

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

In the Matter of

STUDENT,

Petitioner,

v.

LONG BEACH UNIFIED SCHOOL
DISTRICT,

Respondent.

OAH CASE NO. N2005070442

DECISION

Wendy A. Weber, Administrative Law Judge, OAH, Special Education Division, State of California, heard this matter on February 6, 7, 9 and 10, and March 13, 14, 15, 16, 17 and 23, 2006, at Long Beach Unified School District, Long Beach, California.

Student was represented by Tania Whiteleather, Attorney at Law. Rodney Ford, advocate, was also present on behalf of Student during portions of the hearing.

Respondent Long Beach Unified School District (District) was represented by Debra Ferdman, Attorney at Law. Also present on behalf of the District during portions of the hearing was Sara Jochum, Program Administrator.

On June 29, 2005, Student filed a Due Process Hearing Request. On July 19, 2005, the matter was taken off calendar. At hearing, the parties requested closing briefs which were due concurrently on April 11, 2006. Student's brief was timely received and marked for identification as Exhibit QQ. Respondent's brief was timely received and marked for identification as Exhibit 35. The matter was submitted for decision on April 12, 2006.

ISSUES¹

- ISSUE 1: Did the District appropriately assess Student in all areas of suspected disability for the school years commencing June 2002/2003 through 2005/2006.
- ISSUE 2: Did the District deny Student a free appropriate public education for the school years commencing June 2002/2003 through 2005/2006 by failing to address Student's lack of progress and to suggest changes to his IEPs to meet his needs.
- ISSUE 3: Did the District commit procedural violations of the IDEA by:
- A. Failing to conduct standardized testing at the triennial reassessment in March 2004.
 - B. Failing to provide parents with prior written notice at the end of the 2004/2005 school year to address their request for a Lindamood-Bell Learning Processes program.
 - C. Failing to identify Student's present levels and to review his annual goals at the March 2005 annual IEP.
- ISSUE 4: Are Student's parents entitled to compensatory education and reimbursement for expenses and transportation costs for the private Lindamood-Bell program.

CONTENTIONS

Student contends the District failed to assess him in reading comprehension, decoding, fluency, auditory processing and math. Student also contends the District failed to provide Student a free appropriate public education from June 2002 through the 2005/2006 school years by failing to create goals and objectives and to offer programs and

¹ The issues have been reframed for clarity.

services that would have provided educational benefits to allow Student to progress. Student further contends the District failed to properly address Student's needs in math in 2002, failed to address his failure to meet his Language Arts goals in March 2003 and March 2004, failed to identify present levels and review annual goals in March 2005, failed to properly conduct a triennial reevaluation in 2004, and failed to provide parents prior written notice in 2005. Student seeks compensatory education in the form of reimbursement for expenses, including transportation costs, incurred by parents as a result of Student attending the Lindamood-Bell (LMB) Clinic in Newport Beach, California.²

The District contends it properly identified and assessed Student's areas of unique educational needs in attention, processing and reading comprehension, and it properly provided services in a manner that allowed Student to gain educational benefit. The District further contends it complied with all procedural safeguards required under the IDEA, that all triennial assessments and prior written notices complied with the law, and Student's parents are not entitled to reimbursement.

FINDINGS OF FACT

BACKGROUND

1. Student, currently in 9th grade at Lakewood High School, is a 16 year-old male, eligible for special education services under the category of specific learning disability (SLD).³ Student's reading, writing and math skills are affected due to a disability in the basic

² Although Student's Due Process Request includes a proposed resolution of "compensatory educational services to compensate for the lack FAPE," the Amended Statement of Issues, which was clarified the first day of hearing, did not include a request for compensatory education. On the first day of hearing, Student's proposed

³ Student's eligibility for special education with an SLD is not in dispute.

psychological processes of attention to task, and cognitive abilities, including association, conceptualization and memory.⁴ At all relevant times, Student was a resident in the District.

ASSESSMENTS OF STUDENT

2. In March 2001, when Student was in 4th grade, a comprehensive triennial evaluation was conducted. Student's unique needs were identified in the areas of reading and comprehension, written expression, and math, with difficulties with attention and processing nonverbal information. He continued to perform below his peers, particularly in the areas of reading and spelling.

(A) Reading and Comprehension--Student was given the Broad Reading Cluster of the Woodcock Johnson-III Test of Achievement (WJ-III), and curriculum-based measurements (CBM) in reading comprehension, decoding and fluency.⁵ Student tested low resolutions were clarified and limited to a request for reimbursement for costs of the LMB Clinic in Newport Beach. Therefore, and

⁴ "Attention" is the ability to focus on information and sustain or shift this focus as needed during the learning process. "Conceptualization" is the ability to organize or understand the hierarchical nature of materials, transferring and generalizing instruction into practice, or the ability to infer, predict and come to conclusions related to instruction. "Association" is the ability to take information and establish enough knowledge of it in order to categorize or group, involves long term memory and the ability to create cause and affect relationships.

⁵ Basic reading skills are first developed in phonemic awareness (ability to find sounds to form words) and decoding (ability to process sounding out words), followed by the ability to put sections of reading together. As reading rate increases (phonic skills or word attack), accuracy (applying learned phonics principles to written text) increases, which in turn increases fluency.

although Student's closing brief mentions compensatory education of LMB services through the District, compensatory education services are not at issue. average in reading comprehension (10th percentile) on the Broad Reading cluster of the WJ- III (consisting of Letter-Word Identification, Passage Comprehension and Reading Fluency). He scored in the 17th percentile/3rd grade level on the Letter-Word test (measures skills in identifying isolated letters and reading words). He had difficulty decoding less common multi-syllable words, but tried to decode words he did not know. On the Passage Comprehension test (asked to read a short passage and identify a missing word), he scored low average at the 11th percentile/2nd grade level. On Reading Fluency (measures ability to quickly read simple sentences and decide if the statement is true), Student again scored in the low average range at the 12th percentile/3 rd grade level. Oral reading fluency tested by CBM (provides an estimate of reading ability and comprehension skills), showed Student passed the 3rd grade, but failed the 4th grade probe. Student could identify the main character of a story, but only identify conflict 50 percent of the time. Student continued to perform below grade level in reading comprehension, fluency and passage comprehension, and had difficulty with decoding.

(B) Written Language-- Student was also tested for written language fluency and decoding. On the WJ-III, Student tested in the low average range (14th percentile/3.5 grade level) in written language; and although he had appropriate written expression skills when writing isolated sentences, he continued to perform below grade level in spelling and paragraph writing. He was beginning to write a formatted paragraph independently, but continued to have difficulty with sequencing of sentences and ideas. On the Spelling Test (ability to write orally presented words correctly), Student scored below average/borderline range at the 7th percentile/2.6 grade equivalency. On the Writing Samples test

(produce written sentences given verbal and pictorial probes), Student scored in the average range at the 31st percentile/3.7 grade level. On the Writing Fluency test (skills in formulating and writing simple sentences quickly), Student scored in the average range at the 28th percentile/4.6 grade level. Overall, his teacher estimated written language skills were at a 2nd grade level.

- (C) Math--Student scored in the low average range (18th percentile/3.6 grade) on the WJ-III Broad Math cluster, which consisted of calculation (3.5 grade), math fluency (3.6 grade) and applied problems (low average ability 31st percentile/3.8 grade). Overall, math skills were below grade level. He was able to perform basic addition and subtraction, addition and subtraction with regrouping, and simple timetable facts, but not basic division, double digit multiplication, or addition and subtraction of common denominator fractions. Sometimes, he made mistakes by overlooking the computational sign. Student could add and subtract up to four digits, but had continued difficulty with rounding and place value.
- (D) Attention and Processing--The cognitive assessment system (CAS) test showed Student performed low average to below average range, indicating difficulties with attention to task and processing. He also showed a deficit in processing nonverbal information, was easily distracted, forgetful, did not give close attention to details and made careless mistakes. Student's hearing was tested as normal.
- (E) Since difficulties with attention, organization and sustained effort interfered with his ability to meet his learning potential, a multi-sensory, simultaneous and verbal approach to learning was recommended, such as mnemonic strategies for computational rules and summarization strategies for comprehension. Mother attended the IEP meeting held as part of this assessment and consented to the services proposed.

3. For the 2002/2003 and 2003/2004 school years, Student's unique educational needs were identified at annual IEP meetings in March 2002 and 2003, in reading comprehension, fluency, decoding, written expression, math, and attention and processing difficulties based on the 2001 triennial IEP.

4. In preparation for a triennial IEP meeting in March 2004, Vivian Holliday, school psychologist, conducted an assessment on March 11, 2004. Ms. Holliday has a B.A. in psychology, an M.A. in Educational Psychology, and has been a school psychologist with the District for six years. Ms. Holliday reviewed existing information on Student, including assessments and information provided by Mother, Student's records, teachers' reports, the 1998 assessment, the March 2001 triennial IEP test results and report, and interviewed Student, his parents and teachers.

(A) Ms. Holliday noted Student was having difficulties answering 6th grade text reading comprehension questions, and his ability to decode was not commensurate with his ability to comprehend. In writing, Student met the goal to use pre-writing strategies and resources to revise his writing as well as improve organization on simple writing assignments. With editing assistance, he was able to revise his writing with 85 percent accuracy. Student was able to follow instructions and copy anything, but independently struggled with assignments that involved complex sentences, paragraph structure and vocabulary. In math, Student was proficient in addition and subtraction and used the number line to add and subtract, but continued to work toward fluency in multiplication and multi-digit division equations, and had difficulties solving algebraic expressions.

(B) Based on her review, Ms. Holliday determined Student continued to have an SLD with unique needs in reading comprehension, writing, and math, with difficulties in attention and processing nonverbal information. Student had made steady progress since his last triennial review, but reading comprehension was his greatest challenge. Ms. Holliday credibly explained that further standardized

testing was not necessary for her assessment as there was no question Student remained eligible for special education services. Further, her review of existing information was sufficient to assess Student's current academic functioning, and no additional information was needed to provide appropriate educational and/or support services to Student.

(C) Ms. Holliday's report was provided to Mother, with instructions that if Mother had any concerns, she could request additional assessments at any time. No additional assessments were requested by Mother.

5. For the 2004/2005 school year, Student's unique needs were identified at an annual/triennial IEP meeting in March 2004 as reading comprehension, writing, and math, with difficulties in attention and processing nonverbal information based on Ms. Holliday's triennial reassessment.

6. On March 20, 2005, Daniel Sullivan conducted a comprehensive assessment with testing on March 20, 2005, at Mother's request. Mr. Sullivan has a B.A. in psychology, an M.A. in education counseling, and credentials in school counseling and psychology. At the time of this assessment, Student was in the Strategies for Success (SFS) program, where he attended all general education classes with support from a Resource Specialist Program (RSP) teacher in a pull-out study skills class three days a week). Student, a hard worker, had problems completing assignments, and benefited from the RSP teachers assisting him organizing, planning and clarifying. Student tended to be easily influenced by and joined in with peer misbehavior, but responded to teacher redirections.

(A) Student's learning potential was low average for his age peers. He had average processing, and low average ability to intake information, retain it in memory and utilize it to solve academic problems. He also had low average ability to conceptualize (make inferences from known facts, and generalize concepts to new learning tasks). The 1998 assessment showed low average cognitive function and borderline for tasks requiring nonverbal reasoning skills.

- (B) Student scored borderline in ability classification on the Matrix Analogies Test Expanded Form (MAT-EF),⁶ consistent with previous reports (indicating Student's ability to reason and make inferential conclusions was weak compared to other cognitive skills). On the Developmental Test of Visual Motor Integration (VMI), Student scored in the 87th percentile (high average for his age peers), implying he could process visually presented information without difficulty. On the TAPS-UL (Test of Auditory Processing-Upper Level), Student scored in the average range. On the Ordinal Scales test, Student scored equal to his age peers.⁷
- (C) On the WJ-III, Student scored below grade level in all areas, with low average academic skills. Fluency with academic tasks and the ability to apply academic skills were in the low range. Reading, written language, written expression and mathematics were low average, and calculation skills very low.⁸ Overall, Student

⁶ The MAT-EF provides estimates of nonverbal ability. When combined with other assessment tools, it provides information about the range of intellectual strengths and weaknesses.

⁷ The VMI tests eye-hand coordination. The purpose of the TAPS-UL is to assess auditory-perceptual skills, not physical hearing, but the ability to perceive and process auditory stimuli, such as discriminate, understand, interpret and express. It is used as a screening tool for auditory processing. Auditory processing is the ability of the brain to process verbal information. An auditory processing deficit affects learning by ineffective brain processing, which can be reflected in low academic scores if material is presented through sound and language. Ordinal Scales is a timed problem-solving test which requires the use of short and long-term memory and spatial skills.

⁸ Test results showed Total Achievement 5.2, Broad Reading 4.8, Broad Math 4.5, Broad Written Language 6.7, Math Calculation Skills 4.1, Written Expression 6.8, Letter-Word Identification 6.3, Reading Fluency 4.2, Calculation 3.8, Math Fluency, 4.8, Spelling 6.6,

tested at the 5th grade level in academic skills, which indicated he was doing extremely well for a student with low average cognition. Reading comprehension was weak, and although decoding and fluency were not at grade level, both were areas of strength; and, although not on grade level (7.1) in writing, this was also an area of strength. In math, Student had difficulties in all three areas- fluency, calculations and applied problems.

- (D) Mr. Sullivan found no evidence of an auditory processing deficit on the TAPS-UL test, and Student's high decoding score reflected the ability to process. High decoding combined with low comprehension indicated Student could process information, but he had difficulty with conceptualizing and reasoning. Even if Student had needs in auditory processing, the testimony of James Voglund, the District's audiologist, established that this deficit can only remediate to a degree, and is addressed by providing accommodations similar to those Student was already being provided, e.g. preferential seating toward the front. Moreover, the diagnosis of an auditory processing deficit requires average cognitive ability.
- (E) Despite Student's limitations in attention and processing nonverbal information, Student was progressing toward meeting his academic goals. He was motivated to do well, but required additional time to grasp new ideas and concepts, needed clear rules, precise instructions, organized materials, and the use of frequent feedback to improve performance. Since Student's needs could not be fully met in the general education classroom, he remained eligible for special education in reading, writing and math. Mr. Sullivan recommended continuation of the SFS/RSP program with regular accountability.

Writing Fluency 7.1, Passage Comprehension 4.0, Applied Problems 5.1, and Writing Samples 5.6.

7. On May 25, 2005, Susan Buckley conducted testing to assess the appropriateness of the District's summer Lindamood-Bell (LMB) reading programs for Student. Ms. Buckley, a very experienced and well-trained retired employee of the District, testified credibly regarding her test results and recommendations. Ms. Buckley holds an M.A. in education, a special education credential and RSP certificate, and worked 38 years as an elementary teacher and RSP team leader. Ms. Buckley administered the Woodcock Reading Mastery Test (WRMT) (decoding or word attack), Wide Range Achievement Test-Revised (WRAT) (sight words), GORT4 (reading test for fluency and comprehension), and Peabody Picture Vocabulary Test III (PPVT) (tests overall understanding of vocabulary). Pre-test chronological age was 15.4, end of 8th grade.⁹ These scores showed Student had difficulties in comprehension, rate, fluency, accuracy, decoding, vocabulary, and multisyllabic word attack. Ms. Buckley recommended two District LMB reading programs—Visualizing and Verbalizing (VV) and Seeing Stars.¹⁰ VV is designed to help understand text

⁹ On the PPVT, Student scored in the 9th percentile, age equivalent 9.6-10.9. On the WRMT, Student scored at the 5.5 grade level, age equivalent 10.5. On the WRAT, Student scored at 4th grade level in reading. On the GORT4, Student scored at 6.2 grade level, age equivalent 11.3 in rate, 6.7 grade level, age equivalent 11.9 in accuracy, 6.2 grade level, age equivalent 11.3 in fluency, and 4.4 grade level, age equivalent 9.6 in comprehension.

¹⁰ VV provides sensory-cognitive development of concept imagery—the ability to create a visual gestalt (whole) from oral and written language—in order to improve oral language comprehension, reading comprehension, reading recall, problem solving, critical thinking, the ability to follow directions, and to aid in self-monitoring and decoding errors. Seeing Stars provides sensory-cognitive development of phonemic awareness and symbol imagery—the ability to visualize the identity, number, and sequence of sounds and letters within words—for phonological and orthographical processing in order to anchor and retain words in the visual memory system to increase reading and spelling skills.

(comprehension skills were at the 4th grade level). Since decoding and fluency were at an early 6th grade level, Ms. Buckley also recommended the Seeing Stars program for vocabulary development and instruction in decoding multi-syllabic words to bring his skills up to 8th grade level.

8. For the 2005/2006 school year, Student's unique educational needs were identified at the annual IEP meeting in March and June 2005 in reading, writing and math, with attention and processing difficulties based on Ms. Holliday's 2004 triennial evaluation, and Mr. Sullivan's and Ms. Buckley's assessments and testing.

9. No evidence was presented the District should have suspected an auditory processing disorder as an area of need throughout the entire period at issue. Results of the TAPS-UL test in May 2005 revealed no auditory processing deficit, and Mr. Sullivan's explanation for utilizing only a portion of the test to reach this conclusion was credible, reasonable and uncontroverted. Not until the LMB Newport Beach Clinic administered the LAC test in July 2005 was a possible auditory processing deficit detected. However, there was no indication the District should have suspected a need in auditory processing as the LAC test is not administered in the District upon advice from the LMB Newport Beach Clinic; and the validity of the LAC test on Student is questionable as Student has low cognitive ability. Moreover, Student's hearing was tested as normal, thereby obviating the need for an audiological assessment; and the evidence established the phrase "auditory processing" is used interchangeably with "central auditory processing" and "language processing," the terms are frequently and improperly mixed, and no witness clarified the meaning of the terminology used in this case.¹¹ (Cal. Code Regs., tit. 5, §3028.)

¹¹ Even if Student had been assessed in auditory processing, the testimony of Mr. Voglund established that a disability in this area is addressed by providing Student modifications in instruction such as preferential seating, which was already being provided.

MARCH 2002-MARCH 2003 IEP (5TH -6TH GRADE)

10. For the 2002/2003 school year,¹² the operative IEP had been developed at an annual IEP meeting on March 12, 2002, when Student was in 5th grade.

11. In March 2002, a program was designed to address Student's unique needs in reading, writing, math, and difficulties with attention and processing.

(A) Annual goals and short-term objectives in reading and writing were written for March 2002 to March 2003. In reading, Student was to benchmark at beginning 5th grade level and answer comprehension questions with 90 percent accuracy. In writing, he was to write a 3-4 paragraph report using a web, including topic sentence, details and conclusion 80 percent of the time.

(B) Goals and objectives were to be evaluated using the District's content standards for reading and effective writing, and observations by special and general education teachers.

(C) Since Student continued to require Resource Specialist Program (RSP) support in the general education setting, he was placed in general education 90 percent of the time for all academic areas and special education 10 percent of the time. RSP for reading was provided March 12, 2002 to March 12, 2003, in the general and special education classrooms two 30 minutes sessions per week. RSP for written language was provided March 12, 2002 to March 12, 2003 in the general and special education classrooms one 30 minute session per week.

(D) RSP services were increased when Student entered middle school in September 2002 to five 50 minute sessions (250 minutes per week), as more services are routinely provided in middle school. In addition to a general education reading

¹² Although Petitioner's claims commence June 2002, Student did not attend summer school, and was passed to 6th grade at Bancroft Middle School for the 2002/2003 school year commencing September 2002.

class, Student was given special instruction in language arts (written expression), science (vocabulary concepts), and social studies (written expression), plus supportive RSP and test and program accommodations and modifications. In her RSP English class, which included reading and writing, Nancy Walker used Language of Literature, novels, the Wilson program (which emphasized decoding), and followed state curriculum standards, reading and language arts guidelines and Student's IEP goals in order to teach skills tailored to his needs. Ms. Walker presented as a very credible witness. She holds a B.A. in special education and a credential in special education, has been an RSP teacher for 19 years, and has been involved in 600 IEPs, with an average caseload of 20 students a year. Ms. Walker had Student for RSP English in 6th and 7th grades and was also Student's case carrier. In addition to her responsibilities as an RSP teacher, as case carrier, she was responsible for the IEP and goals, scheduled IEP meetings, monitored Student's progress, and met with teachers.

(E) Math was not addressed by a written goal or RSP in March 2002. However, when Student entered Bancroft Middle School in September, in addition to teaching her pull-out RSP English class, Ms. Walker also provided RSP support in the general education math class. RSP in math was further increased during the year once Ms. Walker recognized Student had needs in all academic areas and struggled in math. In addition, Student's math teacher, Jeri Shaver, also recognized his difficulties in math, and provided numerous modifications and accommodations.

(F) To address Student's needs in comprehension, writing, attention and processing, Student was provided instructional accommodations in all subjects. These included flexible scheduling, visual and auditory aides, repeating/simplifying directions, checking for understanding, shortening/modifying assignments, using story web/map to organize written assignments, reinforcing for following

directions and staying on task, and allowing extra time to process nonverbal information. For SAT-9 and District assessments, benchmarks and writing prompts, Student was allowed flexible setting and scheduling, revised test instructions, restating/repeating directions, allowing oral response to comprehension questions, reading comprehension questions, and use of a pre-made story web.

12. Mother did not attend the March 2002 IEP meeting, but was provided a copy of the IEP and information about parent rights and procedural safeguards. Mother signed approval of the IEP and placement, and consented to the eligibility, goals and objectives, and RSP program placement and services.

13. Shortly after entering Bancroft Middle School, on September, 30, 2002, Mother requested Student be transferred to another math class due to concerns he was harassed and threatened with bodily harm by another student. Student complained to Mother he was bullied and teased, and refused to go to school. At Mother's request, Student was placed in Jeri Shaver's math class (a non-RSP math class). Ms. Walker continued to monitor and provide RSP services in Ms. Shaver's class.

14. Jeri Shaver, Student's math teacher for 6th and 7th grades, holds administrative and multi-subject credentials, and was a math teacher for 10 years and Department head for five years at Bancroft Middle School. When Student entered her math class, he had difficulty with fractions, decimals and percentages, but knew his times tables. Although Ms. Walker monitored Student's work during the math class, Ms. Shaver also recognized Student's needs for additional assistance reading and understanding directions. Therefore, Ms. Shaver provided accommodations to address his handicap by giving smaller problems, placing him in a smaller group, going over his homework, and offering before and after school tutoring. She also rephrased directions, pointed out vocabulary words, took him aside, watched to see if he remained on task, made problems simpler, and paired him with a peer for help with reading and discussing.

15. Student's present levels of performance as of March 2003 showed the District's program provided Student educational benefit in reading, writing and math.

(A) Student met his reading goal by benchmarking¹³ at a 5th grade reading level. He received a B in RSP English for the year.

(B) Student was progressing towards his writing goal by benchmarking at a 4th grade level. He could write a report when provided with an organizer and pre-writing

(C) In math (although no goal had been written at the March 2002 IEP), the IEP team noted Student could add and subtract and solve some multiplication and division problems, but made mistakes with regrouping and was unable to multiply and divide multiple digits. Although his math grade for the year was D-, the grade reflected difficulties in transitioning to middle school and a more difficult course curriculum.

MARCH 2003-MARCH 2004 IEP (6TH – 7TH GRADE)

16. When the 2003/2004 school year commenced, the operative IEP had been established at an annual IEP meeting on March 31, 2003.

17. In March 2003, a program was designed to address Student's unique needs.

(A) Three annual goals and several short-term objectives were written for March 2003 to March 2004. In reading (goal#1), Student was to benchmark at beginning 6th grade level by March 2004. In writing (goal #2), Student would revise writing to improve organization, word choices and ideas with 85 percent accuracy using pre-writing strategies and writing resources by March 2004. In math (goal #3), Student would solve addition, subtraction, multiplication and division problems by March 2004 with 90 percent accuracy.

¹³ The District's benchmark includes reading comprehension and decoding.

- (B) Student's needs in reading, writing, math, and attention and processing nonverbal information were addressed by using instructional classroom, State and District testing modifications and accommodations in all subjects in general education and RSP classes. These included extending time of instruction/test-taking, shortening assignments, fewer tasks per assignment, on-task focusing prompts, simplifying/clarifying directions, using visual and writing prompts, and allowing oral responses when appropriate and small groups with minimal distractions.
- (C) Evaluation of progress toward the goals and objectives would be done using the District's content standards for reading, writing strategies and numbers in both special and general education classes, work samples, pre and post testing, monitoring, observations, and review by special and general education teachers.
- (D) Since RSP services helped Student progress in the general curriculum, RSP was continued for 29 percent of the time (an increase over the prior year), with general education participation 71 percent of the time in physical education, lunch, recess, history and science. RSP was provided in reading 55 minutes/session five times a week in both the RSP class and the general education classrooms, math 55 minutes/session five times a week in the RSP classroom, and written language 55 minutes/session five times a week in the RSP classroom. RSP math was provided one period a day, taught by Melissa James in the spring of 2003. Her math class consisted of 20 students for which she provided direct RSP services, which included reading strategies. Ms. James knew Student had difficulty understanding the material, so worked with him on a 1: 1 basis. Consistent practice helped Student retain information. Thanh Vo, math teacher who replaced Ms. James in the spring, also recognized Student's

difficulties in math due to a lack of foundational skills, and provided tutoring after school.¹⁴

18. Mother notified the District at the last minute that she could not attend the IEP meeting. The District sent her parental rights and a copy of the proposed IEP plan, reported Student remained eligible for special education, and recommended continued placement in RSP. Mother approved the IEP, and consented to the placement and services on April 1, 2003.

19. Summer school was offered to Student to work on academic needs in reading and math. He did not attend the District's summer school, as Mother opted to hire a private math tutor. The tutor was not a special education teacher.

JANUARY 2004 IEP MEETING

20. Mother requested an emergency IEP team meeting in January 2004 to discuss special education services. Due to concerns about Student's self-esteem, Mother requested Student be mainstreamed instead of attending pull-out classes for RSP reading, written language and math. Student complained to Mother he was being teased because he was in special education, and did not like the handicapped sign on the classroom door.

(A) At the IEP meeting held on January 23, 2004, the IEP team reported Student's progress, discussed programs, his continued needs in reading comprehension and recent assessment results. Student had benchmarked in reading, could decode fluently, showed some improvement in behavior and assignments, put forth effort, and had strong memorization ability. The IEP team recognized Student's continued difficulties in comprehension and need for services and

¹⁴ During the time Mr. Vo taught Student math, he was employed by the District as a long-term substitute. Although he had no special education credential, he was supervised by the RSP teacher and qualified to provide math instruction to Student.

accommodations. Counseling was discussed to address self-esteem issues common for middle school children.

- (B) Concerned about placing Student in general education English and math classes without support, the RSP teachers recommended the Strategies for Success (SFS) model of special education services.¹⁵ Mother did not want Student in any classroom labeled special education, so refused SFS, as well as an alternative RSP English class.
- (C) At Mother's request, and in spite of Student's problems with reading comprehension and continued need for special education, Ms. Walker's RSP English class (reading and writing) was deleted and changed to general education English. The IEP team agreed to monitor Student's progress through the 2nd semester on a "watch and consult" basis. RSP math continued as before, five times a week 50 minutes a day from January 27 through March 27, 2004 in the RSP classroom.
- (D) Mother acknowledged receipt of Parents Rights and Responsibilities and Procedural Safeguards, and consented to these changes.

21. Student's present levels of performance as of March 2004 showed he benefited from the prior year's programs and services, until Mother removed Student from RSP English in January 2004.

- (A) Reading—In March, Student was still showing progress toward goal #1 in reading. He had benchmarked at a 5th grade level earlier in the year, but after being removed from RSP English, did not pass the middle 5th fiction benchmark.

¹⁵ Although the RSP program consisted of one RSP teacher teaching a separate class for each subject, the SFS special education model placed all RSP students in general education classes, with pull-out periods three times a week taught by an RSP teacher for special help in study skills.

Decoding was much stronger than comprehension. His grade in English dropped from B in January to C in June 2004.

(B) Writing— Student met goal #2 in writing. He was able to write using pre-writing activities and to revise his writing when given editing assistance. He was able to write one paragraph independently, followed the writing process when prompted, but continued to experience difficulties with complex sentences, grade level vocabulary and paragraph structure.

(C) Math—In March, Student was also progressing towards goal #3 in math. He was proficient in addition and subtraction problems, but not multiplication or division, and had difficulty multiplying and dividing multiple digits. Student made slow progress throughout the year. His grade in RSP math had improved to a B in January from a D- the previous year, but dropped to C in June 2004. Ms. James reported that in spite of problems understanding the material, Student made progress in math.

(D) Behavioral/Social-Emotional—Student's peer and teacher relationships were grade appropriate, but he experienced self-esteem issues surrounding special education. A behavioral plan was not needed, but private counseling was suggested.

(E) Attention and Processing— When academic tasks were within Student's ability, he was motivated and on-task, but more challenging tasks required prompting to initiate. He grasped ideas and concepts slowly and required assistance.

MARCH 2004-MARCH 2005 IEP (7TH -8TH GRADE)

22. When the 2004/2005 school year commenced in September 2004, the operative IEP had been established at an annual/triennial IEP meeting on March 11, 2004.

23. Ms. Holliday presented her report, and Student's needs in reading comprehension were discussed. Since Student remained eligible for special education

services, the IEP team determined no additional testing was needed. Joanne Murphy, an RSP teacher for four years with the District, and team leader at this IEP meeting, explained that if a student remains eligible for special education, a three-year review is typically conducted by identifying the student's present performance based on benchmarks, teacher observations and State curriculum guidelines. A program is then designed to provide services specific to the student's needs. Goals are written based on the student's present levels, and State curriculum guidelines are used to guide the instruction. State curriculum guidelines for English/Language Arts included fluency, word analysis, vocabulary, comprehension, and literacy response and analysis. Guidelines for written expression included writing skills and staying on topic.

24. The IEP team members discussed Student's abilities and performance. The RSP teacher reported Student was missing assignments, and due to concerns about the lack of effort being put forth, she and the general education teacher offered teacher assistance before and after school. The general education teacher was concerned about Student's ability to work independently on writing assignments and with retention and comprehension. Math placement for the following year was discussed, and it was agreed that a Special Day Class (SDC) math vs. general education class would best meet Student's needs, possibly on a trial basis for the summer. Accommodations and modifications were reviewed, next year's courses/curriculum for English discussed, and a transition plan drafted. The IEP team agreed Student needed extra time for the upcoming District writing assessment. The IEP team also discussed noting in Student's planner to indicate efforts, and placement in SDC so Student could receive more support and services to meet his needs. Since Student had difficulties related to basic processes of conceptualization, association and attention, Ms. Holliday recommended strategies and services related to reading comprehension, and accommodations and modifications to facilitate Student's progress in general education courses with grade level content. These included assisting Student to connect new concepts to prior knowledge, pausing after reading a paragraph to note

important facts from the text, and providing comprehension questions prior to reading text. Although Student was able to decode at a higher level fluently, Ms. Holliday recommended text he could comprehend.

25. A program was designed to address Student's unique needs in reading, writing, math, and attention and processing difficulties.

(A) Two annual goals and several short-term objectives were written in writing and math for March 2004 to March 2005. In writing (goal #2), Student was able to write and edit a one paragraph essay using simple sentences but struggled with complex sentences, paragraph structure and vocabulary. Therefore, by March 11, 2005, he was to write an expository composition with a proficient introduction, body and conclusion to score a 2-3 on a District rubric using a graphic organizer and prewriting activities. In math (goal #1), Student was able to add and subtract multiple digits but unable to multiply and subtract multiple digits by March 11, 2005, and he was to solve 10 problems involving multi-digit multiplication and division with 80 percent accuracy.

(B) Goals and objectives were to be evaluated by the special and general education teachers using the District's content standards for multiplication and division and writing applications, pre- and post testing all objectives, work samples and curriculum-based assessments.

(C) RSP and SDC programs were selected. Student was placed in general education (81percent) for physical education, lunch, recess, school day activities and academic areas of English, history and reading, and special education (19 percent). RSP was provided for math and study skills from March 11, 2004 to June 10, 2004 in the RSP classroom five times a week for 55 minute sessions, study skills from September 4, 2004 to March 11, 2005, in the RSP classroom 3-5 days/165-275 minutes a week; and SDC for math from September 4, 2004 to March 11, 2005. The RSP math teacher would provide tutoring, and Student's

planner would be signed for attendance. In discussing SDC math for September, the IEP team agreed to reconvene in September if the IEP team felt the class was not appropriate. In spite of recognized ongoing needs in reading, a separate RSP class for reading was not provided as Mother did not want Student in a pull-out RSP reading class.

(D) Attention and Processing—Classroom accommodations were provided in all subjects, and included reading directions, checking for understanding and shortened writing assignments. Student was to participate in State/District testing with accommodations in reading, writing, math, history, and spelling, which included extended time, flexible setting, check for understanding, read directions, use of a calculator, graphic organizer and an essay outline.

(E) Reading— Although Student did not pass the benchmark in reading, no reading goal was written. All District witnesses recognized Student needed a reading goal, but no witness offered any explanation as to why one was not written.

26. Mother attended this triennial IEP meeting, was provided her rights and procedural safeguards, and consented to the goals, objectives and program offered on March 11, 2004.

27. Student's present levels of performance as of June 2005 showed he benefited from the District's program and services provided over the prior year. He met some, and was progressing toward meeting his other IEP goals.

(A) Since Student was not reading at grade level and struggled in math, he attended summer school classes in reading, writing and math for 95 hours from June 21 through July 22, 2004, and made progress in all areas. He passed writing by demonstrating proficiency or growth towards proficiency. Student did not pass reading or math, but pre- and post-tests showed improvement.¹⁶

¹⁶ During the hearing, the District's attorney offered to stipulate the District erred in not providing SDC math for summer school. However, the evidence established that SDC

- (B) Reading—By June 2005, Student read at mid-5th grade level in fiction, could decode grade level text, but comprehended at 4.4 Grade level. Student was doing well with decoding, and although a hard worker with a grade B, showed a decline in work completion as he became more distracted/social in March. For a recent essay assignment, Student was given a graphic organizer and a transparency of an assignment completed as a class. In reading comprehension, Student understood content with prompting, stated when he could not understand, and his notes were thorough and neat.
- (C) Writing—By March, Student met goal #2 in writing. He was able to write a five paragraph essay independently, but needed prompting to use the writing process and had difficulty using transitions. Student received A's in Language Core class fall and spring, and B in Language Arts.
- (D) Math—By March, Student was progressing towards goal #1. He was unable to solve multi-digit multiplication and division with 80 percent accuracy, but was proficient in addition integer facts, and could add and subtract multiple digits with regrouping. He needed a calculator for multiplication and division, often relied on his tutor for homework, but was beginning to work on his own. Student was doing well academically, as his grade improved from F in fall to C in spring. The failing grade was based on low scores, and missing or incomplete work with accommodations. Mr. Vo wrote in Student's planner and parents checked it daily. Student understood concepts, and the peer aide assisting him was working, as Student's fall semester grade was an F.
- (E) Other Academics—By June, Student's Science and History grades were C, he comprehended text with assistance and completed classwork/homework some of

math was not offered for summer school, only for fall semester commencing September 2004.

the time, but had low test scores due to lack of comprehension concepts. In Physical Education, Student had not completed classwork/homework, had difficulty with written work, and had not turned in monthly paragraph papers, but appeared to be motivated, received As on 20 foot runs and was passing the course.

- (F) Behavioral/Social-Emotional—Student was putting forth effort and occasionally talked excessively. By June, he no longer showed difficulty respecting authority, but was off-task occasionally with some difficulty taking responsibility for his actions, and had continued self-esteem issues regarding special education.

MARCH 2005-MARCH 2006 IEP (8TH – 9TH GRADE)

28. When the 2005/2006 school year commenced in September 2005, the operative IEP had been established at an annual IEP meeting which occurred over three sessions, March 14, June 2 and June 6, 2005.¹⁷ Mother attended all sessions with her advocate.

29. Over the course of three meetings, a program was designed to address Student's unique needs. At the first meeting, the RSP teachers recommended the SFS/RSP service delivery model vs. watch and consult, but Mother and her advocate wanted time to decide on placement. A draft of IEP goals was presented and progress toward previous goals was discussed. Accommodations/modifications were reviewed, a calculator and preferential seating were added, and teachers were to sign a daily planner to keep Student accountable. Mother requested an assessment by the school psychologist, Daniel Sullivan, after which the IEP team would reconvene. Mother would then finalize her decision of trial placement in SFS/RSP for the remainder of 8th grade.

¹⁷ The IEP meeting was reconvened on June 6, 2005, to complete an individual transition plan.

30. When the IEP meeting reconvened on June 2, 2005, Student's present levels were again discussed, team members reviewed reports and the eligibility statement, and 2004/2005 goals, accommodations, modifications and services were reviewed and revised.

31. On June 2, a program was designed to address Student's unique needs in reading, writing, math, and difficulties with attention and processing.

(A) The IEP team agreed Student would attend the District's summer LMB reading clinic. Post-testing at the District after the summer LMB clinic would be done, after which an addendum IEP meeting would be held to decide whether additional District LMB classes were necessary for the fall.

(B) Robert Hedges, administrator for the District in the curriculum and special education office, is the person most knowledgeable regarding the District's LMB programs. He explained that the District's LMB program emphasizes achieving literacy by developing phonemic awareness and symbol and concept imagery using the LMB Phoneme Sequencing (LiPS), VV and Seeing Stars programs. The programs are effective for improving decoding and reading comprehension, with one to two years growth for every year the student attends.¹⁸ The District's summer LMB program is part of the general education summer school program for 8th graders. It is typically given to middle school students for a head start on high school, with the expectation the program will continue in the fall. Students are generally admitted to the course due to very low standardized test scores, severe language processing problems, and/or reading two or more years below grade level. Typically, the course is 1 ½-2 hours per day for 4 ½ weeks, conducted in one small group of 3-5 students, 2-3 groups per class, and taught

¹⁸ The District's expert witness, Tess Dunhoff, also testified credibly regarding the District's LMB programs. She verified Mr. Hedges's testimony, and added that the District's programs could provide up to four years growth in one year.

by 2-3 adults, who work 45 minutes with one child, thereby providing 1:1 instruction for 10-15 minutes. To exit the course, students must read fluently at mid-4th grade (decoding and comprehension) as demonstrated by achievement on standardized tests. Other reading programs are also offered by the District, as LMB should not be given continuously.

(C) Goals and short-term objectives were written in math and language arts for March 2005 to March 2006. No reading goal was written pending Student's completion of the District's summer LMB program. In math (goal #1), by March 2006, when given a mixture of 10 grade-level math problems requiring both single and multi-step solutions to include $+/-/x/div$, Student would determine how and when to break a problem into simpler parts as measured by 90 percent correct. In writing (goal #2), by March 2006, when given a writing prompt, Student would revise writing to improve organization and consistency using transition words to get a 3 on a district rubric. Since Student was partially proficient in integer math facts, goal #3 was written in math, which provided that by March 2006, Student would pass the integers math facts tests with 100 percent correct.

(D) Mother agreed to SFS (which included RSP services for reading, written language and math). Student was placed in general education 80 percent of the time for physical education, lunch, recess, electives and all academic areas, and 20 percent in special education. Starting June 17, 2005, he was to receive SFS in the classroom 1-2 times a week for 10-20 minutes of indirect service, and SFS in the classroom, 3 times a week for 55 minutes of direct services. SFS would continue September 7, 2005 to March 14, 2006, 3- 5 times a week for 180-270 minutes. The RSP teacher would collaborate with the general education teacher to assist with education coursework. Student would also attend the District's LMB clinic from June 27 to July 29, 2005 daily for two periods.

- (E) According to Mr. Sullivan, SFS was appropriate for Student as it met his unique needs in the curriculum, and offered a smaller group setting, organizational strategies, and homework and study skills services provided by an RSP teacher who was familiar with Student's work. The program addressed Student's needs in reading, math and writing, with extra help from the RSP teacher in each subject.
- (F) Assessments would be done by the District's content standards in organization and focus, number sense and mathematical reasoning. Evaluation methods included observation, documentation, work samples, curriculum-based assessment, and pre and post testing.
- (G) Classroom and instructional accommodations for all subjects and State/District Assessments were provided. For reading, these included extended time, checking for understanding, frequent praise for task accomplishment, shortened writing assignments, flexible setting, preferential seating, and daily monitoring of planner by teachers and parents. For math, Student could use a calculator.

32. Mother was given parental rights and procedural safeguards at each session, and consented to the goals, objectives and placement of Student. Mother did not list any exceptions to the IEP program offered, did not mention the lack of a reading goal, and did not object to the District's summer LMB program.

DISTRICT'S SUMMER LINDAMOOD-BELL PROGRAM

33. Student enrolled in the District's summer LMB VV program, a 4 ½ week course for reading comprehension, two hours a day, from June 27 to July 29, 2005. Student only attended 17 days of LMB instruction as his parents removed him for vacation. Although Student was to also enroll in the SFS service over the summer, Student did not attend as the class was full by the time Mother called to enroll him.

SUBSEQUENT EVENTS

34. On July 27, 2005, two days before completing the District's summer LMB course, Mother sent Student for pre-testing at the private LMB Clinic in Newport Beach. Student, age 15.6 and in 9th grade, scored at the 10.5 Grade level on the PPVT-III, 6.2 in Word Attack, 6.6 on Slosson Oral Reading Test-R, 8th grade in WRAT spelling and 3rd grade in WRAT arithmetic. On the GORT4, reading rate was at 6.2, accuracy at 7.2, and comprehension at 5.0. On the Lindamood Auditory Conceptualization Test (LAC),¹⁹ Student scored at the 6th grade level. Based on these scores, the LMB Newport Beach Clinic recommended sensory-cognitive instruction four hours a day, five days a week for 10-12 weeks, for an estimated 200-240 hours in the VV and Seeing Stars programs (the same programs recommended by the District).

(A) Kim Zakaryan, Associate Clinical Director of the LMB Newport Beach Clinic, has been a consultant and instructor in LMB programs for several years. Although very knowledgeable regarding the LMB programs, she is not trained or experienced in special education or learning disabilities, and clearly has a financial bias toward promoting private LMB programs. She described LMB as several programs targeted at improving information processing in reading comprehension and math to help students participate better in the school curriculum. Core curriculum instruction is not provided at the private clinic. The primary difference between the private and the District's LMB instruction is that the private clinic provides 1:1 instruction four hours a day versus the District's small group instruction. The private clinic also provides consultants for the District's LMB programs, and the District uses mentors trained in LMB, such as Ms. Dunhoff, to run the District's LMB program.

¹⁹ The LAC tests phonemic awareness, but is not given at the District, on recommendation by LMB.

35. According to Ms. Zakaryan, Mr. Hedges, Ms. Buckley and Ms. Dunhoff, the District's summer LMB program provided educational benefit to Student for reading comprehension skills. Comparison of the District's pre-LMB test results on May 23 to the LMB Newport Beach Clinic's test results on July 27 showed Student made significant growth after only 17 days in the District's LMB program. Reading comprehension and decoding improved from 4.4 to the mid to late 5th grade level (1/2 year), accuracy improved 6.7 to 7.2 (1/2 year), and fluency improved 6.2 to 6.7 (1/2 year). Although reading rate remained the same, Student showed seven months growth in word attack (phonics skills), growth in reading out loud (Slosson test), and improvement in spelling and arithmetic.

36. On July 29, 2005, two days after Student was tested at the LMB Newport Beach Clinic, the District gave Student course assessments. Results of the end of grade 5/Fiction test (9th grade) after two periods of VV showed Student passed reading comprehension (8 of 10, vs. 5 of 10 at the beginning of the program, or not passed). He also passed decoding with 99 percent accuracy or 6th grade level.

37. Student did not return to the District in the fall for LMB post-testing. Had Student returned to the District in the fall, the District would have recommended its high school LMB program. Although Student also had a need in decoding, and did not get the Seeing Stars course during the summer, he could get it in the fall. Mr. Hedges explained that it was appropriate to address Student's lowest score first, i.e. reading comprehension. Decoding may go up if reading comprehension improves, and Student could have been provided two periods in high school (reading comprehension and decoding).

38. Instead of reconvening to discuss Student's fall placement, on August 11, 2005, Mother informed the District she enrolled Student in the LMB Newport Beach Clinic for six hours per day of services (four in 1:1, two in group/supervised instruction) for 12 consecutive weeks from September 7 through December 2, at a cost of \$21,330.00. Mother sought reimbursement from the District in that amount.

39. The District responded to Mother's request on September 20, 2005. It refused to reimburse the cost of the private LMB, but offered a double block of LMB services at high school, which met two hours per day five days a week, plus additional tutoring by trained District staff two hours a week, for the 2005/2006 school year. The District set forth the reasons and bases for its decision and provided parents' procedural rights. The District also requested a response to the proposal in time for Student to re-enroll in high school for the semester.

40. At the time the District responded to Mother's request, it was not aware Student had been tested at the LMB Newport Beach Clinic, and was not aware of those test results. Neither the parents nor their advocate responded to the District's proposal.

41. On October 11, after 2 ½ months of private LMB, interim testing at the LMB Newport Beach Clinic showed ½ year decrease on the PPVT, 3.8 years growth on word attack, 1.5 years growth on Slosson Oral Reading Test, and growth of 0.2 year in rate, 1.5 years in accuracy, 0.7 year in fluency, and 2.2 years in comprehension on the GORT4. On November 22, 2005, after 316 hours of private LMB instruction (157 hours in VV, 129 in Seeing Stars, and 30 hours in math), Student showed growth of 0.5 year on the PPVT, growth from 6.2 to 16.9 grade level on word attack (above high school), and 6.6 to 9.0 grade level on the Slosson Oral Reading Test-R. On the WRAT, he showed no change in spelling, but improved grade 3 to 4 in arithmetic. On GORT4, Student's reading rate improved ½ year (from 6.2 to 6.7 grade level), accuracy improved to grade level (7.2 to 9.4), fluency improved one year (but he was still below grade level) (6.7 to 7.7), and comprehension improved two years (5.0 to 7.2) (although still below grade level). The LAC test showed growth of 3.7 years (6.0 to 9.7), at or near grade level.

42. The LMB programs allowed Student to catch up in many, but not all, areas. Student credibly testified LMB helped him with reading, math and homework. Although test results showed Student's reading skills improved with LMB, the evidence did not establish that this growth carried over into the academic setting.

43. An addendum IEP meeting was finally held on December 13, 2005. Student had returned to the District and was placed in an independent study program for the remainder of the fall semester of 9th grade. New goals were written in academics and self help, and evaluation of work was done by progress reports. He was provided RSP services of individual and small group support twice a month for 30 minutes each session. Mother agreed to provide the LMB Newport Beach Clinic test results to the District to help determine Student's spring 2006 schedule, and an IEP would be conducted in January.

44. Mother agreed to the placement, consented to waive advanced written notice, received a copy of parents' rights and procedural safeguards, and consented to the changes set forth in the addendum IEP.

CREDIBILITY OF MOTHER

45. Although Mother seemed genuinely concerned about Student's education, her admittedly unreliable recollection of events and overreaching claims negatively impacted her credibility. For example, in spite of evidence to the contrary, Mother claimed she attended every IEP meeting, never gave the District permission to hold an IEP without her, her rights were never explained, and she was unaware she could request further testing. Yet, Mother offered no plausible explanation as to why she failed to ask the District questions regarding her rights, Student's progress, individual IEPs, or programs and services offered. Student had been receiving special education services for years, Mother was aware she could request modifications and/or withdraw consent as she did on numerous occasions, and could call an IEP meeting at any time to voice her concerns, which she did in January 2004. Mother also consented to the programs and services offered annually without question or comment.

PRINCIPLES OF LAW

1. A child with a disability has the right to a free appropriate public education (FAPE) under the Individuals with Disabilities Education Act (IDEA) and California special

education law. (20 U.S.C. §1412(a)(1)(A); Ed. Code §56000.6.) A FAPE consists of special education and related services provided at public expense and under public supervision and direction that meet the State's educational standards and conform to the student's IEP. (20 U.S.C. §1401(9); Ed. Code §56040; Cal. Code Regs., tit. 5, §3001, subd. (o).) "Special education" is defined as specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability. (20 U.S.C. §1401(29); Ed. Code §56031.) "Related services" means transportation and other developmental, corrective, and supportive services, as may be required to assist a disabled child to benefit from special education. (20 U.S.C. §1401(26); Ed. Code §56363; Ed. Code §56363, subd. (a).)

2. Student received a FAPE if the program (1) addressed his unique needs; (2) was reasonably calculated to provide Student with some educational benefit, and (3) comported with Student's IEP.²⁰ (*Capistrano Unified Sch. Dist. v. Wartenberg*, 59 P.3d 884, 893 (9th Cir. 1995) (citing *Board of Education of the Hendrick Hudson Central School Dist. v. Rowley* (1982) 458 U.S. 176, 188-189.) A school district must provide a basic floor of opportunity consisting of access to specialized instruction and related services which are individually designed to provide educational benefit to the child with a disability. (*Rowley*, 458 U.S. at pp. 200-201.) The IDEA requires neither that a school district provide the best education to a child with a disability, nor that it provide an education that maximizes the child's potential. (*Id.* at pp. 198-199.) If the school district's proposed placement reflects the student's needs, provides some benefit, and comports with the IEP, the school district has offered or provided a FAPE. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.)

²⁰ Although the District is also required to provide a program in the least restrictive environment (LRE), LRE is not in dispute. (20 U.S.C. §142(a)(5)(A).) Further, no evidence was presented the District failed to provide services that comported with the IEPs.

3. A court should review for procedural compliance with the statute, and for whether the program is reasonably calculated to enable the child to receive educational benefits. Therefore, a court's inquiry in suits brought under §1415(e)(2) is twofold: First, has the District complied with the procedures set forth in the Act? And second, is the IEP developed through the IDEA's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the District has complied with the obligations imposed by Congress and the courts can require no more. (*Capistrano*, 59 P.3d at p. 891.) This inquiry will require a court not only to satisfy itself that the District has adopted the plan, policies, and assurances required by the Act, but also to determine that the District has created an IEP for the child in question which conforms with the requirements of §1401(19). (*Rowley*, 458 U.S. at p. 206.)

4. The parent's participation in the IEP process is also a factor in determining the appropriateness of a District's offer of FAPE. The fact that the parents signed and approved the IEP is evidence they considered the goals and objectives contained in the IEP to be appropriate to meet the needs of their child at the time they signed the IEP. (*J.P. v. West Clark Comm. Schools* (2002) 230 F.Supp. 2d 910.)

5. Student has the burden of proving non-compliance with the IDEA by a preponderance of evidence. (*Schaffer v. Weast* (2005) 126 S.Ct. 528, 163 L.Ed. 2d 387.)

LEGAL ANALYSIS

ISSUE 1: DID THE DISTRICT APPROPRIATELY ASSESS STUDENT IN ALL AREAS OF SUSPECTED DISABILITY FOR THE SCHOOL YEARS COMMENCING JUNE 2002/2003 THROUGH 2005/2006?

6. The evidence established Student was assessed in all areas of suspected disability from June 2002 through the 2005/2006 school years, as set forth in the 2001 and 2004 triennial evaluations, the 2005 assessment, and the District's 2005 LMB testing. (20 U.S.C. §1414(a)(2).) Factual Findings 2-9. No evidence was presented Student had any additional areas of suspected disability not assessed by the District.

7. In addition, although Student alleges the District failed to conduct a behavior intervention plan, one was not needed. The only evidence presented as to Student's behavior was that he experienced some self-esteem issues about being labeled a special education student in 2004, and that other students harassed and teased him at times. No evidence was presented Student exhibited a "serious behavior problem that significantly interfere[d] with the implementation of the goals and objectives of [his] IEP." (Cal. Code Regs., tit. 5, §3001(f).)

ISSUE 2: DID THE DISTRICT DENY STUDENT A FREE APPROPRIATE PUBLIC EDUCATION FOR THE SCHOOL YEARS COMMENCING JUNE 2002/2003 THROUGH 2005/2006 BY FAILING TO ADDRESS STUDENT'S LACK OF PROGRESS AND TO SUGGEST CHANGES TO HIS IEPs TO MEET HIS NEEDS?

8. Student contends the District denied him a FAPE because it failed to address his lack of progress in reading from June 2002 through the 2005/2006 school years, failed to identify specific goals in reading comprehension, decoding, fluency and accuracy throughout this period, and failed to address his language arts goal in March 2003 and March 2004. Once identified as having an SLD, the District was obligated to identify Student's unique educational needs by appropriate assessment, create annual goals and short-term benchmarks to meet those needs, and determine specific services to be provided. (20 U.S.C. §1412; Ed. Code §56300-56302.) It does so by including summaries of the child's abilities and present levels of educational performance, outlines of measurable educational goals, specification of educational services to be provided, and appropriate evaluation procedures and schedules for determining whether instructional objectives are being achieved. (20 U.S.C. §1414(d)(1)(A); 34 C.F.R. §300.347.) The IEP team is required to review each child's IEP at least annually to determine whether the child is reaching the stated goals, and the IEP team is to revise the IEP to address lack of progress and make necessary changes arising from reevaluation of the child and parental input. (20 U.S.C. §1414(d)(4)(A); 34 C.F.R. §300.343(c)(2).) IEP goals and objectives apply not only to meeting

needs for enabling a child to be involved in and progress in the general curriculum, but also to “meeting each of the child’s other educational needs that result from a child’s disability.” (20 U.S.C. §1414(d)(1)(A)(ii).)

9. In determining whether a school district offered a FAPE, the focus is on the adequacy of the proposed placement. The criterion is not whether the parents desire another program, or if another program may result in greater educational benefit. A placement is adequate if it is reasonably calculated to provide educational benefit to the student. (*Gregory K., supra.*) An IEP is a snapshot, not a retrospective of what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141.)

A. 2002/2003 School Year

10. The District provided Student a FAPE for the 2002/2003 school year commencing September 2002.²¹ At the time Student entered middle school in September 2002, the operative IEP established at the March 2002 IEP meeting adequately identified Student’s needs based on the 2001 triennial assessment. Factual Findings 2, 3. Appropriate goals, objectives and services resulted in a program that was reasonably calculated to provide educational benefits. Factual Finding 11. Student received educational benefit in reading, writing and math until Mother withdrew Student from RSP math. Factual Findings 13-15.

11. Although Student contends the District failed to address Student’s lack of progress in reading because the IEP does not specifically identify decoding as a need, credible District witnesses established that the reading goal included decoding and

²¹ No evidence was presented the District failed to provide a FAPE during the summer of 2002. Student, therefore, failed to meet his burden of proof during that time period, and this decision will address only the school years commencing September 2002 through 2005/2006.

comprehension, and Student had accomplished both at the 5th grade level. The IEP also specifically notes Student's decoding skills were better than his comprehension skills, and the District continued to address Student's needs in reading by providing a separate daily RSP reading class, accommodations and modifications. The fact that Mother approved the March 2002 IEP is also evidence she considered the goals and objectives contained therein to be appropriate to meet the needs of her child at the time. (*J.P. v. West Clark Comm. School, supra.*)

12. Furthermore, although no goal was written for math at the March 2002 IEP meeting, Student's math needs were addressed through RSP services in math class when he entered middle school in September. Federal and state statutes generally provide that a child's broad area of need should be addressed in an IEP. However, there is no specific requirement that the educational program

... include in an annual IEP goals that relate to areas of the curriculum in which the child's disability does not affect the child's ability to be involved in and progress in the general curriculum. If a child with a disability needs only modifications or accommodations in order to progress in an area of the general curriculum, the IEP does not need to include a goal for this area; however, the IEP would need to specify those modifications or accommodations.

(34 C.F.R. Part 300, Appendix A, Q. 4.) Even after Mother requested another math class in September 2002, Ms. Walker continued to monitor Student in Ms. Shaver's general math class as she recognized Student's difficulty with fractions, decimals and percentages. Factual Findings 11, 13-14. RSP in the general education math class was increased during the year when Ms. Walker determined Student needed more services in that area. Student's general education math teachers, Ms. Shaver, Ms. James and Mr. Vo, all testified credibly they

recognized Student's difficulties with math, and provided Student numerous modifications and accommodations to address his handicap. These accommodations and modifications provided educational benefit to Student. Factual Finding 15.

B. 2003/2004 School Year

13. The District provided Student a FAPE for the 2003/2004 school year. The operative IEP established at the March 2003 IEP meeting adequately identified Student's needs based on the 2001 triennial assessment. Factual Findings 2, 3. Student's needs were addressed by reviewing his present levels of performance based on results of standardized tests, CBM, teacher observations and reports, and review and analysis of the goals and short-term objectives from the prior year. Factual Finding 17.

14. Appropriate goals, objectives and services resulted in a program that was reasonably calculated to provide educational benefits. Factual Finding 17. Annual goals and numerous short-term objectives were written in reading, writing and math, and accommodations and modifications were provided for comprehension, writing, attention and processing difficulties. RSP services were provided in reading, written language and math at the beginning of the year, and the RSP math teacher provided 1:1 assistance and tutoring after school. Summer school was offered in reading and math, but Mother opted to hire a non-special education tutor instead. Factual Finding 19.

15. Until Mother removed Student from RSP English in January 2004, the District's program provided Student educational benefit in reading, writing and math. Factual Finding 21. Prior to January 2004, Student was progressing toward and had benchmarked in reading at a 5th grade level, met his writing goal, and was progressing toward his math goal. Factual Finding 21.

16. Student's contention the District failed to address his lack of progress in reading is again unsupported by the evidence. The IEP clearly identifies the District was aware that Student's ability to decode was stronger than his ability to comprehend, and in spite of Mother's decision to withdraw Student from RSP English, the District continued to

address Student's needs in reading by providing RSP in the general education reading class, along with accommodations and modifications to address those needs. Factual Findings 17, 19-21.

C. 2004/2005 School Year

17. The District provided Student a FAPE for the 2004/2005 school year. The operative IEP established at the March 2004 IEP annual/triennial meeting adequately identified Student's needs based on Ms. Holliday's 2004 triennial assessment. Factual Findings 4, 5, 22. These needs were addressed by reviewing Student's present levels of performance, CBM, teacher observations and reports, interviews, and review and analysis of the goals and short-term objectives from the prior year. Factual Findings 23, 24.

18. Appropriate goals, objectives and services resulted in a program that was reasonably calculated to provide educational benefit. Factual Finding 25. Annual goals and short-term objectives were written in writing and math, and accommodations and modifications were provided for reading comprehension, writing, math, and attention and processing difficulties. RSP services were provided in study skills and math and SDC was provided for math for the fall semester. Consultant teacher services and RSP support were provided for core classes, and Student received testing modifications. Student also attended summer school to work on reading, written and math skills.

19. The District's program provided Student educational benefit in spite of Mother withdrawing consent for special education services in reading and writing. Factual Finding The District continued to recognize Student's needs in all areas, and Student met some, and was progressing toward meeting IEP goals. Since the District was aware Student was not reading at grade level and struggled in math, he attended summer school in reading, writing and math, and by the end of the course, his scores increased in all areas, indicating the skills had improved.

20. The IEP identified and addressed Student's needs and was reasonably calculated to provide meaningful benefit in light of the limits imposed by Mother. The lack

of a written goal in reading comprehension was not the result of the District's failure to identify the need, but rather due to Mother's request to remove Student from RSP English (which included reading) two months earlier. Factual Finding 20. Without parental consent, the District was prevented from providing further special education services in reading comprehension, and therefore, no goal for special education services in that area was drafted. (Ed. Code §56346(b).) Student did, however, continue to receive modifications and accommodations to address his needs in reading. Factual Finding 20. Moreover, Mother was given her parental rights at the IEP meeting, and consented to the goals, objectives, programs and services set forth. Student's parents never requested any additional goals, services or assessments. Factual Finding 20.

21. Although Student contends the District failed to address Student's failure to meet his Language Arts goal in March 2004, Ms. Holliday and Student's teachers all recognized and agreed Student continued to have a need in reading and writing, and Student's needs in these areas were addressed in Ms. Holliday's review and at the IEP meeting.

22. Student also contends the District failed to offer extended school year services (ESY) to Student.²² However, no evidence was submitted to establish that Student required ESY, or that the IEP team ever recommended ESY. (Ed. Code §56345(b)(3).) Student was provided summer school instruction in reading, writing and math, his three broad areas of need. Educational methodology, including instructional techniques, remains within the discretion of the school district, provided the methods chosen offer the student FAPE. (*Barnett v. Fairfax County School Board* (4th Cir. 1991) 927 F.2d 146.) Courts lack the specialized knowledge and experience necessary to resolve persistent and difficult

²² ESY programming is special educational programming which extends instruction beyond the conventional school year to prevent serious regression over the summer months. (*Hoelt v. Tucson Unified School Dist.* (9th Cir. 1992) 967 F.2d 1298, 1301.)

questions of educational policy, and they must avoid imposing their view of preferable educational methods. (*Rowley*, 458 U.S. at pp. 207-208.) No state educational expert at the hearing criticized the District's method of teaching Student how to read. The District's educational expert, Ms. Dunhoff, found Student benefited from the instruction provided at the District. As long as a student is benefiting from his education, it is up to the educators to determine the appropriate educational methodology. (*Id.* at p. 208.) Moreover, since Mother removed Student from RSP English, the District was precluded from offering special education classes in reading and written expression for the summer.

D. 2005/2006 School Year

23. The District provided Student a FAPE for the 2005/2006 school year. The operative IEP established over several meetings in March and June 2005 adequately identified Student's needs based on Ms. Holliday's 2004 triennial reevaluation, and Mr. Sullivan's and Ms. Buckley's 2005 assessments and testing. Factual Findings 4, 6-8. Student's needs were addressed by reviewing his present levels of performance, CBM, teacher observations, reports, summer school courses, analysis of the goals and short-term objectives from the prior year, and test results. Factual Findings 29-30.

24. Appropriate goals, objectives and services resulted in a program that was reasonably calculated to provide educational benefit. Factual Finding 31. A program and services designed to meet Student's unique needs in reading, writing, math, attention and processing were provided through summer school of 2005. The District offered Student two periods of its LMB reading instruction for the summer, goals and short-term objectives were written in math and language arts, and SFS and RSP services were provided for the fall. Assessments and evaluation methods targeted Student's needs, and he was provided classroom and instructional accommodations for all subjects. By offering LMB for the summer, the District addressed Student's needs in reading, but did not ignore Student's additional needs.

25. The District's program provided Student educational benefit up to the time Mother withdrew Student from the District on August 11, 2005. Factual Findings 35-37. Despite his learning disabilities, Student earned passing marks and showed improvement. Attendance of only 17 days in the District's LMB program showed Student's reading skills improved in reading comprehension, decoding, accuracy, fluency, word attack, spelling and arithmetic.

26. The teaching methods used by the District conferred an educational benefit, as established by the testimony of the District's teachers, Ms. Dunhoff and Ms. Zakaryan. Although Student was not reading at grade level prior to the LMB course, his overall reading skills had improved, and he had been promoted to 9th Grade. (*Rowley*, 458 U.S. at p. 203) (grades and advancement from grade to grade are important factors in determining educational benefit.) The 2005/2006 IEP goals in writing and math called for Student to spend one hour each day in the SFS/RSP classroom in the fall in order to address his disabilities, and the IEP team agreed to revisit additional LMB courses for the fall. (*Id.*) (noting that Congress "equated an 'appropriate education' to the receipt of some specialized educational services"). The District's willingness to review the IEP to consider what was learned from Student's experience at summer school belies Student's assertion the District was not providing educational benefit to Student.

27. Due to Mother's actions, the District was prevented from developing and implementing an appropriate educational program for Student for the remainder of the 2005/2006 school year. When an IEP has not been implemented because of a different placement by the parents, the determination of the IEPs reasonableness at the time of its creation is limited to the information known to the IEP team when it wrote the IEP. (*Adams, supra.*) The requirement that the District's program be "reasonably calculated" to enable a child to receive educational benefits is prospective, i.e. based on an evaluation done by a team of experts prior to the student's placement. (*Furhmann v. East Hanover Bd. of Educ.* (3rd Cir. 1993) 993 F.2d 1031.) At the time Mother placed Student in the private LMB clinic,

she had not informed the District she had sent Student for testing at the private LMB clinic, and did not request or mention she wanted Student to attend that clinic. By opting to send Student to the private LMB clinic for fall semester without providing the District the opportunity to post-test Student or provide the District with the results of the private LMB clinic's tests, Mother prevented the District from making a determination as to an appropriate program for Student for the fall.

28. Student also contends his lack of reading and writing at grade level over the years indicates the District failed to provide appropriate services which resulted in a denial of a FAPE. Although there was extensive questioning at hearing about goals not written for decoding, rate, accuracy and fluency, no evidence was presented Student required written goals in these specific areas. Student had needs in reading comprehension, and a goal was written for this need over the years, which included decoding, until Mother removed Student from RSP English. Factual Finding 20. Moreover, the testimony established the District's summer LMB program paralleled the private LMB private clinic services, and had Student returned to the District in the fall, the District would have recommended its high school LMB program. Factual Findings 31-33, 35-38.

29. The preponderance of the evidence established that Student's IEPs conferred a meaningful educational benefit. The relevant inquiry is not whether Student's IEP provided an optimal benefit, but rather whether it provided a meaningful benefit. (*M.A. v. Voorhees Township Bd. of Educ.* (D.N.J. 2002) 202 F.Supp. 2d 345.) "Meaningful educational benefit" does not mean the District must maximize Student's potential. Although Student may have been capable of achieving grade level, Mr. Sullivan and Ms. Dunhoff noted students with an SLD require special education throughout school, and it is the nature of the disability to be below grade level. It is the District's responsibility to provide access to grade level curriculum with the optimal goal to provide special education services in an effort to narrow the gap between ability and achievement. Although LMB programs helped Student in reading, the District is not required to ensure Student achieve grade level.

30. While academic results are recognized as an important factor in determining whether an IEP is reasonably calculated to provide educational benefit, evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA. (*Berger v. Medina City School Dist.* (6th Cir. 2003) 348 F.3d 513.) It is true that Student's reading skills were very weak. However, the District was addressing those weaknesses by offering LMB over the summer. Although Student benefited from the "intensive" private LMB program, the IDEA does not require the best possible education or superior results. The statutory goal is to make sure that every affected student receives a publicly funded education that benefits the student. The methodology offered by the District during the summer, the VV program, represented a recognized method to assist Student with his unique needs in reading. This program, however, constituted only one methodology or set of techniques to be used as part of, or supplement to, an ongoing reading program. The IDEA does not permit parents to mandate that a particular teacher, material, or instructional method be provided to a student. (*Rowley, supra.*) Student achieved material educational progress in his placement at the District, and the District met its responsibilities to provide special education and related services that were reasonably calculated to enable Student to receive educational benefit. (*Id.*)

31. Moreover, placing Student in a segregated environment such as the private LMB clinic is appropriate only when the nature or severity of a disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. §1412(5).) There was testimony Student's behavior may have been affected by being placed in a classroom identified as "disabled," but there was no testimony from educational experts that Student needed a completely segregated environment such as the private LMB clinic. Student's IEPs allowed him to interact with non-disabled students while providing him educational benefit in all academic areas. A

segregated environment was not appropriate for him, and, as such, neither was the private LMB clinic.

32. Mother consented to the programs and services at each annual/triennial IEP from 2002 through 2005. At no time did she request additional goals, additional services or tests until the 2005 IEP meetings, and did not object to the results of any test given by the District. Neither Mother nor her advocate voiced any concerns about reading comprehension, auditory processing or math during any IEP meeting prior to 2005, and Mother was provided parental rights and procedural safeguards annually.

ISSUE 3: DID THE DISTRICT COMPLY WITH THE PROCEDURES SET FORTH IN THE IDEA?

33. Student contends the District committed several procedural violations which also led to the denial of a FAPE. The IDEA requires certain procedural safeguards to children and their parents. (20 U.S.C. §1415(b)-(i).) Although a student is entitled to both procedural and substantive protections of the IDEA, not every procedural violation is sufficient to support a finding that a student was denied a FAPE. Mere technical violations will not render an IEP invalid. (*Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877.) A procedural violation does not result in the denial of a FAPE, unless the violation impedes the child's right to a FAPE, significantly impedes the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the child, or caused a deprivation of educational benefits (*Id.*) (*See also* 20 U.S.C. §1415(f)(3)(E)(ii); Ed. Code §56505(f)(2), (A), (B), and (C); *W.G. v. Bd. of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479.)

A. Did the District fail to conduct standardized testing at the triennial evaluation in March 2004?

34. Student contends he was denied a FAPE because Ms. Holliday failed to conduct standardized testing and personally observe him in the classroom as part of her

March 2004 triennial reassessment. Standardized testing may be required for a triennial reassessment if the IEP team believes additional assessment materials are needed to determine if a child remains eligible for special education. (Ed. Code §§56320, 56381(a)(2).) Student remained eligible in 2004 for special education as having an SLD, thereby obviating the need for additional testing. Moreover, even though Ms. Holliday specifically noted Mother was entitled to request additional assessments and testing, the District was not obligated to inform Student's parents of its determination that no additional testing was required because Student's eligibility remained unchanged. (Ed. Code §56381(d).)

35. There is no requirement in the IDEA that a reassessment must mimic the depth and breadth of an initial assessment. Reassessments may be properly limited to a review of records, observations, curriculum-based measures and other non-standardized assessments when the child's broad needs have already been established and when there is no evidence that the child's needs have changed substantially.

36. The District's reassessment was proper in that it sought to take the evaluation information available, conducted assessments pertinent to Student's potential performance in the District's curriculum, and from those sources created an IEP reflecting the evaluation sources. Ms. Holliday determined Student remained eligible for special education services as having an SLD in reading, writing and math, with attention and processing disorders based on her review of existing information, and no additional data was needed to reach this conclusion. In lieu of her own personal observations, Ms. Holliday relied on teachers' daily observations of Student, out of recognition of Student's concerns about being labeled a special education student.

37. The fact that the District did not conduct anew particular types of standardized testing for the March 2004 reevaluation is not error, since the District already had the information it needed to establish Student's needs in each relevant area. (*Robert B. v. Westchester Area School Dist.* (E.D. Pa. 2005) 44 IDELR 123.) At the IEP meeting on March 11, 2004, at which Mother was present, the IEP team determined Student's present levels of

performance and educational needs, and whether any additions or modifications to the special education and related services were needed to enable Student to meet the measurable annual goals set out in the IEP. Ms. Holliday presented her findings, the IEP team reviewed all existing evaluation data, including current classroom-based assessments and observations, information provided by the parents, and teacher and related services providers' observations. (20 U.S.C. §1414(c)(1); 34 C.F.R. §300.533(a); Ed. Code §56381(b)(2)(A)-(D).) At hearing, Ms. Holliday and other District witnesses involved in the March 2004 triennial IEP meeting all testified no additional data or testing was required to ascertain Student's areas of disability. Since Student had well-known and clearly established needs in reading, writing and math, additional standardized testing (as opposed to curriculum-based measures) in those particular areas was not required, and would have had little additional value in planning Student's new IEP.

38. The total amount of information available to the District was sufficiently comprehensive to identify all of Student's special education and related service needs. (34 C.F.R. §300.532(h).) The District had access to normative assessments conducted before the District's reassessment. Ms. Holliday's assessment was an appraisal by other than standardized normed instruments, and as an acceptable alternative assessment, included records, inventories, skill probe sheets and interviews. Because there was no indication Student's eligibility changed, the reassessment, of which Ms. Holliday's report was clearly a part, under the IDEA and its implementing regulations, did not require the District to perform anew the full scope of testing properly included in Student's initial or previous triennial evaluations. (20 U.S.C. §1414(b)(3)(D), 34 C.F.R. §300.532(j) and Ed. Code §56381(a)(1). *See also Park v. Anaheim Union High Schol Dist.* (2006) 444 F.3d 1149.)

B. Did the District fail to provide parents with prior written notice at the end of the 2004/2005 school year to address their request for a Lindamood-Bell Learning Processes program?

39. Student contends the District failed to timely respond to parents' August 11, 2005 request for placement at the LMB Newport Beach Clinic for the fall of 2005. The evidence does not substantiate this claim. The parents, not the District, changed the educational placement of Student when they notified the District they were enrolling Student in the LMB Newport Beach Clinic for the fall semester.

40. A parent who seeks educational services for a child must give the district an opportunity to provide those services before administrative or judicial relief may be sought or provided. (*Evans v. Dist. No. 17 of Douglas Cty.* (8th Cir. 1988) 841 F.2d 824, 831-32 ("A school district should be on notice of disagreements and given an opportunity to make a voluntary decision to change or alter the educational placement of a handicapped child."); *Doe v. Defendant I* (6th Cir. 1990) 898 F.2d 1186 (student received FAPE despite student's low grades where "the IEP was never given a chance to succeed," because the school was "frustrated" in its efforts to provide an appropriate education due to lack of parental cooperation).

41. There can be no showing of inadequate services or the denial of an FAPE where a school district is not afforded a sufficient opportunity to formulate or revise an IEP. (*Schoenfeld v. Parkway School Dist.* (8th Cir. 1998) 138 F.3d 379.) If a school district is "denied an opportunity to formulate a plan to meet [the student's] needs, it cannot be shown that it had an inadequate plan under IDEA." (*Id.* at p. 382.) The school district must be provided "an opportunity to modify [a student's] IEP to meet his needs for the . . . school year in public school as is preferred under IDEA." (*Id.*)

42. Prior to filing a due process request, Mother agreed at the March-June 2005 IEP meetings that Student would attend the District's summer LMB program, after which the District would conduct post-testing and an IEP meeting would be reconvened to discuss fall services and placement. When Mother sent the August 11 notice, no educational placement

for the fall had yet been established by the District. Student had just completed the summer program, had not returned to the District for post-testing, and no IEP meeting had been reconvened. Instead of allowing the District to complete testing to determine appropriate placement and services for the fall, Mother sent Student to the LMB Newport Beach Clinic for testing (the results of which she did not disclose to the District until after the December 2005 IEP meeting). There is no evidence that prior to the August 11, 2005 letter Mother mentioned the possibility of removing Student from the District's summer LMB program or from the District altogether. By opting to remove Student without allowing the District to conduct post-summer school testing and hold another IEP to discuss fall placement, the parents usurped the District's opportunity to evaluate Student's tests—the results of which were to form the basis for determining an appropriate placement for Student in the fall.

43. Even if Mother's letter can be considered a request for placement (rather than a unilateral statement of what she was going to do), the District properly rejected Mother's request in writing on September 29, 2005. In that letter, the District noted the decision to place Student in a private school was, in essence, a unilateral decision on the part of Mother. The letter followed the structure of 20 U.S.C. §1415(b)(3) and (c), and included all information required by that statute. The District explained it was rejecting Mother's request for placement at the LMB Newport Beach Clinic because the District could provide Student a FAPE.

44. Further, the District's response did not result in a loss of educational opportunity or seriously infringe on Mother's opportunity to participate in the IEP formation process. (*Target Range, supra.*) At the March-June IEP meetings, the District believed it was offering a FAPE by providing Student with the District's summer LMB program, after which Student would be tested to determine what additional District LMB programs would be needed for the fall. The District's proposed placement for the fall concerned programs in which Student had already been placed over the summer, i.e. the District's LMB programs—

programs which helped Student make progress in reading, and which involved the same methodology as provided by the LMB Newport Beach Clinic.

45. Mother suffered no prejudice from her failure to know in advance exactly what programs the District would propose to enroll Student in the fall of 2005. At the June 6 IEP meeting, Mother received notice of, and consented to, the proposals in Student's IEP for the summer and plan for the fall. Mother was aware of the impending change in Student's placement over the summer, and had been engaged in ongoing negotiations with the District on this issue. She fully participated in the IEP meetings and IEP formation process with her advocate to help her understand her rights. At the time the IEP was developed and written, it was provided to Mother and her advocate and both were permitted to comment on the IEP during its development.

C. Did the District fail to identify Student's present levels and to review his annual goals at the March 2005 annual IEP?

46. Student's contention the District failed to identify his present levels and review his annual goals at the March 2005 IEP meeting is not supported by the evidence. The March 2005 IEP, which took place over three sessions, clearly shows Student's present levels and annual goals were reviewed and addressed.

47. At the first meeting, Mother requested additional assessments, so the IEP meeting was continued until after the assessments had been completed. At the second session, Mr. Sullivan discussed his and Ms. Buckley's assessments and testing results, which included extensive information regarding Student's present levels of performance in reading comprehension, decoding, rate, accuracy and fluency, written language, written expression, math and calculation skills, and difficulties with attention and processing nonverbal information. Present levels in behavior and other academic areas were also addressed at the March and June 2 sessions, Student's 2004/2005 annual goals were reviewed in reading, writing and math, and annual goals were revised for writing and math.

No reading goal was written at these sessions pending Student's completion of the District's summer LMB program.

ISSUE 4: ARE STUDENT'S PARENTS ENTITLED TO REIMBURSEMENT FOR EXPENSES AND TRANSPORTATION COSTS FOR THE PRIVATE LINDAMOOD-BELL PROGRAM?

48. Student requests reimbursement for the private LMB clinic programs he attended during the fall of 2005 in the amount of \$21,300.00, plus costs of transportation. For the following reasons, parents are not entitled to reimbursement for those expenses.²³

49. In order to prevail in a request for reimbursement, Student must establish by a preponderance of evidence that the placement offered by the District was not a FAPE, and that the parents' unilateral placement in the LMB Newport Beach Clinic was an appropriate placement for Student. However, parents who "unilaterally change their child's placement during the pendency of review proceedings, without the consent of state or local school officials, do so at their own financial risk." (*Burlington School Comm. v. Dept. of Ed.* (1985) 471 U.S. 359, 85 L.Ed. 2d 385, 105 S.Ct. 1996.)

50. Parents are entitled to reimbursement only if the public placement violated IDEA and the private school placement was proper under the IDEA. (20 U.S.C. §1412(a)(10)(C)(ii); 34 C.F.R. §300.403(b); *Burlington, supra.*) The trigger of eligibility for reimbursement of private placement tuition is the denial of a FAPE. (*Florence County School Dist. Four v. Carter* (1993) 510 U.S. 7, 126 L.Ed. 2d 284; 34 C.F.R. §300.403(c) (providing for reimbursement only where the district has not made a FAPE available to the child in a timely manner prior to private placement).) As noted in Section 2, *infra*, the

²³ As noted above, Petitioner also argued in his closing brief for an award of compensatory education for additional LMB services. Even if compensatory educational services were at issue, the District's September 29, 2005 offer of a double-block of LMB for the fall 2005 semester renders the request moot.

District offered Student a FAPE at the March 2005 IEP and during the summer of 2005.²⁴ The IEP outlined his particular needs and responded to them in compliance with the IDEA, and the District agreed to consider possible improvements after Student completed summer school. Mother consented to the program offered, and agreed to the District re-testing Student and reconvening an IEP meeting to discuss fall placement.

51. Parents' placement in the LMB Newport Beach Clinic for the fall 2005 semester was also improper based on equitable considerations. (*Burlington*, 471 U.S. at 374.) Equitable considerations allow the denial of tuition reimbursement when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by a school district, or upon a finding of unreasonableness with respect to the actions taken by the parents. (20 U.S.C. §1412(a)(10)(C)(iii).) *See also Wolfe v. Taconic Hills Cent. Sch. Dist.* (N.D.N.Y. 2001) 167 F.Supp. 2d 530 (additional considerations include the parties' compliance or noncompliance with state and federal regulations and the reasonableness of the parties' positions.) Mother's abrupt removal of Student from the District precluded the District's opportunity to provide a FAPE or the fall 2005 semester. By Mother's actions, the District was prevented from following through on post-summer school testing, the results of which would have set the basis for determining fall placement. (*Evans, supra*) (no failure to provide FAPE where the school district had not been given an opportunity to change the child's educational placement.) In order to require the District to compensate her for the LMB Newport Beach Clinic services, Mother was required to provide the District an opportunity to consider the private LMB clinic's test results. (20

²⁴ Any delay in responding to Mother's August 11 letter is excused. After receiving Mother's request, the District undertook an investigation to determine a response, which took some time due to summer vacations. (*Roland M. v. Concord School Comm.* (1st Cir. 1990) 910 F.2d 983 (strict compliance with the IDEA must be tempered by considerations of fairness and practicality.)

U.S.C. §1415(b)(1); 34 C.F.R. §300.502(c)(1); Ed. Code §56329, subd. (c).) The District was not provided these results until sometime after the December 13 IEP meeting.

52. There is no disagreement that the LMB programs, whether provided by the District or the private LMB clinic, conferred educational benefit to Student, and reimbursement is sought for cost of the same program methodology that could have been provided by the District. Differing only in the "intensity" of services provided, the District's LMB programs parallel the private clinic's courses in all respects. The IDEA does not permit parents to mandate that a particular teacher, materials, or instructional method be provided to a child with disabilities. (*Rowley, supra.*) It is inequitable to order reimbursement for obtaining private services to replace adequate services that were being provided by the District. (*Id.*) Placement of Student at the LMB Newport Beach Clinic was also highly restrictive and, therefore, inappropriate. The District's LMB programs offered Student services in his areas of disability while advancing the IDEA's mainstreaming purpose by placing him with non-disabled students for a substantial portion of the school day. Since the District's assessments and programs provided were appropriate, Mother is not entitled to reimbursement. (34 C.F.R. §300.503(b).)

CONCLUSIONS OF LAW

1. The District appropriately assessed Student in all areas of suspected disability from June 2002 through the 2005/2006 school years.

2. The preponderance of the evidence establishes the educational services provided by the District were designed to meet Student's unique needs, and assisted Student to benefit from special education. Student achieved educational progress in his placements at the District, and the District provided special education and related services that were reasonably calculated to enable him to receive educational benefits.

3. The District proposed and provided, up to the point of Student's withdrawal from the District's LMB summer school program, a FAPE in the least restrictive environment.

4. There are no procedural violations which resulted in a loss of educational opportunity.

ORDER

1. The request of Student for relief from Respondent Long Beach Unified School District is denied based on Conclusions of Law Nos. 1, 2, 3 and 4.

2. The request by Students for reimbursement for their unilateral placement of Student at the Lindamood-Bell Clinic in Newport Beach, California during the fall of 2005 is denied.

PREVAILING PARTY

Pursuant to Education Code §56507, subdivision (d), Respondent Long Beach Unified School District prevailed on each and every issue heard and decided in this matter.

NOTICE OF APPEAL RIGHTS

This is the final administrative decision and both parties are bound by this Decision. Under California Education Code §56505, subd. (k), either party may appeal this Decision to a court of competent jurisdiction within ninety (90) days of receipt of the Decision.

DATED: September 21, 2006

/s/
WENDY A. WEBER
Administrative Law Judge
Office of Administrative Hearings
Special Education Division