of Administrative Hearings, Special Education Division, State of California, heard this matter on July 6, 7, 10, 11, 12, 13, 14, and 24, 2006, in Oakland, California.

Mandy G. Leigh and Emily Berg, Attorneys at Law, represented petitioner (Student). Damara L. Moore, Attorney at Law, represented respondent Fremont Unified School District (District).

Petitioner's father (Father) was present throughout the hearing. Jack Bannon, the District's Director of Special Education, was present on July 6, 7, 10, and 11, 2006. Charlene Okamoto, the District's Assistant Director of Special Services, was present on July 11, 12, 13, 14, and 24, 2006.

Oral and documentary evidence were received. Closing briefs were filed on August 7 and August 14, 2006, and the matter was submitted.

ISSUES

1. Did the District fail to provide a free appropriate public education (FAPE) to Student in the school years 2003-2004, 2004-2005, and 2005-2006, by:

A. Failing to meet Student's unique needs, by: failing to assess in all areas of suspected disability; failing to provide adequate speech and language and occupational therapy; failing to adequately address Student's behavioral problems, incontinence and limited attention span; or designing Student's Individualized Educational Programs (IEPs) to fit a single available program rather than to serve her unique needs;

B. Failing to provide IEPs that were reasonably calculated to result in educational benefit to Student, by: failing to provide adequate goals and objectives; or failing to provide a program under which Student could make educational progress;

C. Failing to deliver speech and language services in conformity with Student's IEPs for the school year (SY) 2003-2004;

D. Failing to provide to Parents the right to participate meaningfully in the decision- making process, by: failing to properly report Student's progress, or lack of it; failing to have a regular education teacher at IEP meetings; or failing to consider the views of parents or the reports and recommendations of Parents' outside consultants?

2. Should the District be required to provide to Student 30 to 35 hours a week of one-on-one instruction?

3. Should the District be required to reimburse Parents for tuition and expenses at a private school that would provide to Student 30 to 35 hours a week of one-to-one instruction?

4. Is the District entitled to monetary sanctions to compensate it for attorneys' fees incurred in opposing a frivolous motion by Petitioner for clarification of the date of the due process hearing?

CONTENTIONS OF THE PARTIES

Parents contend that from the SY 2003-2004 to the present, the District has not provided a FAPE to Student because it has failed to address her unique needs. They allege that the District has not assessed Student in all areas of suspected disability; has not addressed her needs in the areas of speech and language, occupational therapy, behavior, incontinence, or attention; has written her IEPs to accommodate a "one-size-fits-all" autism program; and has failed to provide a necessary program of 30 to 35 hours a week of one-to-one instruction overseen by a behavioralist.

Parents also contend that Student's IEPs were not reasonably calculated to confer educational benefit on Student because she has made no progress, or only trivial progress, in her education; and that her goals and objectives were inappropriate.

Parents also assert that the District failed, in the SY 2003-2004, to provide speech and language services that conformed to Student's IEPs.

Finally, Parents argue that the District denied them a meaningful opportunity to participate in the decision-making process by failing to accurately report Student's progress, failing to have a regular education teacher at IEP meetings, and declining to consider Parents' views or the views of their outside consultants.

The District contends that none of Parents' assertions is factually correct. It argues that it has assessed Student in all areas of suspected disabilities and identified and served all of her unique needs. It asserts that Student has made significant progress in her education within the limitations imposed by her disabilities, and that her goals and objectives were appropriate. It contends that services were delivered and progress was reported as required, that no regular education teacher was required at IEP meetings, and that Parents had full opportunity to participate in the decision-making process.

FACTUAL FINDINGS

JURISDICTIONAL FACTS

1. Student is an eight-year-old female who resides within the District and attends its James Leitch Elementary School (James Leitch). She is between the second and third grades. She is eligible for and receives special education as a child who exhibits autistic-like behaviors.

2. On May 11, 2006, Student filed a request for this due process hearing under the Individuals with Disabilities Education Act (IDEA), seeking an order that the District provide to Student 30 to 35 hours a week of one-to-one instruction supervised by a behaviorist.

STUDENT'S UNIQUE NEEDS

3. Student is profoundly disabled by autism. She has significant deficits in the areas of speech and language, reading, handwriting, behavior, fine and gross motor functioning, generalization, social skills, and all academic subjects. She is only beginning to express herself verbally. She is incontinent in stool and urine. She sometimes engages in self-stimulation and other undesirable behaviors such as kicking, scratching, and biting. Her attention span is so short it renders her unable to focus on most tasks.

4. Student is also severely mentally retarded. Her cognitive abilities cannot be measured by ordinary tools. Rough estimates of her IQ range from 20 to 45. A Mullens Scales of Early Learning assessment, performed when Student was six, showed language skills below those of a one year old, and gross motor, fine motor, and visual reception of a two year old. Student has scored below the first percentile on the Vineland Adaptive Behavioral Scales.

THE DISTRICT'S IEPS

5. Student entered the District's system in 2002. In an IEP dated October 2, 2002, Parents and the District agreed upon a placement for Student in a preschool Special Day Class (SDC) for the SY 2002-2003. That IEP is not in dispute here.

6. On June 5, 2003, Parents and the District agreed upon an IEP that placed Student in preschool for the summer and, for the SY 2003-2004, in a kindergarten SDC for autistic students at James Leitch for five hours a day, five days a week. There Student received speech and language (S/L) therapy and occupational therapy (OT) as integral parts of the school day. The IEP set forth goals and objectives, and provided that Student would receive S/L therapy for 60 minutes per day "as allocated to class."

7. On October 3, 2003, at Student's annual IEP meeting, the District offered Student a program in the SDC substantially the same as that agreed to in June. It added consultation from a speech pathologist and an occupational therapist to Student's program, and designated Student as subject to alternative assessments rather than standardized testing. Parents signed the IEP, but noted on the document that they requested, in addition, 30 minutes a day of one-to-one speech therapy and 30 minutes a day in a mainstream classroom.

8. On September 23, 2004, the District convened its triannual IEP meeting. For Student's transition from kindergarten to the first grade in the SY 2004-2005, the District offered placement in the SDC 95 percent of the school day and in the general education program 5 percent of the day, 15 minutes a day of "small group + 1:1" S/L therapy, 30 minutes of Adapted Physical Education (APE) twice a week, and continuation of consultation from a speech pathologist and an occupational therapist. The new IEP slightly altered the goals and objectives from the October 3, 2003 IEP. Parents requested nine additional changes in the IEP. The District promised to look into some of those changes but declined to adopt others. Parents did not consent to the IEP.

9. On October 20, 2004, the District convened another IEP meeting to discuss Parents' concerns. Parents did not sign the IEP addendum reflecting this meeting.

10. On January 13, 2005, the District made another IEP offer to Student consisting of the same program offered on September 23, 2004. Parents again declined to sign the addendum reflecting this meeting.

11. The District held another IEP meeting on April 22, 2005 to discuss a two-page document setting forth parental concerns, but no progress was made, and Parents did not sign the addendum.

12. The District held another IEP meeting on June 16, 2005, primarily to set forth a summer school program for Student. Parents agreed to the IEP with exceptions that were noted. The District attached a written behavior support plan to the IEP addendum reflecting this meeting. By agreement, the IEP carried forward the goals and objectives from the September 23, 2004 IEP.

13. At the annual IEP meeting on September 30, 2005, the District offered Student a program similar to the one proposed in the September 23, 2004 IEP, with S/L and APE services to be delivered in small groups. It again attached the behavior support plan, and altered the goals and objectives somewhat. Parents agreed to this IEP, noting that certain matters remained to be discussed. They asked for 30 minutes a day of S/L therapy, and consultation from a specialist in Applied Behavioral Analysis (ABA) at home and at school. They attached two pages of specific requests, most of which the District declined.

Student's Progress in the SDC

14. The crux of Parents' case is the claim that Student has made no progress in the District's SDC, or so little progress that it is meaningless and *de minimis*. That claim is addressed first because, if it is correct, most of Parents' case logically follows. If it is incorrect, most of Parents' case fails.

15. In light of the nature and extent of her disabilities, Student has made progress under the District's IEPs during the years at issue. That progress has been meaningful and more than *de minimis*, for these reasons:

Student's Capability for Progress

16. Student's progress can only be evaluated in light of her capability for progress. That capability is severely limited by the nature and extent of her disabilities (see Factual Findings 3-4, above). Because Student is profoundly disabled and severely mentally retarded, progress that would be trivial for other students is meaningful for her.

17. A District witness, Dr. Susan Clare, accurately described Student's capability for progress. Dr. Clare, who was the most credible and persuasive witness at the hearing, is retired, and was most recently a private psychologist and educational consultant. She has a Bachelor of Science degree in Speech Pathology and Audiology from the University of Kansas, a Master of Science in Speech Pathology and Audiology from Portland State University, and a Ph.D. in Educational Psychology from the University of Utah. She is board-certified as a school psychologist, a behavior analyst, and a psychologist. She has worked as a speech pathologist and therapist in numerous school districts since 1966. Her career in speech pathology and audiology has centered on autistic children. After working as a special education resource person, she became an SDC teacher in Davis County, Utah. She started an autism unit there that the state later designated as a teacher training site. As a result, she became the teacher/ trainer for the Utah State Department of Special Education's model program for autistic children. In California she established a program for the acquisition of language and social skills by autistic pre- schoolers at the Clovis Unified School District, where she worked for 16 years as a school psychologist. She taught a university-level class called "Teaching Language to Autistic Children" in Oregon, and a class on teaching autistic children at Utah State University. She has published and given presentations widely and received numerous honors and awards. Throughout her

testimony Dr. Clare appeared thoughtful, balanced, and well informed. Her testimony demonstrated a detailed understanding of Student's educational records.

18. Dr. Clare credibly testified that a student's cognitive abilities determine how quickly she will learn. Appropriate benchmarks are set in light of those abilities. Based on her review of Student's records, Dr. Clare explained that Student's slow rate of learning stems from the fact that her cognitive abilities place her below the first percentile in relationship to other students her age. Her cognitive abilities are less than 70 per cent of those of other students her age, a benchmark commonly used to determine cognitive levels of performance.

19. In October, 2004, at the request of Parents, the Autism Spectrum Disorders Clinic of Kaiser Permanente administered to Student the Mullens Scales of Early Learning, a developmental inventory that, according to Dr. Clare, is widely respected, reliable, and well- normed. The Mullens results showed that Student has significant delays across developmental skills, and even more significant delays in communications skills. The Mullen results support the conclusion that Student's cognitive abilities are in the "severe to profound" range of mental retardation.

20. It is possible to arrive at a rough estimate of a range within which Student's true IQ lies by employing a formula commonly used when assessments of cognitive ability cannot be performed. By applying that formula to Student's Mullens results, Dr. Clare estimated that Student's IQ is somewhere between 20 and 30.

21. Dr. Clare credibly testified that a low rate of progress in school would be consistent with Student's cognitive abilities. The rate would probably be uneven as well; Student could be expected to display higher levels of skill at some times than others. Student will probably need support even in adulthood, and may never achieve total independence. Measured by the low rate of progress that must be expected, Dr. Clare opined, Student's records show improvement over time that has been significant.

22. Parents made no attempt to demonstrate at hearing that, in light of Student's cognitive abilities, she is capable of a significantly greater rate of progress in school than she has attained. In their closing brief, Parents state only that Student "can benefit" and "can learn," and that her "true potential for learning is still unknown."

23. Parents did not prove that, in light of Student's cognitive abilities, she is capable of a significantly greater rate of progress in school than she has demonstrated. The evidence showed that she is probably not.

Credible Evidence of Progress

24. Without exception, District professionals who worked regularly with Student testified credibly that she has shown progress in some areas. One of Parents' five expert witnesses agreed.

25. Since 1997, the SDC at James Leitch in which the District placed Student has been taught by Linda Martinez, who has a level one credential in teaching students with moderate to severe disabilities. Martinez received a bachelor's degree in accounting in 1979 but chose in 1994 to enter special education. She began as a special education aide in the Fremont and Newark unified school districts and, from 1995 to 1997, worked with severely disabled students at Washington High School in Fremont. In 1997, Martinez enrolled in the graduate special education program at California State University at Hayward, and later transferred into a similar program at San Jose State University, where she is working on a level two credential and specializing in autism. The District has given Martinez training in autism, behavior management, and related programs and techniques. In the last two years she attended conferences related to best practices in teaching students with autism. Martinez is a well qualified and well respected special education teacher. Parents do not challenge her skill, training, experience, or dedication.

26. Martinez testified that when Student first came into her SDC in September 2003, she was unable to identify colors, numbers, letters, or shapes. She was incapable of

functional verbal communication, and could use only four or five PECS icons[1] to communicate. She was not toilet trained, and required staff assistance to pull her pants up and down. She had difficulty with motor imitation skills, and could not trace letters or cut with scissors without hand-over- hand help. She needed physical and verbal prompting to follow one-step directions, preferred to play alone, and needed physical prompting to interact with other students.

27. At the end of the SY 2003-2004, Martinez recorded Student's progress on her goals and objectives. Student no longer needed visual and physical prompting to perform functional tasks such as lining up or sitting down. Although she had not increased the number of PECS icons she could use, she used them more consistently. She had begun to use verbal language, though inconsistently, to identify familiar items. She was able consistently to use verbal imitation to label objects and pictures, and had improved in her ability to complete work tasks with visual prompting. She could use the numbers one through ten in a song. In other areas she had made little or no progress, except that in toileting she had adapted somewhat to a schedule requiring her to use the toilet three times a day, although she did not initiate the visits. Socially, she had learned to take turns with prompting. She had learned to identify shapes with verbal rather than physical prompting.

28. After Student attended summer school in 2004, and by the time of the September 23, 2004, IEP meeting, Martinez reported that Student could identify upper-case letters and numbers one through 10 (shown to her at random), and could identify six shapes in response to the question, "What's this?" She could also identify familiar food

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[1] PECS (Picture Exchange Communications System) is a widely used method for communication by the nonverbal that allows the user to convey meaning by pointing to a graphical icon.

objects. She could trace the straight letters in her name, but still needed hand-over-hand help to trace the curved letters ana to cut paper with scissors.

29. By the time of the April 22, 2005 IEP meeting, Martinez reported that Student was making some progress in language, moving from PECS alone to the spoken word. Parents apparently agreed; they attached to the IEP a document asking for details about Student's transition from PECS to actual language, and stated: "We feel she is ready for the next step."

30. At the end of the SY 2004-2005, Martinez again recorded Student's progress toward her goals and objectives. Student had progressed slightly to identifying the color red and the numbers one through 12 at random. She could identify 25 of 26 lower case letters and could label objects, pictures, and photographs expressively without needing a verbal model. She still could not trace the curved letters in her name or cut with scissors without hand-over-hand support.

31. By the end of the SY 2005-2006, Martinez recorded that Student had begun to learn sight words, though slowly. She could identify five calendar words 30 percent of the time, though inconsistently. She had begun to learn the concept of quantity. She could identify red and blue. She began the year able to obey two one-step directions ("sit down" and "wave bye bye") but by the end of the year could follow five. She could identify 25 common items in response to several different questions in addition to "What's this?" 83 percent of the time she could imitate six movements rather than the four she could imitate at the beginning of the year. She still needed hand-over-hand help to trace the curved lines in her name and to cut with scissors, still required prompting to interact with peers, and had made no progress in toileting.

32. By the time of hearing, Martinez testified, Student's ability to be in groups had improved, although she sometimes had to be removed when overstimulated. With prompting, she is able to return greetings. She still does not initiate social interaction. The incidence of her temper tantrums, however, had diminished.

33. Dzi Ha is a speech/language pathologist who holds a Bachelor of Science degree in Speech and Hearing Communication from the University of Washington, and a Master's Degree in Communicative Disorders from San Jose State University. She has worked with autistic children at O'Connor Hospital in San Jose, and as a speech pathologist for the Alum Rock School District in San Jose in two of its elementary schools. She is licensed as a speech/language pathologist in California, is certified by the American Speech/Language Hearing Association, and has a clinical or rehabilitative services credential. She began work as a speech/language pathologist for the District in 2002, providing push-in and pull-out services in the SDC, and has worked there since. She maintains a private practice and has extensive experience in assessments and private tutoring.

34. Since Student's arrival in the first grade SDC, Ha has delivered both direct speech/language services to Student and has consulted with Martinez and others about her. Ha has also worked with Student during two summer school sessions. Ha's testimony about Student's progress was believable and generally corroborated that of Martinez. Ha confirmed that Student arrived unable to use words to communicate, but can now do so on a limited basis. Ha saw Student progress significantly during her time in the SDC. Student has begun to understand the cause and effect relationship inherent in speech. Ha now classifies her as verbal, although lower functioning than most.

35. Norma Lattanner was, until her recent retirement, an Adapted Physical Education (APE) teacher at the District for 16 years. Lattanner holds a Bachelor of Science Degree in Physical Education from California State University at Sonoma, and Standard Secondary and APE credentials from the state. She has taught physical education since 1969, and has substantial experience in assessing students to determine their physical education needs. She has conducted between 50 and 100 assessments of autistic students.

36. Lattanner conducted a formal APE assessment of Student by standardized tests on September 23, 2004. Lattaner reported that, in the category of locomotor skills,

Student could run, but could not gallop, hop, leap, jump, skip, or slide. Student was unable to display object control skills such as batting, dribbling, catching, kicking, or throwing a ball. The results placed Student below the first percentile for her age group in both locomotor and object control skills.

37. Student was at first resistant to taking her turn in PE activities. By the end of SY 2005-2006, Lattanner testified, Student had come a long way in her willingness to take her turn, though she still required prompting. During the year she learned to jump and kick independently, and to bounce on a hippity-hop.

38. Before the SY 2005-2006, Student walked sideways, crossing her feet. By the end of that school year, Lattanner testified, Student had learned side-sliding and a step-by-step pattern of walking. This is significant for brain development. Student began to volunteer to take her turn.

39. The SY 2002-2003, when Student attended the SDC in the District's Glankler Preschool, is not at issue here. However, the methods used at Glankler were closely similar to those used for Student in the next three school years (see below). It is relevant that Student made progress during SY 2002-2003 while being taught in nearly the same ways. SDC teacher Evelyn Novello and speech/language pathologist Wendy Rothaug both testified that they noticed some progress in Student during that school year.

40. Based on her review of Student's records from 2002 to 2006, Dr. Clare testified that Student made significant educational progress in making her needs known verbally; verbal imitation; identifying numbers, letters, objects; complying with one-step directions; and understanding language. She made less progress in color identification and toileting.

41. Parents presented the testimony of Jennifer Murphy, a speech/language pathologist with six years' experience at the Livermore Joint Unified School District. Murphy currently serves clients from three to 18 years of age at the private East Bay Therapy clinic. Since September, 2005, Parents have employed Murphy to provide private

speech/language therapy services to Student twice a week for 45 minutes a session. Murphy testified that Student has been making progress in verbal speech. In June 2002, a speech and language evaluation of Student disclosed an expressive communication age (ECA) of 8 months, which was 41 months below her chronological age. In June 2006, Murphy performed a similar assessment and discovered that Student's ECA is now about two years.

42. Murphy attributed some of Student's progress during this period to her own work, but recognized that it was difficult to separate cause and effect. The weight of evidence showed that, while it is not possible to determine how much of Student's progress in speech and language is due to Murphy's efforts, and how much to the District's, both contributed to that progress.

43. Student's teachers and therapists regularly recorded her progress in teacher notes, and on data sheets and forms, that measured her progress toward her goals and objectives. Those contemporaneous documents generally corroborate their testimony that Student made, for her, significant educational progress from the SY 2003-2004 through the SY 2005-2006. Notwithstanding minor inconsistencies in those records (see below), the documents support the testimony of the witnesses who created them.

44. In some areas Student made little or no progress. She still requires some hand- over-hand help to trace and to cut with scissors. She has improved only slightly in the recognition of colors. She has grown used to visiting the bathroom on schedule three times a day, but does not initiate these visits and is still incontinent.

Less Credible Testimony About Student's Lack of Progress

45. Parents presented four witnesses who testified that Student did not make significant educational progress during the school years at issue. Their testimony was less credible than that of the District's witnesses for these reasons:

Limited Personal Experience

46. Progress is measured over time; it cannot be assessed on a single occasion. Other than Father, the only witness that Parents presented who had known and worked with Student over time was Jennifer Murphy, the private speech/language pathologist who testified that Student was making progress in speech and language (see above). All of Parent's other witnesses, though well credentialed and articulate, had little opportunity to observe Student directly.

47. Dr. Howard Friedman is a clinical neuropsychologist in private practice. He holds a Ph.D. degree in Psychology, is licensed as a psychologist in five states, belongs to many professional associations, and has substantial experience in neuropsychological assessment. Dr. Friedman opined that Student made no meaningful progress during the school years at issue. He based his opinion in part on one meeting with Student, of one and one half hours duration, the Friday before the hearing. He testified that in that meeting he was only able to conduct an assessment "to some extent" because formal testing was not successful. There was no evidence that Dr. Friedman had any other personal experience with Student.

48. Tracie Soder is a speech/language pathologist in private practice. She holds a Master of Arts Degree in Speech/Language Pathology and Audiology from San Jose State University, and has significant experience working with disabled children, including autistic children, in the Santa Clara County Office of Education. Soder opined that Student had achieved no meaningful progress during the school years at issue. She based her opinion in part on a meeting with Student of unstated duration on November 25, 2005, in which she was partially successful in conducting an assessment of Student, and on a two-hour visit with Student at James Leitch. There was no evidence that Soder had any other personal experience with Student.

49. Cheri Worcester is a board-certified Behavior Analyst and a proponent of Applied Behavior Analysis (ABA), a discipline fostered by B. F. Skinner involving the use of

reinforcement and other experimentally supported methods[2] to teach socially significant behavior. Worcester holds a Bachelor of Arts degree in psychology from Queen's College, and a Master's degree in Social Work from Columbia University. She has been a consultant to school districts. At present she is a consultant to Advance Kids, a private group dedicated to helping autistic children. Worcester opined that Student had shown little or no progress in school during the years at issue. She based her opinion in part on a brief visit to the James Leitch SDC, and in part on a two or two-and-a-half hour one-to-one session with Student at home. There was no evidence that Worcester had any other personal experience with Student.

50. A closely related (and inaccurate) premise of Parents' experts in forming their opinions was the assumption that Student could not learn in a group. They based this assumption in part upon their examination of records (see below), and in part upon personal visits to the SDC by Soder and Worcester. Soder visited the SDC for a little over an hour on a single day. Worcester visited it from 10:30 a.m. until the end of the school day on a single day. From this scant exposure, Soder and Worcester drew broad conclusions about what did or did not happen in the SDC, whether SDC staff pursued Student's goals, and whether their teaching techniques were adequate. However, the exposure of Soder and Worcester to the SDC was so brief and limited that the impressions they formed are insubstantial when compared to the testimony of the teachers and staff who worked with Student daily over the three year period at issue.[3] Martinez, Ha, Rutaugh,

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[2] The principal method used in ABA is discrete trial training, an exercise in which a trainer gives a stimulus, gets a response, and then metes out reinforcement or an "informational no."

[3] Since the visits by Soder and Worcester took place months after the last challenged IEP (September 23, 2005) was written, they have little relevance here. They

and Dr. Clare all credibly testified that Student was able to learn in a group. Soder also thought that Student could benefit from group work. The fact that Student made some progress in groups corroborates that view. Student was able to learn in groups.

51. The opinions about Student's progress expressed by District witnesses such as Martinez, Ha, Lattanner, Novello, and Rutaugh were based on extensive personal experience gained every school day over a period of years. The personal exposure to Student of Parents' experts (except Murphy) was slight. Accordingly, the opinions of District witnesses concerning Student's progress are entitled to substantially greater weight.

Record Review

52. All of Parents' experts (except Murphy) depended heavily in forming their opinions of Student's progress on their reviews of her school records. Each extracted data from those records to argue that Student made no progress. Their arguments are unpersuasive.

53. A central flaw in the analyses by parents' experts of Student's records is that those analyses contradicted the testimony of the people who created the records. Written reports of progress were most often created by SDC teacher Martinez, who was Student's case manager, with significant contributions from Ha, Lattanner, Novello, Rutaugh, and other District staff. The principal authors all testified from their extensive personal experience, recorded in those records, that Student made significant progress during the time at issue.

54. A second basic flaw in the analyses by Parents' experts of Student's records is their assumption that inconsistencies in Student's records must have resulted from

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might have been relevant to Student's progress or to the wisdom of certain teaching methods, but they were so short they provided no useful information.

poor or incoherent data collection. That assumption is unwarranted. There are numerous inconsistencies in the District's records of Student's performance. For example, progress reports on a functional academics goal made part of the September 23, 2004 IEP show that in March, 2005, Student could identify 20 of 26 lower case letters during testing. By June, 2005, she could identify 25 lower case letters, but by September could only identify 22 letters. It is possible to extract such entries from the records, compare them to other entries, and argue that no progress occurred. However, the testimony was undisputed that Student's learning did not follow a straight line or smooth curve. Student's levels of performance were uneven, as Dr. Clare testified they would be. At times Student progressed, at times her skills were stable, and at times, as Dr. Friedman testified, she regressed.[4] The weight of evidence showed that the inconsistencies in the District's records of Student's progress reflect no more than the unevenness of Student's performance.

55. A third basic flaw in the analyses by parents' experts of Student's records is that they contradict the records themselves. Although gaps and imperfections can be identified, the records, read as a whole in light of Student's disabilities, demonstrate significant progress, and do not support the interpretations made of them by Parents' experts.[5]

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[4] Parents' behaviorist Worcester recognized this problem. She testified that she was able, in a two-hour one-to-one session at Student's home, to get Student to identify four colors, something the District had not yet accomplished. But Worcester agreed that she did not know whether that ability would endure; at the time she was striving only for performance on that particular occasion. Mastery of the skill, she stated, would take much more work.

[5] Parents attack the testimony of Dr. Clare because it also depended on her review of Student's records. But there is a key difference: Dr. Clare's testimony was consistent with

INFORMATION FROM PARENTS

56. Parents' experts also relied heavily on information given them by Parents. Dr. Friedman, for example, testified that the bulk of the information he used in his assessment came from Parents. At least some of the information Parents gave their experts was incorrect. Two experts' reports incorrectly state, for example, that Student was receiving only 15 minutes of small group speech/language therapy a week. In fact she was receiving small group speech/language therapy every day during circle time and in other groups. This information appears to have been supplied by Father.

57. None of Parents' experts was specific in describing the records he or she reviewed. Father furnished the records.

58. Father is a high school graduate and computer programmer who has attended a community college part time. He works from 3 p.m. to 11 p.m. on weekdays, and spends much of his time during the day caring for his daughter. During the school years at issue, Father drove Student to school approximately twice a week, took her to the SDC, and picked her up again in the afternoon. Since September, 2005, he has also taken her twice a week from school to Murphy's office for speech/language therapy. Usually, on these visits, Father stayed from ten to twenty minutes in or around the SDC, speaking to faculty and staff, bringing Student snacks, or changing her diapers. His impressions of the teaching occurring in the SDC were formed mostly from these visits and were related to each outside consultant and expert whose testimony and reports were admitted.

59. Father's love for and dedication to his daughter, while admirable, suggest that he is not an objective observer. He does not pretend to be; he views his relationship to the District as adversarial. (For example, he attached objections to an April 22, 2005 IEP entitled "Battle Round #2.") He testified that he viewed this due process hearing as an

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the records and with the testimony of those who created them. Her testimony, their testimony, and the records are mutually reinforcing.

exercise in advocacy. His testimony, his observations, and the information he supplied others must be viewed in that light.

60. The weight of evidence was that Parents did not always understand Student's curriculum. Principal Debra Amundson, who attended most of Student's IEP meetings, and SDC teacher Martinez testified that Parents did not seem to appreciate what services where actually being delivered in the SDC or how they were delivered. Amundson thought that some of Parents' requests, such as ongoing language acquisition, were redundant with activities already occurring in the classroom. Occupational therapist Shanti Mannadi testified that Parents, through an outside report, urged her to adopt Handwriting Without Tears, a multi-sensory teaching methodology widely used with autistic students that she already used in the SDC every day. District documents show that District personnel frequently responded to Parents' requests by stating that some of them were already being fulfilled, and by inviting Parents to observe this in the SDC. Parents came twice to the SDC for that purpose, but continued to request some services already being provided. The evidence showed, for example, that Father commonly disregarded the occurrence of any speech/language therapy that was not delivered one-to-one, and apparently did not accept Martinez' explanation that her methods already involved discrete trial training, the ABA technique that he wanted incorporated in Student's curriculum.

61. Father's credibility as a witness was lessened by numerous details in his testimony. Much of his testimony consisted of assents to leading questions. He testified repeatedly that District personnel did not consider his views, only later to admit that they had considered his views but rejected them. When shown that he had agreed to a September 20, 2003 speech/language report stating that Student's receptive and expressive language had improved since the previous year, he stated that he simply took the therapist's word for it. However, he recognized Student's growing verbal skills himself. For example, he attached to the April 22, 2005 IEP a writing expressing concern that the

District was holding Student back by focusing on the icon-based PECS program. He wrote that Student was ready for the next step and that she was "beginning to talk more without PECS." Contradicting his privately retained speech/language therapist Murphy, among others, Father insisted at hearing that Student is nonverbal. He dismissed reports that Student could verbally describe shapes such as a triangle, a circle, or an oval by asserting that she was just guessing at the words or engaging in echolalia. Father frequently expressed opinions in the language of experts, suggesting that he was repeating the views of others. Father was not qualified to offer a professional opinion on any services discussed here.

UNIQUE NEEDS

Delivery of Student's Program

62. Martinez' SDC had 8 to ten autistic students. Typically they had communications delays, social deficits, limited imitation skills, toileting problems, and academic deficits. Most commonly they were unable to communicate naturally with others. In addition to teaching, Martinez assessed students, monitored her aides, and worked with general education teachers to coordinate curriculum and foster mainstreaming. She studied each student in order to individualize his or her program.

63. Martinez ran her class on a transdisciplinary model, merging activities and therapy throughout the day. The day was highly structured. Student's typical kindergarten day in the SDC during the SY 2003-2004, for example, lasted an average of six hours. It began either with physical education or with computer lab. Physical education occurred in a mix with regular education students; computer lab was conducted by Martinez's aides. Next was one half hour of circle time, a small group academic and language session. For most of the rest of the day, Martinez divided the class into two sections, one for the more verbal students and one for the less verbal, including Student. This was followed by some bathroom and sensory motor activities, snack, recess, a supervised play group for social

skills, some seat work (supervised by aides) with a “fun box” of toys particularly motivating for Student, more circle time, a half hour with the program TEACCH,[6] lunch, a video, the fun box, TEACCH again, recess, motor skills activities, snack, music or bathroom, and departure. Two days a week, Martinez mixed her students with typically developing peers by bringing the latter into the SDC for peer teaching.

64. In the years at issue, not every student in the SDC followed this program exactly. Each activity was limited to a few students, and sometimes to only one or two. SDC students had written schedules, which varied in activities and details. Student’s schedules were always individualized and differed from those of other students.

65. Martinez’ classroom had sufficient aides so that the ratio of students to adults was no higher than two to one. Martinez taught her aides primarily by modeling interventions with students, so that the treatment of each student would be consistent. The students’ written schedules were followed closely, so that Martinez and her aides knew at any time what a particular student should be doing. Three of Martinez’ aides had worked in her classroom since before her arrival in 1997, and have more than ten years’ experience working with each other and with her. Each is well qualified and well trained for the role.

66. Speech/language pathologist Ha spent 60 minutes a day in the SDC, in two segments, delivering direct speech/language therapy to students. In addition, Ha and Martinez consulted throughout the day as needed. Ha supervised the language program in the class, which continued through Martinez and her aides when Ha was not present. Ha and Martinez discussed, planned, and delivered services to each student according to his

[6] TEACCH (Treatment and Education of Autistic and Related Communication Handicapped Children) is a multi-sensory teaching methodology widely used with autistic children.

or her unique needs. They wrote students' goals and objectives together, and then adapted them as needed in the classroom.[7]

67. Until 2006, OT was delivered in the SDC by trained staff. Starting in January, 2006, OT was delivered and supervised by occupational therapist Shanti Mannadi, who evaluated SDC students and delivered OT both directly and by consultation with Martinez and her staff. Mannadi holds a Bachelor of Science degree in chemistry from the University of Bombay, and a Bachelor's degree in OT from San Jose State University. She has more than five years' experience in school districts working in a clinical setting with disabled students, and has assessed more than 400 students to determine their OT needs.

68. During the SY 2004-2005, Parents expressed concern about Student's OT needs. In response, Mannadi assessed Student's OT needs, created an individualized sensory diet and a listening program for her, and provided Handwriting Without Tears. Mannadi delivered OT directly to students, and, once a week for 45 to 60 minutes, consulted with Martinez and her staff about the students' OT needs.

69. Starting in September, 2004, when Adapted Physical Education (APE) was added to Student's IEPs, APE teacher Lattanner taught Student gross motor skills twice a week; once for 30 minutes with the regular education PE teacher in a group, and once for 30 minutes individually. Typically Student would warm up by jogging, kicking, jumping, and catching and throwing balls, and then turn to basic developmental skills such as rolling, crawling, walking on a balance beam, and various sports activities. Lattanner coordinated these activities with Martinez, the aides, and the regular PE teacher. During these activities, the adult-to-student ratio was six to seven.

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[7] Although the record is not clear, it appears that, prior to Ha's arrival in the SDC, the speech/language therapist was Michelle Garcia Winter, who did not testify. There was no evidence that there was any substantial difference between the services of Winter and Ha.

70. Services were delivered in the SDC throughout the day. Circle time, play groups, and most other activities included the delivery of speech and language therapy. Principal Amundson, who frequently observed Martinez' SDC, testified that Martinez' class was very language-oriented, and that language acquisition was being taught in the SDC all day long. Sensory motor groups included OT such as brushing and joint compression. Behavioral problems were addressed as they arose (see below). The ratio of students to adults was low enough that when a student needed one-to-one attention, staff provided it. Student received substantial one-to-one assistance in the SDC. It was frequently not obvious to an observer that particular services were being delivered at particular times or in particular ways.

Assessments

Mental Retardation

71. Parents contend that the District should have assessed Student for mental retardation as early as June 2003. No one has managed to complete such an assessment. The District's psychoeducational report of September 21, 2004, states that a cognitive assessment was attempted but could not be completed. Jack Bannon, the District's Director of Special Services, testified that the District attempted but failed to administer an IQ test to Student and could not assess her for mental retardation.

72. Dr. Friedman confirmed that Student cannot be tested for mental retardation. He attempted to administer an IQ test, but failed because of Student's distractibility. In his opinion Student would have required so much prompting to complete the test that the results would have been invalid. Dr. Friedman concluded that Student is unable to complete a cognitive assessment because she cannot stay on task long enough, and that she is "not amenable to valid assessment of her intellectual function - her intellectual level." He also testified the only real way to measure her intellectual level is with an IQ-type test, which is "the basis for determining mental retardation."

73. The District made a reasonable attempt to assess Student for mental retardation, but could not complete an assessment because she is untestable for mental retardation.

AUDIOLOGY

74. In September, 2004, the school nurse who routinely administers hearing tests for the District conducted an assessment of Student's hearing. She reported finding no hearing difficulties, but, for unstated reasons, could not complete the screening. Her report requested that parents share any reports on Student's hearing they might have had.

75. On December 2, 2005, Parents obtained an audiological evaluation of Student from Judith Paton, a well-qualified and experienced private audiologist. Paton tested Student in her office and reported that Student had hyperacusis (an unusual sensitivity to certain sounds), and a distorted peak-and-valley audiogram with depressed hearing at most frequencies, as typically seen in people with hyperacusis but possibly occurring in others as well. As examples of sounds to which Student was particularly sensitive, Paton's report listed the sounds of a vacuum, raised voices, and group noise in class and in play. It also stated that Student had been awakened from sleep by the distant sound of a far-away train. There is a test for loudness discomfort levels, but Paton did not administer it in light of Student's age and limited verbal ability. Student at some point stopped cooperating with Paton's examination. It is not clear when or whether the District was aware of Paton's report during the time periods at issue.

76. Paton's report stated that Student's hyperacuity "appears in [Student's] difficulty tolerating the vacuum," but Paton was unable to identify the source of that information. The other facts upon which she based her diagnosis came from Father. It is not clear whether the events Paton described occurred as Father related them to Paton; Father did not testify about them. It is doubtful, for example, that Father could know that Student was awakened from a sound sleep by the sound of a distant train, since Student

could not articulate that concept. Paton admitted there might be other reasons for Student's sensitivity to sound. In light of these uncertainties, Paton's diagnosis of hyperacusis was unconvincing.

77. Like many autistic children, Student is sometimes over-stimulated by loud noises. Martinez dealt with that problem on occasion by removing Student to a quieter place. Both Rutaugh and Ha (who has a Master's degree in communicative disorders and is certified by the American Speech and Hearing Association) testified that they did not notice that Student had any particular sensitivity to sound.

78. Parents did not prove that the District had reason to suspect, in the school years at issue, that Student needed, or might benefit from, an audiological assessment, or that she had a hearing deficit.

Speech/Language Therapy

79. The IEP written on June 5, 2003, was designed to offer Student a transition into James Leitch and kindergarten. It provided for speech/language and occupational therapy as "integral parts of daily school day. Speech 1x 60 minutes per day as allocated to class." That description of S/L therapy was adequate to convey Student's program to Parents. Because of the transdisciplinary nature of the class, it probably understated the amount of S/L therapy actually delivered. The IEP contained appropriate, measurable goals on communication and on language, reading, and writing, including the use of PECS.

80. Parents attack the October 3, 2003 IEP on two grounds: that it was part of a "cookie-cutter" program (see below), and that it did not provide one-to-one services of the kind and in the amount sought as relief here. Speech/language pathologists Soder and Murphy testified that Student would benefit more from one-to-one S/L services than her present program. Since those services were not needed to afford Student a FAPE, however, their absence from the IEP had no legal consequence.

81. Parents claim it was inappropriate to reduce Student's speech/language services to 15 minutes a day in the September 23, 2004 IEP. On the line for speech and language, the IEP states: "15 min/day – small group 1:1." However, that statement did not limit the speech/language services that were delivered. The IEP also provided for consultation from a speech pathologist, including model teaching and the developing and implementing of a language program. The entire SDC day was infused with speech/language services (see above). As the June 5, 2003 IEP put it, speech/language therapy was an "integral part" of the school day. Parents did not prove that the 15 minute reduction had any effect on Student's education.

82. Parents' claim that the September 14, 2005 IEP inadequately addressed Student's speech/language needs are repetitive of the claims rejected above.

Occupational Therapy

83. The June 5, 2003 IEP stated, and testimony of District witness established, that OT was an integral part of the school day. That OT, frequently delivered by aides supervised by an occupational therapist, continued as needed through the years at issue. Parents made no showing that additional OT was required in that IEP or later ones, except through testimony of experts in other fields who examined and then contradicted school records (see above). No occupational therapist testified for Parents.

84. Starting in October 3, 2003, all of Student's IEPs provided for consultation from an occupational therapist that included model teaching and group activities, and for a sensory motor program, which the therapist and SDC staff created and delivered. The only testimony Parents presented in support of their claim that Student required direct OT during this period was by Father, and by witnesses who reviewed records but were not occupational therapists. Parents did not establish that Student needed direct OT during the school years at issue.

85. On November 8, 2004, Parents obtained a report from Kaiser Permanente's Autism Spectrum Disorders Center that encouraged the "initiation" of OT. The Center appears to have been unaware that OT was already provided in the SDC.

86. On October 4, 2004, the District had proposed a formal assessment of Student for OT needs, and on January 13, 2005, District occupational therapist Shanti Mannadi completed one. She recommended continuation of the delivery of OT in the classroom, and found that direct services were unnecessary.

87. On February 24, 2005, Parents obtained a report from the Autism Center of the Columbus Organization that recommended specific gross motor exercises. Lattanner testified without contradiction that her APE sessons with Student served those gross motor needs. The Columbus Organization also recommended the use of Handwriting without Tears. The Center appears to have been unaware that the program was already being used daily in the SDC.

88. Parents did not establish that any OT needs of Student were not adequately addressed in her programs.

Behavior

89. During the years at issue, Student exhibited some undesirable behaviors at school, such as self-stimulation, crying, hitting, kicking, slapping, and biting. These behaviors are common in autistic children, and SDC faculty and staff were trained and experienced in coping with them in the normal course of the school day. If an SDC student's behavior required additional intervention, SDC staff began with a behavior support plan. Only if that did not work did they resort to a behavior intervention plan, which requires numerous formal steps under state law. Parents contend that Student required a behavior intervention plan during all the school years at issue.

90. Student's IEPs of June 5, 2003; October 3, 2003; and September 23, 2004, all note that Student's behavioral problems were primarily caused by communications deficits

usually associated with autism. Throughout SY 2003-2004 and SY 2004-2005, SDC staff dealt with Student's behavior problems in the ordinary course of the school day, as they had been trained to do. There is no evidence in the record concerning the frequency or seriousness of her negative behaviors in SY 2003-2004, and Parents did not establish that the way SDC staff addressed them was inadequate or ineffective.

91. Near the end of SY 2004-2005, Martinez noticed and reported an increase in Student's negative behaviors. In June 2005, the District developed a written behavior support plan as part of the September 23, 2005 IEP. The plan reported that Student was "tantruming (slapping, kicking, pulling on staff)" about three to five times a day, and could not complete activities when that occurred. Martinez and her aides rated Student's behavioral difficulties as "serious" but not "extreme" on a printed form. The plan also reported that Student's misbehavior occurred when she was denied a highly preferred activity, when she was frustrated at her inability to express herself, or when she was confronted with a challenging task. The plan set forth detailed intervention strategies for each of these events, and added a new behavior goal to the IEP. District personnel credibly testified that the behavior support plan was adequate to deal with Student's misbehavior. Informally, SDC staff were already using the plan with Student. Dr. Clare and Martinez both testified that a behavior intervention plan was unnecessary.

92. Parents' behaviorist Worcester testified that a behavior intervention plan was necessary, basing her opinion on records and information from parents. She did not rely on her brief visit to the SDC, because she did not see Student misbehave that day. The bases for Worcester's analysis were flawed (see above), and because of those flaws, her analysis was not persuasive. District witnesses who dealt with Student daily based their opinions on much more direct experience, and for that reason were more persuasive. Parents did not establish either that a behavior support plan was required before one was offered, or, once it was offered, that it was inadequate.

93. Parents established the approximate frequency of Student's negative behaviors, but did not address their seriousness. There was no evidence, for example, that any of Student's kicking, biting, or slapping actually injured anyone, nor did Parents separate that behavior from behavior not directed to others, such as crying or self-stimulation.

94. Parents did not establish that Student's misbehavior was so serious as to warrant a behavior intervention plan, or significantly interfered with the implementation of Student's goals and objectives. Nor did they establish that Student's misbehavior was severe or pervasive, or that the instructional and behavioral approaches used by SDC staff and then proposed in the September 23, 2005 IEP were ineffective.

Toileting

95. Student made little progress at James Leitch in controlling her incontinence, and still returns home with soiled garments. As Dr. Clare testified, she may need assistance with that function even in adult life.

96. SDC staff routinely took Student to the toilet in the SDC three times a day on a schedule, and assisted her in pulling her pants up and down, urinating and defecating, and washing and drying her hands. Student has not learned to initiate a visit to the toilet; she simply waits until an aide takes her there. As a result, she sometimes sits in class or goes home with soiled clothes.

97. Student's June 5, 2003 IEP noted that Student was not toilet trained. The October 3, 2003 IEP added a toileting goal incorporating the three-times-a-day schedule apparently already in effect. Since Student made so little progress in the following year, and since Martinez thought the goal so important, the goal was continued from year to year. In the September 23, 2004 IEP, Martinez slightly altered the goal so that the process was more detailed. She reasoned that if Student could not use the toilet independently, at

least she could help staff to help her use it. At some point (the document is not dated), SDC staff wrote a five-page toileting program for Student, which they put into effect.

98. Parents did not establish that Student's failure to make more progress toward her toileting goal was the consequence of any failing of her educational program, or that there was any particular additional step the District should have taken. Parents' experts implied that more progress could have been made, but did not plausibly explain how that could have been done.

Dr. Friedman, for example, proposed a program of reinforcement to reward basic skills. SDC staff routinely used that technique. Parents were implementing a toilet training program at home, but there was no evidence that the results of that program were any better than the District's.

Distractibility

99. The parties agree that Student is distracted easily and frequently, and that her inability to stay on task undermines her learning. That inability is sufficiently severe that it prevented Dr. Friedman and the District from conducting valid cognitive assessments (see above); Student would simply lose interest and direct her attention elsewhere. Murphy testified that she had to manipulate Student's head and face to achieve eye contact. Dr. Friedman characterized her ability to attend to a task as "minimal to nil."

100. Martinez regularly assessed whether Student was paying attention. Her strategies to cope with Student's attention problem varied, because Student's ability to attend differed from day to day. Sometimes Martinez could persuade Student to participate in circle time simply by showing her, or letting her hold, a graphic of some sort. At other times Martinez would use a transition object, such as something from Student's fun box, that would at least permit her to remain near the group. These interventions were sometimes, though not always, effective in involving Student in circle time. The need for

them was continuing. In other groups, such as the sensory motor group, Student's interest was high enough that such methods were unnecessary.

101. Throughout the school years at issue, Student's IEPs have contained a goal related to improving her ability to stay on task. The goal from her September 23, 2005 IEP, for example, sought to have her complete nine named tasks with only three staff redirections to stay on task in three out of four trials over time. The objectives supporting this goal gradually reduced the number of required staff redirections while Student performed those tasks. The goal is modeled on the TEACHH program. Dr. Clare testified that this goal is appropriate because it extends Student's attention. It requires her to manipulate materials with her fingers and eyes, thus imitating her self-stimulation but replacing it with appropriate, useful, non-self-stimulating skills.

102. Student's inability to concentrate is a function of her autism and her cognitive and other deficits. Parents did not establish that any lack of improvement in Student's ability to stay on task was a result of any shortcoming in Student's educational program.

103. The District adequately addressed all of Student's unique needs. No alleged flaw in the way the District addressed her needs impeded Student's right to a FAPE, significantly impeded Parents' opportunity to participate in the decision-making process, or caused a deprivation of educational benefits.

Goals and Objectives

104. The goals and objectives in Student's IEPs adequately addressed her unique needs. Parents' contention that they did not is unpersuasive, for these reasons:

105. Parents' experts made hundreds of criticisms of the goals and objectives contained in Student's IEPs for the years at issue, usually starting with the claim that the goals and objectives were based on inaccurate present levels of performance (PLOP). The validity of their criticisms depends upon the proposition that they knew better than the

District what Student's present levels of performance were, from 2003 to the present. The evidence showed that they did not.[8]

106. None of the experts who testified for parents could describe Student's PLOP from personal experience. The most recent PLOP Parents attack were drafted for the September 14, 2005 IEP meeting. Murphy began providing private speech/language therapy to Student sometime in September 2005. Soder first saw Student on November 25, 2005. Paton examined Student once, on December 2, 2005. Worcester could not identify the date she first encountered Student, but it was probably in January 2006. Friedman first met Student on June 30, 2006. None had sufficient exposure to Student to justify an opinion concerning her September 14, 2005 PLOP, especially since it was undisputed that her performance was uneven from day to day. Nor did any of Parents' experts have any reason to know personally of Student's PLOP dating back to June, 2003.

107. In forming their opinions about Student's PLOP, the principal sources of information for Parents' experts were her educational records and her parents. Those opinions were fundamentally flawed for the reasons discussed above: they contradicted the testimony of the witnesses who worked with Student every school day and who created the records; they ignored the unevenness of Student's performance; they contradicted the records themselves; and they depended upon information from Parents.

108. The District attached to each challenged IEP a full page of typed descriptions of Student's PLOP. In addition, each goal begins with a present level of performance.

[8] The District argues that Parents did not identify their disagreement with Student's PLOP as an issue in pretrial pleadings or at hearing, that the Order Following Prehearing Conference did not list it as an issue, and that the District has therefore been deprived of an adequate opportunity to respond. However, since Student's PLOP are arguably part of her goals and objectives, and since Parents' criticisms of Student's PLOP are factual predicates for their criticisms of the goals and objectives, the argument is addressed here.

These descriptions are detailed and clear. Each conveyed its substance adequately to Parents. In addition, Parents had and used numerous other opportunities to learn of Student's PLOP (see below).

109. A central theme of Parents' attacks on Student's PLOP was that the District collected inadequate or inaccurate data. Most of Parents' witnesses believed that Student could not be adequately taught without data collection as rigorous as that practiced in clinical trials. Worcester, for example, testified that collecting behavioral data every day was essential, and that it must be collected trial by trial. Murphy thought it was unacceptable for anyone but a licensed speech/language pathologist to record data for use in speech/language therapy. These opinions mistake the primary purpose of collecting the data, which was not to support a clinical trial, but to furnish a record sufficient to make adequate instructional decisions for the classroom.

110. Data on Student's progress in the SDC were kept on data sheets designed by Martinez, who testified that she either entered the data herself, partly from observational notes she had taken in class, or had one designated aide record the data. Martinez taught that aide, who had more than ten years' experience in the SDC, how to record data concerning Student's behavior and the results of her discrete trial training. Twice a week, Martinez and the aide set aside time to record the data.

111. Dr. Clare examined the data collected about Student for use in writing goals and objectives, and persuasively testified that it was adequate for instructional decisions.

112. During the years at issue, Student's goals and objectives were drafted by Martinez with help from Ha or another specialist, depending on the goal. The goals and objectives followed a form, and are substantially alike in their presentation and degree of detail. A typical example is the third functional academics goal from the September 23, 2004 IEP. In the box entitled "Present level of performance/baseline data," Martinez reported that "[Student] was not able to identify the colors red, blue, yellow, green during testing." In the next box, "Measurable Long Term Annual Goal," Martinez proposed that

> by 9/23/05, [Student] will identify visual structures and functions of art using language of the visual arts by identifying the colors – red, blue, yellow, green – in response to "What color?" when shown a color card in 3 out of 4 trials, and 7 out of 10 trial days as measured by teacher observations recorded on a data sheet.

That goal was understandable to teachers and parents. It related directly to the development of Student's communicative skills, and set forth the mechanism by which progress would be measured.

113. That same goal had three short-term objectives. The first was that Student identify two out of four colors in three out of four trials. The second was that Student identify three colors in three out of four trials. The third restated the annual goal. Next to each objective, in a box calling for the method of evaluation, "observation" was checked. To the right of each objective were four boxes in which periodic observations could be recorded. The evidence showed that District personnel, at the required intervals, routinely recorded Student's progress, or lack of it, next to the objectives, and shared that information with Parents.

114. As the above example illustrates, Student's goals and objectives set forth in the IEPs challenged here were clear, informative, measurable, and addressed directly to Student's PLOP.

115. The criticisms of the District's goals and objectives by Parents' experts are unpersuasive because their central premise (that the PLOP were inaccurate) was not proved. For the same reasons that Parents' experts failed properly to assess Student's progress (see above), they failed properly to assess her levels of performance through the years.

116. Since Parents did not prove that their versions of Student's PLOP were more accurate than the District's versions, their criticisms of those PLOP lack merit. There was no evidence that Parents objected to the PLOP at the IEP meetings for which they were written. No alleged flaw in Student's PLOP impeded Student's right to a FAPE, significantly impeded Parents' opportunity to participate in the decision-making process, or caused a deprivation of educational benefits.

117. Parents' experts' incorrect assessments of Student's progress (see above) permeated their analysis of Student's goals and objectives. Each expert would have aimed lower in one goal and higher in another, added a goal here and subtracted a goal there. These judgments are unpersuasive because their premise – that Student made no progress – was incorrect.

118. Many of the criticisms Parents' experts made of Student's goals and objectives were based on disagreements with the District about methodology and technique. For example, Worcester would use food as a reinforcement in a different way, and would never use hugs. Paton would have Student undergo auditory integration training, or take large amounts of vitamin C. Soder would have Student paired with a peer as a communications partner, always available for conversation and modeling, while the others would have Student taught one-to-one throughout the school day. It is unnecessary to resolve these and other methodological disputes here.

119. Parents argue that Student's goals and objectives show she has been placed in a one-size-fits-all program, not treated individually. Worcester testified that an acquisition chart (a checklist of one-step instructions) incorporated into one of the September 23, 2004 IEP goals was copied from a standard textbook on autism. She then alleged that many of the documents that were part of the IEP had been retyped or cut-and-pasted from standard sources, demonstrating that Student was receiving a "cookie-cutter" program. When asked on cross- examination where these sources were, she stated she had them at home. Although she returned days later as a rebuttal witness, Worcester

did not produce any of these sources, nor did Parents. Parents' failure to introduce any of the documents from which the District allegedly copied, so comparisons could be made, substantially lessened the persuasiveness of their claim.

120. District witnesses uniformly and credibly rejected the claim that they copied goals and instructions out of books or failed to individualize Student's program. Martinez testified, and Amundson, Lattanner, and Ha confirmed, that Student's programs were individualized. Daily schedules for Student demonstrate that she was receiving individualized treatment and not being treated like other students in her class. Parents made no attempt to show that other students in the SDC had programs identical to Student's.

121. Student's goals and objectives contained cryptic references to state standards such as "(R/LA-10)" or "(PE-2)." Parents argue that these references prove that the goals and objectives were copied from some generic state source. Parents produced no such source for comparison. Martinez persuasively testified that she drafted goals individually and did not use generic sources. The references were to a state curriculum guide, and were intended in part to assist a subsequent teacher of the same student. State law requires that a goal include a "goal stem" from the curriculum guide. Martinez began with goal stems and then developed individualized goals from them.

122. The District drafted Student's goals, objectives, and IEPs to serve her unique needs. They were not generic. Parents failed to prove that the District placed Student in a one- size-fits-all program.

123. Martinez acknowledged making a mistake in creating a goal attached to the October 3, 2003 IEP. The purpose of the goal was to increase the number of PECS icons Student could use. Martinez originally entered, as baseline data, that Student could use two or three icons, and listed that number as a starting point next to each of the objectives below. However, the speech therapist who worked with Student during snack time convinced Martinez that Student could already use four or five icons, so Martinez

changed the goal's baseline to four or five icons. She neglected to change the starting points that she had entered next to the objectives, which should also have stated that Student could use four or five icons. However, there was no evidence that Martinez or anyone else relied on the mistaken data in implementing the goal, nor was there any evidence that the mistake had any effect on Student's instruction or education.

124. Student's goals and objectives were adequate, appropriate, and reasonably calculated to enable Student to receive educational benefit. No alleged flaw in them impeded Student's right to a FAPE, significantly impeded Parents' opportunity to participate in the decision-making process, or caused a deprivation of educational benefits.

DELIVER OF SERVICES IN CONFORMITY WITH IEPS

125. Parents contend that, during the SY 2003-2004, the District did not deliver speech therapy in conformance with the June 5, 2003 and October 3, 2003 IEPs, which offer 60 minutes of speech therapy a day. Parents claim that since the speech therapist herself was only present for 15 minutes a day, Student received only 15 minutes a day of speech therapy. This argument was not supported by the evidence. Speech therapy was delivered not just by the speech therapist herself, but also by SDC staff throughout the day (see above), and there was no substantial evidence that staff were not trained or lawfully authorized to deliver it.

REGULAR EDUCATION TEACHER AT IEP MEETINGS

126. Parents contend that no "appropriate grade level" regular education teacher attended any of Student's IEP meetings. Principal Amundson testified that third grade teacher Gloria Dunlap attended the October 3, 2003 IEP meeting, and Dunlap's signature appears on the form. Amundson testified that first grade teacher Maria de Luz attended the September 23, 2004 IEP meeting, and de Luz' signature appears on the form. The

signature lines for a general education teacher on the forms for the June 5, 2003 and September 23, 2005 IEPs are blank.

127. Although Student mixed with typically developing peers at lunch and recess and during physical education, under the supervision of SDC staff, there was never a realistic possibility that she would be placed in a regular education classroom or environment. Parents do not argue that there was. They argue, inconsistently, that one-to-one instruction is the only appropriate placement for Student, a placement more removed from general education than the SDC.

128. Principal Amundson was present at the September 23, 2005 IEP meeting and available to Parents at all relevant times. As Principal, Amundson routinely and frequently observed the school's regular education classes. Before she was Principal, Amundson was an elementary teacher in the first, second, and sixth grades for a total of nine years. Father testified he knew Amundson and assumed she would be familiar with the general education curriculum at James Leitch. At that meeting or on other occasions, Amundson could and would have given Parents any information on general education they required. At all relevant times there was a general education teacher, or someone who could fill that role, present at Student's IEP meetings or readily available to answer questions. The grade level of the general education teacher is irrelevant.

129. The absence of a regular education teacher at two of Student's IEP meetings did not impede her right to a FAPE, significantly impede Parents' opportunity to participate in the decision-making process, or cause a deprivation of educational benefits.

Parental Participation

130. The evidence did not support Parents' contention that their participation in the decision-making process was impeded by the District. One or both parents attended every IEP meeting, expressed their views freely, and usually wrote comments on, or appended comments to, the IEP. The District called some IEP meetings specifically to

consider their views. Parents and Martinez maintained a written communications log in which they corresponded about Student over the years at issue. The correspondence is extensive, and shows that Martinez was fully responsive to Parents' concerns, although she did not always accede to their wishes. Father was in the SDC about twice a week (see above), and testified he felt that Martinez was always approachable and could be questioned. Through periodic report cards, voluntary written and oral reports, and frequent written and oral communications, the District adequately communicated Student's progress to Parents. At all times Parents had adequate prior written notice of any proposed change in Student's program, or of any consideration and subsequent rejection of their proposals.

131. Father's testimony showed that he frequently equated lack of agreement with his views with failure to consider them. But failure to agree is not failure to consider. Parents submitted to the IEP team numerous writings, all of which the team considered. Martinez's handwritten responses appear on one such writing ("Battle Plan #2"). The communications log reflects her consideration of the others. Parents submitted the reports of numerous private consultants, all of which Martinez, as Student's case manager, read and considered. The other members of the IEP team also considered them before or during IEP meetings. The District had no obligation to communicate directly with the outside consultants. It fully considered Parents' views and proposals, and agreed with and implemented some of them. The District rejected others on their merits. The District did not impede Parents' participation in the decision-making process.

Least Restrictive Alternative

132. Student could not have been satisfactorily or appropriately educated in a mainstream classroom or environment. Her placement in the SDC constituted the least restrictive placement in which, in light of her deficits, she could be satisfactorily and

appropriately educated. The one-to-one instruction sought by Parents would have been a more restrictive placement.

Alternative Placements

133. Because of the factual findings above, there is no need to consider the merits of Parents' proposed remedies.

Reimbursement

134. Because of the factual findings above, Parents are not entitled to any reimbursement.

Motion for Sanctions

135. The District's motion for monetary sanctions to compensate it for expenses incurred in opposing a frivolous prehearing motion has merit, for these reasons:

136. Petitioner's request for due process was filed on May 11, 2006. On May 12, the Office of Administrative Hearings (OAH) issued a Notice of Due Process Hearing and Mediation, setting the due process hearing for July 6, 2006, and the mediation for June 22, 2006.

137. Attorneys Mandy Leigh and Emily Berg of the Leigh Law Group represented Student throughout the proceeding. Leigh was Student's lead attorney and actively supervised Berg.

138. Federal and state law govern the time in which due process requests must be brought to hearing, and provide that the timeline for a due process hearing is tolled for 30 days while the parties engage in a resolution session. An exception to the 30-day tolling rule exists if the parties agree in writing that the resolution session is waived. (See Legal Conclusion No. 26.)

139. On May 22, 2006, the parties met for a resolution session. Jack Bannon, the District's Director of Special Services, and Student's case manager were present for the District. After some discussion, Student's attorneys walked out of the session.

140. On May 23, 2006, Berg faxed a letter to the District's attorney, Damara Moore, claiming that the previous day's events did not amount to a resolution session within the meaning of the IDEA. Berg's letter stated that the District's representatives had been unprepared, accused the District of bad faith conduct, and demanded another meeting. It announced that unless the District convened another meeting, "we will consider your actions a waiver of resolution," and in that event Student was "prepared to go forth with the Due Process Hearing within an abridged timeframe, with hearing to be set on or about the second week in June."

141. On May 23, 2006, Moore faxed a response to Berg disagreeing with her interpretation of the events of May 22 and interpreting Berg's reference to an abridged timeframe as a withdrawal of Petitioner's request for mediation. "I am not aware," Moore added, "of any other way the timeframe for a hearing would become 'abridged.'"

142. In a faxed reply to Moore on May 24, 2006, a copy of which Berg sent to OAH, Berg interpreted Moore's response of May 23 as a refusal to set another resolution session. Berg's letter stated:

> Furthermore, this is notice to the Office of Administrative Hearings of Petitioner's waiver of Resolution and request to hold the hearing date within the required time frame. See http://www.oah.dgs.ca.gov/Special+Education/SE-FAQ.htm stating that waiver of resolution impacts the time in which the hearing is set, see also 20 U.S.C. § 1415(f)(1)(B)(i)(IV). Since the District is refusing to hold a Resolution Session, the 30 day

waiting period for hearing is waived and the hearing date should be set accordingly absent any legal exceptions.

143. On May 24, 2006, Moore responded, rejecting Berg's claim that a resolution session had been waived and expressly refusing to supply a written waiver of a resolution session. Moore quoted 20 U.S.C. § 1415(f)(1)(B)(i)(IV) in its entirety, pointing out that, to waive a resolution session, the parties must "agree in writing to waive such a meeting." Moore also quoted the OAH web page Berg had cited, pointing out that it also required, as a condition of a shortened hearing schedule, "a written waiver of the required resolution session signed by both sides."

144. On June 13, 2006, Berg filed "Petitioner's Motion for Clarification Regarding Date of Hearing." The motion referred to Berg's previous letter announcing that, in the absence of another resolution session, Petitioner would consider the resolution session waived. The motion then stated that Petitioner "requires clarification as to whether the date of Hearing on this matter is still July 6, 2006, as the waiver of resolution would have changed the timeline for hearing." The motion was not accompanied by any supporting declaration, did not cite any authority or offer any reasoning, and suggested no specific date for hearing.

145. On June 15, 2006, the District filed a response to the motion, arguing that it had not waived the resolution session.

146. On June 20, 2006, Judge William Hoover of OAH denied the motion for clarification, noting that the governing statute, 20 U.S.C. § 1415(f)(1)(B)(i)(IV), plainly required the tolling of the timeline for 30 days "unless the parents and the local educational authority agree in writing to waive such meeting..." In his order, Judge Hoover confirmed that the due process hearing would proceed on July 6, 2006, as previously noticed, and observed that "[g]iven the express language of the statute, it is unclear how Student's counsel could, in good faith, assert such an untenable position."

147. On June 19, 2006, before receiving Judge Hoover's June 20 order, Berg filed another "Motion for Clarification Regarding Date of Hearing." The second motion reiterated Petitioner's factual claims concerning the failed resolution session and stated that, based on those claims, "Petitioner asserts that this 'meeting' did not meet the definition of a resolution session" as defined by IDEA. Once again, Berg failed to provide a supporting declaration or discuss any authority that might arguably support the relief the motion sought. The remainder of the second motion consisted of an argument against extending the hearing date. The pleading concluded: "Based on the foregoing, Petitioner again requests clarification of the hearing date as soon as possible."

148. On June 20, 2006, in response to Petitioner's June 19 filing, Judge Hoover issued an "Order on Motion for Clarification" that restated his previous ruling.

149. On June 26, 2006, the District moved for sanctions for the filing of two frivolous motions requesting clarification of the hearing date, restating the events above and attaching the relevant pleadings and correspondence as exhibits.

150. On July 3, 2006, Leigh filed a response in opposition to the motion for sanctions, in which she accused the District of making the "misleading" argument that Petitioner had filed two motions for clarification of the hearing date. In a footnote, Leigh claimed that, in the caption "Motion for Clarification Regarding Date of Hearing" filed on July 19, 2006, Petitioner "inadvertently left out the word 'Reply.'" In her response, Leigh argued that the motion, or motions,[9] had been made in good faith "given that Respondent's conduct ... violated the clear mandates" of the IDEA. Leigh then claimed that Petitioner's attorneys believed in good faith that the District had not conducted the resolution session as provided by law; that the motion had succeeded because it did

[9] It does not matter here whether the motion was filed twice. For convenience it is treated as one motion.

obtain a clarification of the hearing date; and that the request for clarification was therefore legitimate.

151. Petitioner's Motion for Clarification Regarding Date of Hearing, filed June 13, 2006, was frivolous. Every reasonable attorney would agree that it was totally and completely without merit. The governing statute is unmistakably clear: waiver of a resolution session requires 1) an agreement of the parties that is 2) set forth in writing. Neither requirement was met here, as Leigh and Berg knew. Nonetheless, they filed a groundless motion, citing no authority but incorporating their letter to Moore of May 24, which cited two authorities that directly contradicted their position (see above). They knew the governing law; they cited it in their May 24 letter. Had they been ignorant of the governing law, Moore's reply of May 24 would have adequately brought it to their attention. No reasonable attorney could interpret 20 U.S.C. § 1415(f)(1)(B)(i)(IV) as permitting one party unilaterally to declare a resolution session waived over the opposition of the other party, and thereby to obtain an expedited hearing date.

152. The form of the motion reinforces the conclusion that it was frivolous. The motion referred vaguely to Berg's letter of May 24, informing OAH that Petitioner considered the resolution session waived. The motion itself cited no authority whatever. It did not even explicitly argue that the consequence of Petitioner's unilateral declaration of waiver was that the timeline for the hearing was shortened. It did not append the correspondence to which it referred, or any other correspondence, nor did it acknowledge the existence of the District's contrary position or the correspondence from Moore. Although the motion depended in part upon the resolution of contested facts, it did not set forth any facts in the form of a sworn declaration on which OAH could have based a factual ruling. It did not even set forth in un- sworn form the facts upon which Petitioner relied to declare the resolution session waived. While attorneys are entitled to argue in good faith for a change in existing law, the motion made no such argument. It simply

asserted a plainly untenable position, without support in law, reasoning, or cognizable fact, and demanded relief.

153. Leigh's disingenuous response to the motion for sanctions also supports the conclusion that the motion for clarification was frivolous. The response deliberately conflated two separate issues: whether the District violated the IDEA in the resolution session; and whether any such violation had the effect of changing the timeline for the due process hearing. The response claimed that Petitioner's attorneys acted in good faith in believing that the District had acted unlawfully in the resolution session, and purported to conclude from that claim, without any further reason or authority, that they therefore must also have acted in good faith in moving to alter the hearing date. However, whether the District violated the IDEA in its conduct of the resolution session was only one of two issues the motion raised. The more important issue was, assuming such a violation, whether the violation had any effect on the timing of the hearing. As any reasonable attorney would agree, the two issues are distinct. The response to the motion for sanctions cited no authorities other than decisions expressing generalities about sanctions. Notably, the response was not supported by a declaration of any kind. Neither Leigh nor Berg filed a sworn statement that she acted in good faith or had any reason to believe that the motion had merit.

154. Leigh and Berg made the motion in subjective bad faith and for the sole purpose of harassing the District. The motion had no apparent purpose other than to punish the District for its alleged misconduct in the resolution session of May 22 and for its refusal to schedule a continuation of that session. The content and tone of Berg's letters of May 23 and May 24 make it clear that, unless the District changed its conduct, the groundless motion to alter the hearing date would be filed and pursued.

155. Cause exists to order monetary sanctions for the filing of a frivolous motion. With the motion for sanctions, Moore filed a credible declaration stating that her hourly rate is $195 and that she spent approximately three hours "responding to Petitioner's

claims and drafting this motion." Apparently those three hours included time spent corresponding with Petitioner, the costs of which are not recoverable on this motion for sanctions. It appears, from comparing Moore's correspondence of May 23 and 24 with her opposition to the frivolous motion and with her motion for sanctions, that the correspondence accounted for less than half of the three hours of total time stated in her declaration. It is therefore reasonable to award compensation in the amount of $300, for work on the motions only, since preparing and filing them consumed slightly over half of Moore's total time.

CONCLUSIONS OF LAW

ELEMENTS OF A FAPE

1. Under the IDEA and state law, children with disabilities have the right to free appropriate public education (FAPE). (20 U.S.C. § 1400(d); Cal. Ed. Code § 56000.) FAPE means special education and related services that are available to the child at no charge to the parent or guardian, meet State educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(a)(9).) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(a)(29).) "Related services" are transportation and other developmental, corrective and supportive services as may be required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26).) In California, related services are called designated instruction and services (DIS), which must be provided if they may be required to assist the child in benefiting from special education. (Ed. Code § 56363, subd. (a).)

2. There are two parts to the legal analysis of a school district's compliance with the IDEA. First, the tribunal must determine whether the district has complied with the procedures set forth in the IDEA. (*Board of Educ. v. Rowley* (1982) 458 U.S. 176, 206-07.) Second, the tribunal must decide whether the IEP developed through those procedures was reasonably calculated to enable the child to receive educational benefit. (*Ibid.*)

3. In determining whether a district offered a student a FAPE, the proper focus is on the adequacy of the District's placement, not on any alternative proposal. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) As long as a school district provides a FAPE, methodology is left to the district's discretion. (*Rowley*, *supra*, 458 U.S. at 208.)

4. In *Rowley*, the Supreme Court held that the IDEA does not require school districts to provide to special education students the best education available, or to provide instruction or services that maximize a student's abilities. (*Rowley*, *supra*, at 198.) School districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instruction and related services individually designed to provide educational benefit to the student. (*Id.* at p. 201.)

EDUCATIONAL BENEFIT

5. The relevance of a student's subsequent performance to the adequacy of her IEP is limited. In *Adams v. Oregon* (9th Cir. 1999) 195 F.3d 1141, parents who had supplemented their child's education with private tutoring challenged the adequacy of an Individual Family Service Plan (IFSP) (the equivalent of an IEP for infants and toddlers) on the ground that the child's subsequent lack of progress in school demonstrated the inadequacy of the IFSP. The Ninth Circuit, however, rejected that approach:

> Instead of asking whether the IFSP was adequate in light of [the student's] progress, the district court should have asked the more pertinent question of whether the IFSP was appropriately designed and implemented so as to convey [the student] with a meaningful benefit.

(*Adams*, *supra*, 195 F.3d at p. 1149.) The court rejected the process of measuring an IFSP retroactively by its results:

> We do not judge an IFSP in hindsight; rather, we look to the IFSP's goals and goal achieving methods at the time the plan was implemented and ask whether these methods were reasonably calculated to confer [student] with a meaningful benefit...

(*Ibid.*) Quoting *Fuhrmann v. East Hanover Bd. of Educ*. (3d Cir. 1993) 993 F.2d 1031, 1041, the *Adams* court observed:

> 'An [IEP] is a snapshot, not a retrospective.... [A]n IEP must take into account what was, and was not objectively reasonable when the snapshot was taken. '

(*Adams*, *supra*, 195 F.3d at 1149.) The *Adams* court stated that while inquiry into subsequent performance "may shed light" on the adequacy of the program, "such evidence is not outcome determinative." (*Ibid.*; see also, *Carlisle Area School v. Scott P.* (3d Cir. 1995) 62 F.3d 520, 530 ["Any lack of progress under a particular IEP ... does not render that IEP inappropriate.")

6. In *Rowley*, the Court found that some educational benefit had been conferred on the student since she achieved passing marks and advanced from grade to grade. (*Rowley*, *supra*, 458 U.S. at 202-03.) However, the Court cautioned that it was not establishing any one test for measuring the adequacy of educational benefits conferred under an IEP. (*Rowley*, *supra*, 458 U.S. at p. 202, 203 fn.25.)

7. The Ninth Circuit refers to *Rowley*'s "some educational benefit" requirement simply as "educational benefit." (See, e.g., *M.L. v. Fed. Way Sch. Dist.* (2004) 394 F.3d 634, 645; *Ash v. Lake Oswego School Dist.*, *No. 7J* (1992) 980 F.2d 585, 587-88.) Other circuits have interpreted "some educational benefit" to mean more than trivial or *de minimis* benefit. (See, e.g., *Houston Indep. Sch. Dist. v. Bobby R.* (5th Cir. 2000) 200 F.3d 341, 349.)

The Third and Sixth circuits have required that the benefit be "meaningful." (See, e.g., *L.E. v. Ramsey Bd. of Educ*. (3d Cir. 2006) 435 F.3d 384, 395; *Deal v. Hamilton County Bd. of Educ*. (6th Cir. 2004) 392 F.3d 840, 862.)

8. The factual showing required to establish that a student has received some educational benefit under *Rowley* is not demanding. For a student in a mainstream class, "the attainment of passing grades and regular advancement from grade to grade are generally accepted indicators of satisfactory progress." (*Walczak v. Florida Union Free Sch. Dist*. (2d Cir. 1998) 142 F.3d 119, 130.) A district need not guarantee that a student will make a month's academic progress in a month's instruction. A student may benefit even though his progress is far less than one grade level in one school year. (See, e.g., *Houston Indep. Sch. Dist. v. Bobby R., supra*, 200 F.3d at 349 n.3.) A two-month gain in reading in 10 instructional months has been held an adequate showing. (*Delaware Valley Sch. Dist. v. Daniel G*. (Pa. Cmwlth. 2002) 800 A.2d 989, 993-94.)

9. A student derives benefit when she improves in some areas even though she fails to improve in others. (See, e.g., *Fort Zumwalt Sch. Dist. v. Clynes* (8th Cir. 1997) 119 F.3d 607, 613; *Carlisle Area School v. Scott P, supra,* 62 F.3d at 530.) She may derive benefit while passing in four courses and flunking in two. (*Cypress-Fairbanks Indep. Sch. Dist. v. Michael F*. (S.D.Tex. 1995) 931 F.Supp. 474, 481.) A showing of progress does not require that a D student become a C student and thus rise in relation to her peers. Progress may be found even when a student's scores remain severely depressed in terms of percentile ranking and age equivalence, as long as some progress toward some goals can be shown. (*Coale v. Delaware Dept. of Educ*. (D.Del. 2001) 162 F.Supp.2d 316, 328.)

10. Whether a student has received more than *de minimis* benefit must be measured in relation to the student's potential. (*Mrs. B. v. Milford Bd. of Educ.* (2d Cir. 1997) 103 F.3d 1114, 1121; *Polk v. Central Susquehanna Intermediate Unit 16* (3d Cir. 1988) 853 F.2d 171, 185.) As the Supreme Court put it:

> It is clear that the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between. One child may have little difficulty competing successfully in an academic setting with nonhandicapped children while another child may encounter great difficulty in acquiring even the most basic of self- maintenance skills.
>
> *Rowley, supra*, 458 U.S. at p. 202.

The limitations on educational progress for the profoundly retarded student were described by the Third Circuit in *Battle v. Pennsylvania* (1980) 629 F.2d 269, 275:

> The Severely and Profoundly Impaired (SPI) are generally regarded as children whose I.Q. is below 30. The severely retarded 'are likely to be physically handicapped and have difficulty moving. They may enter the school system

without toilet training and lack many basic self-help skills, such as dressing and feeding. Their language deficit is usually significant. Academically, one expects their achievements to be very limited, although they may be able to count, tell time and identify a few words on sight at the completion of their education.'

> [¶]...[¶]
>
> The educational programs of [these] children depend on the individual abilities of each child. Where basic self help and social skills such as toilet training, dressing, feeding, and communication are lacking, formal education begins at that point. If the child masters these fundamentals, the education

> moves on to more difficult but still very basic language, social, and arithmetic skills, such as counting, making change, and identifying simple words.
>
> The modest objectives of the educational programs of [these] children are related to each child's potential and typically include 'acquiring additional self help skills, avoiding institutionalization or attaining that level of independence with regard to self care that he or she can live in a community living arrangement or at home and work in a sheltered workshop.'

(*Battle, supra*, 629 F.2d at 274 (quoting *Armstrong v. Kline* (E.D.Pa.1979) 476 F. Supp. 583, 588, 590-91).

11. 34 Code of Federal Regulations, section 300.350(a) provides that a district must make "a good faith effort to assist the child to achieve the goals and objectives or benchmarks listed in the IEP." However, subsection (b) of that regulation provides that the IDEA "does not require that any agency, teacher, or other person be held accountable if a child does not achieve the growth projected in the annual goals and benchmarks and objectives." According to the accompanying Comment, the purpose of subsection (b) is "to make clear that the IEP is not a performance contract and does not constitute a guarantee by the public agency that a child will progress at a specified rate." (64 Fed.Reg. 12598 (March 12, 1999); see also, Ed. Code § 56345, subd. (c).)

12. A student may derive educational benefit under *Rowley* even if most of her goals and objectives are not met, as long as she makes progress toward some of them. In *J.P. v. West Clark Community Schools* (S.D.Ind. 2002) 230 F.Supp.2d 910, 943, the court held a student benefited under *Rowley* when he met only four of his thirty-five objectives, because he made progress toward some of the others. (See also, *McGovern v. Howard County Pub. Schs*. (D.Md. Sept. 6, 2001, Civ. No. AMD 01-527) 2001 U.S.Dist. LEXIS 13910,

p. 59; *Fermin v. San Mateo-Foster City School Dist*. (N.D.Cal., August 7, 2000, No. C 99-3376) U.S.Dist. LEXIS 11325, pp. 22-23.)

Least Restrictive Environment

13. Federal and state law also require a school district to provide special education in the least restrictive environment (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).) A placement must foster maximum interaction between disabled students and their nondisabled peers "in a manner that is appropriate to the needs of both." (Ed. Code § 56031.) The Supreme Court has noted, however, that IDEA's use of the word "appropriate" reflects Congressional recognition "that some settings simply are not suitable environments for the participation of some handicapped children." (*Rowley, supra,* 458 U.S. at 197.)

Behavior

14. If a child's behavior impedes her learning or that of others, an IEP team must consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. (20 U.S.C. § 1414(d)(3)(B)(i); 34 C.F.R. § 300.346(a)(2)(i); Ed. Code § 56341.1, subd. (b)(1).) One such intervention is with a behavioral intervention plan, a written document that is developed when the student exhibits a serious behavior problem that significantly interferes with the implementation of the goals and objectives of her IEP. (Cal. Code Regs., tit. 5, § 3001, subd. (f).) A serious behavior problem is behavior that is self- injurious or assaultive, causes serious property damage, or is pervasive and

maladaptive and not effectively controlled by the instructional and behavioral approaches specified in the student's IEP. (*Id.*, subd. 3001(aa).)

Adapted Physical Education

15. Adapted physical education (APE) is required for special education students who require developmental or corrective instruction and who are precluded from participation in the activities of the general physical education program, modified general physical education program, or in a specially designed physical education program in a special class. (Cal. Code Regs., tit. 5, § 3051.5, subd. (a).)

Procedural Requirements

16. In *Rowley*, the Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA. (*Rowley, supra*, at 205-06.) However, a procedural error does not automatically require a finding that a FAPE was denied. Since July 1, 2005, the IDEA has codified the pre-existing rule that a procedural violation results in a denial of FAPE only if it impedes the child’s right to a FAPE, significantly impedes the parents’ opportunity to participate in the decision-making process, or causes a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see, *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

17. Federal and state law require that parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement, and provision of a FAPE to their child. (34 C.F.R. § 300.501(a), (c); Ed. Code §§ 56304, 56342.5.) School officials and staff do not predetermine an IEP simply by meeting to review and discuss a child's evaluation and programming in advance of an IEP meeting. (*N.L. v. Knox County Schs.* (6th Cir. 2003) 315 F.2d 688, 693 n.3.) However, a school district that predetermines the child’s program and does not consider the parents’ requests with an open mind has denied the parents' right to

participate in the IEP process. (*Deal v. Hamilton County Bd. of Educ, supra,* 392 F.3d at 858.)

18. If a student is, or may be, participating in the regular education environment, at least one regular education teacher must be a member of the IEP team. (20 U.S.C. § 1414(d)(1)(B)(ii); Ed. Code § 56341, subd. (b)(2).)

19. An IEP must include a statement of the child's present levels of educational performance, a statement of measurable annual goals, a statement of the extent to which a child will not participate in a regular classroom with nondisabled children, a statement of the special education and related services to be provided, and a statement of how the child's progress toward the annual goals will be measured. (20 U.S.C. § 1414(d)(1)(A)(i); 34 C.F.R. § 300.347(a); Ed. Code § 56345, subd. (a)(1)-(3).)

20. There are no specific requirements for what information should be contained in a statement of present levels of performance; that is left to the discretion of the participants. (See, *O'Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233* (10th Cir. 1998) 144 F.3d 692, 702; *Bend-Lapine Sch. Dist. v. D.W.* (9th Cir., July 9, 1998, No. 97-35711) 1998 U.S. App. LEXIS 16462, pp. 4-5 (unpublished); 34 C.F.R. § 300.346, App. C, No. 36.) The omission of a baseline from which progress can be measured is a procedural violation and does not deprive a student of a FAPE unless it causes a loss of educational opportunity or seriously infringes upon the parents' opportunity to participate in the IEP process. (*Nack v. Orange City School Dist.* (6th Cir., July 26, 2006, No. 05-3256) 2006 U.S. App. LEXIS 18666, pp. 16-18.) Even the entire absence of present levels of performance does not deny a student a FAPE if the parties involved knew the information through other means. (*Doe v. Defendant I* (6th Cir. 1990) 898 F.2d 1186, 1189-91.)

21. An IEP must contain a description of when "periodic reports ...(such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided." (20 U.S.C. § 1414(d)(1)(A)(i)(III); Ed. Code § 56345, subd.

(a)(3).) A district must report a Student's progress to her parents at least as often as it reports the progress of typically developing peers. (34 C.F.R. § 300.347(a)(7)(ii).)

Assessments

22. Under the IDEA a district must, in an initial evalution, determine whether the child evaluated is a child with a disability. (20 U.S.C. § 1414(a)(1)(C)(i)(I).) In California, a district assessing a student for eligibility for special education must use tests and other tools tailored to assessing "specific areas of educational need" and must ensure that a child is assessed "in all areas related to" a suspected disability. (Ed. Code § 56320, subd. (c),(f).) Statutory examples of such related areas of educational need include areas such as vision, hearing, motor abilities, academic performance, and social and emotional status. (*Ibid.*) Federal law also requires that the child be "assessed in all areas of suspected disability." (20 U.S.C. § 1414(b)(3)(B).) Like the California statute, the federal statute does not require a medical diagnosis. Instead, it requires assessment in all areas of educational need related to the suspected disability. (34 C.F.R. § 300.532(g); see, *J.K. v. Fayette County Bd. of Educ.* (E.D.Ky., Jan. 30, 2006, Civ. A. No. 04-158) 2006 U.S.Dist. LEXIS 3538, pp. 12-13.)

Parental Participation in IEP Process

23. A parent is a required member of the IEP team. (20 U.S.C. § 1414(d)(1)(B)(i); 34 C.F.R. § 300.344(a)(1); Ed. Code § 56341, subd. (b)(1).) The team must consider the concerns of the parents throughout the IEP process. (20 U.S.C. § 1414(c) (1)(B), (d)(3)(A)(i), (d)(4)(A)(ii)(III); 34 C.F.R. §§ 300.343(c)(2)(iii), 300.346(a)(1)(i), (b), 300.533 (a)(1)(i); Ed. Code § 56341.1, subd. (a)(1), (d)(3), (e).) While the IEP team should work toward reaching a consensus, the school district has the ultimate responsibility to determine that the IEP offers a FAPE. (App. A to 34 C.F.R. Part 300, Notice of Interpretation, 64 Fed. Reg. 12473 (Mar. 12, 1999).)

24. A parent has meaningfully participated in the development of an IEP when he is informed of his child's problems, attends the IEP meeting, expresses his disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools, supra*, 315 F.3d at 693.) A parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way. (*Fuhrmann v. East Hanover Bd. of Educ.*, *supra,* 993 F.2d at 1036.)

Reimbursement

25. Parents may be entitled to reimbursement for the costs of placement or services they have procured for their child when the school district has failed to provide a FAPE, and the private placement or services were appropriate under the IDEA and replaced services that the district failed to provide. (20 U.S.C. § 1412(a)(10)(C); *School Comm. of Burlington v. Department of Education* (1985) 471 U.S. 359, 369-71.) Parents may receive reimbursement for their unilateral placement if the placement met the child's needs and provided the child with educational benefit. However, the parents' unilateral placement is not required to meet all requirements of the IDEA. (*Florence County Sch. Dist. Four v. Carter* (1993) 510 U.S. 7, 13- 14.)

Sanctions

26. When a local educational agency (LEA) receives a request for a due process hearing, it must conduct the hearing and mail a decision to the complaining party within 45 days, unless an extension is granted. (34 C.F.R. § 300.511.) Under California law, an LEA that has received such a request must afford the complainant the opportunity to participate in a resolution session. If the LEA has not resolved the complaint in 30 days, a due process hearing may occur and "all the applicable timelines for a due process hearing ... shall commence." (Ed. Code § 56501.5, subd. (a), (c).) A resolution session is not required

"if the parents and the local educational agency agree in writing to waive the meeting." (*Id.*, subd. (b).)

27. California Government Code section 11455.30 provides:

(a) The presiding officer may order a party, the party's attorney or other authorized representative, or both, to pay reasonable expenses, including attorney's fees, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay as defined in Section 128.5 of the Code of Civil Procedure.

(b) The order, or denial of an order, is subject to judicial review in the same manner as a decision in the proceeding. The order is enforceable in the same manner as a money judgment or by the contempt sanction.

28. A comprehensive discussion of the grounds for sanctions under California Code of Civil Procedure section 128.5 is set forth in *Levy v. Blum* (2001) 92 Cal.App.4th 625, 635- 637. A trial court may impose sanctions under Code of Civil Procedure section 128.5 against a party, a party's attorney, or both, for "bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay." A bad faith action or tactic is frivolous if it is "totally and completely without merit" or if is instituted "for the sole purpose of harassing an opposing party." (*Id.*, subd. (b)(2).) Whether an action is frivolous is governed by an objective standard: whether any reasonable attorney would agree it is totally and completely without merit. There must also be a showing of an improper purpose; i.e., subjective bad faith on the part of the attorney or party to be sanctioned. Code of Civil Procedure section 128.5 requires notice and an opportunity to be heard before the imposition of sanctions, and the court must issue a written order reciting in detail the conduct justifying sanctions.

29. California Code of Regulations, title 1, section 1040, governs the imposition of monetary sanctions by an Administrative Law Judge (ALJ). It provides:

(a) The ALJ may order a party, a party's representative or both, to pay reasonable expenses, including attorney's fees, incurred by another party as a result of bad faith actions or tactics that are frivolous or solely intended to cause unnecessary delay.

(1) ‘Actions or tactics’ include, but are not limited to, the making or opposing of Motions or the failure to comply with a lawful order of the ALJ.

(2) ‘Frivolous’ means

(A) totally and completely without merit or

(B) for the sole purpose of harassing an opposing party.

(b) The ALJ shall not impose sanctions without providing notice and an opportunity to be heard.

(c) The ALJ shall determine the reasonable expenses based upon testimony under oath or a Declaration setting forth specific expenses incurred as a result of the bad faith conduct. An order for sanctions may be made on the record or in writing, setting forth the factual findings on which the sanctions are based.

Burden of Proof

30. Petitioner has the burden of proving the essential elements of her claim. (*Schaffer v. Weast* (2005) 546 U.S.____ 126 S.Ct. 528, 163 L.Ed.2d 387.)

RESOLUTION OF ISSUES

31. Based on Factual Findings 3-4 and 71-78, and Legal Conclusion 22, the District assessed Student in all areas of suspected disability.

32. Based on Factual Findings 3-4, 62-70, and 79-124, and Legal Conclusions 1, 14, and 22, the District met Student’s unique needs in the areas of speech and language therapy, occupational therapy, behavior, incontinence, and distractibility.

33. Based on Factual Findings 3-4, 72-70, and 79-124, and Legal Conclusions 1, 14, and 22, the District individualized Student's programs for her and did not write them to conform to a single existing program.

34. Based on Factual Findings 3-124, and Legal Conclusions 4 and 5-13, Student's IEPs were reasonably calculated to result in meaningful educational benefit to her, and did.

35. Based on Factual Findings 3-4 and 104-124, and Legal Conclusions 1, 4, and 5- 12, Student's goals and objectives were adequate. The IDEA requires that Student receive an appropriate education; it does not require that each of Student's goals and objectives be found appropriate. The goals and objectives as a whole were sufficiently precise, measurable, and directly related to Student's needs that they were reasonably calculated to benefit her educationally.

36. Based on Factual Findings 62-70 and 125, and Legal Conclusions 1-4, the District delivered speech and language services in the SY 2003-2004 as required by the governing IEPs.

37. Based on Factual Findings130-31, and Legal Conclusions 17 and 23-24, the District did not deny Parents the right to participate meaningfully in the decision-making process.

38. Based on Factual Findings 104-124 and 130-31, and Legal Conclusions 19-21, the District adequately reported Student's progress. It was obliged to report her progress periodically at the intervals used for report cards for typically developing peers; it was not required to report progress to Parents more frequently.

39. Based on Factual Findings 3-4, 16-23, and 126-129, and Legal Conclusion No. 18, the District was not required to have a regular education teacher in attendance at IEP meetings.

40. Based on Factual Findings 130-31, and Legal Conclusions 17 and 23-24, the District adequately considered the views of Parents and their outside consultants.

41. Based on Factual Findings 3-124, and Legal Conclusions 1-15 and 22, the District should not be required to provide to Student 30 to 35 hours a week of one-to-one instruction.

42. Based on Factual Findings 3-124, and Legal Conclusions1-15, 22, and 25, the District should not be required to reimburse parents for tuition and expenses at a private school.

43. Based on Factual Findings 3-132, and Legal Conclusions 1-24, the District provided a FAPE to Student in the school years 2003-2004, 2004-2005, and 2005-2006.

44. Based on Factual Findings 135-55, and Legal Conclusions 26-29, Student's attorneys Mandy Leigh and Emily Berg knowingly filed a frivolous motion in subjective bad faith for the sole purpose of harassing the District, and are liable to the District for the reasonable costs incurred in resisting that motion.

ORDER

1. Petitioner's requests for relief are denied.

2. Attorneys Mandy Leigh and Emily Berg of the Leigh Law Group are jointly and severally liable for, and shall pay, $300 to the District within 30 days to compensate it for attorneys' fees incurred in opposing the frivolous motion Leigh and Berg filed on behalf of Petitioner on June 13, 2006, for clarification of the date of the due process hearing.

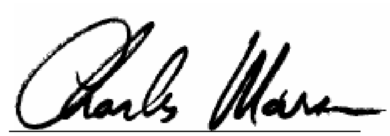
PREVAILING PARTY

Education Code section 56507, subdivision (d) requires that this decision indicate the extent to which each party prevailed on each issue heard and decided. The District prevailed on all issues.

RIGHT TO APPEAL THIS DECISION

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

Dated: August 24, 2006



CHARLES MARSON

Administrative Law Judge

Office of Administrative Hearings

Special Education Division