

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

In the Matter of:

STUDENT,

Petitioner,

v.

ALHAMBRA UNIFIED SCHOOL DISTRICT

Respondent.

OAH CASE NO. N 2006050809

DECISION

Eileen M. Cohn, Administrative Law Judge (ALJ), Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter on January 22 through 25, February 8 through 9, February 22, and February 27, 2007, in Alhambra, California.

Petitioner (Student), was represented by Mark Woodsmall, Attorney at Law, of Woodsmall Law Group, PC. Student's mother (Mother) was present throughout the hearing.

Respondent, Alhambra Unified School District (District), was represented by Ms. Cyndi L. Dalton, Attorney at Law, of The Dalton Law Group. Mr. Harold Standerfer, District's Deputy for Special Education, was present throughout the hearing, except during the morning of February 8, 2007, at which time Dr. Laurel Bear, Director, Pupil Services, Moor Field Preschool, represented District.

Student filed a request for due process on May 23, 2006. On July 7, 2006, OAH continued the due process hearing for good cause on the basis of a joint stipulation of the

parties. On January 19, 2007, Student moved to continue the hearing on the ground that a key District witness was unavailable. The ALJ opened the record on January 22, 2007, at which time the motion was heard and denied. The hearing was continued until January 23, 2007. Testimony and documentary evidence were received on the remaining hearing dates. The record remained open to permit the parties to submit written closing arguments on or before March 21, 2007. The parties timely submitted written closing arguments and the record was closed.¹

ISSUES²

1. Whether District failed to appropriately respond to Mother's request for independent assessments at public expense (IEEs).
2. Whether District failed to appropriately respond to Mother's request for a

¹ After the written closing arguments were submitted and the record closed, District submitted a written motion to strike portions of Student's brief and to award sanctions. The ALJ did not consider any further briefing. The ALJ will only consider relevant evidence introduced during the hearing.

² Student attempted to frame the issues according to procedural and substantive denials of FAPE. Without eliminating issues, the ALJ reframed the issues presented to be consistent with the legal framework of the IDEA and to avoid redundancy. To the extent certain issues first give rise to a procedural violation they were addressed in that category. For example, Student also claimed that the absence of a general education teacher at an IEP team meeting was a substantive denial of FAPE. Student claimed that the "clear delineation of specific times, location, and manner of delivery of services was a substantive violation. The ALJ also examined the due process complaint to ensure that the issues presented conformed to the Student's complaint and the issues presented at the hearing. A separate section on prior written notice was added for this reason.

behavioral assessment.

3. Whether District failed to timely conduct an audiological assessment

4. Whether District failed to offer a free appropriate public education (FAPE) as of January 10, 2006, in formulating Student's Individualized Education Program (IEP) due to procedural violations that included District's failure to:

- (A) involve Parent in the development of the IEP;
- (B) include the private school teacher as a necessary team member;
- (C) include the Head Start teacher as a necessary team member;
- (D) consider the findings of Parent's private experts;
- (E) clearly delineate the specific times and location and manner of delivery of services; and
- (F) provide prior written notice.

5. Whether District failed to substantively offer a FAPE as of January 10, 2006, in the least restrictive environment, by offering Student a placement in its preschool speech and language delayed aphasia (SLDA) special day class when it failed to:

- (A) provide appropriate behavior, speech and transition services; and
- (B) provide a placement which afforded Student typical peer interaction.

REMEDIES

Student seeks:

- (A) placement at a licensed nonpublic school serving both typical and disabled children at District expense for the 2006 school year and remaining 2006-2007 school year;
- (B) Compensatory education;
- (C) District funded nonpublic agency individualized speech and language services at a rate of two clinical hours per week;
- (D) District funded nonpublic agency occupational therapy at a rate of at least two clinical hours per week; and

(E) Such other relief as the ALJ deems proper.

PROCEDURAL MATTERS

At the hearing Student moved to shift the burden of proof. District opposed the motion. The ALJ took the motion under submission and reviewed the moving and opposition briefs. Student claims that the burden of proof should be shifted is based on District's alleged procedural violations, which Student claims resulted in District acquiring a "unique informational advantage" over Student. Student's motion is denied as contrary to *Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 163 L.Ed.2d 387].

CONTENTIONS OF THE PARTIES

Student contends that District's initial offer of placement at District's special day class devoted to severe speech and language delays with inclusion at Head Start was not an offer of FAPE in the least restrictive environment as of January 2006. Specifically, Student contends that the following procedural flaws in District's development of the IEP rendered its offer fatally defective: Parent was not given an adequate opportunity to participate as a member of the IEP team because the individualized educational program IEP team did not adequately consider Parent's views, assessments or her expert; a regular education teacher or a Head Start teacher was not at the IEP team meetings; and District's failure to either fund Student's IEE or file a due process complaint as required by statute undermined Mother's right to participate in the IEP process or denied Student an educational benefit.³

³ Student's claims are framed as procedural violations which resulted in Student's loss of FAPE. Student did not allege in his complaint that District's assessments were inappropriate, and accordingly, the appropriateness of District's assessments are not part of this proceeding. Student did not request reimbursement for an IEE and did not clearly request an IEE. Student was given another opportunity at the Prehearing Conference to

District denies that it committed any procedural violations that impeded Mother's opportunity to participate in the IEP process, or denied Student an educational benefit. District contends Mother was an active and informed participant in the IEP process.

Student further contends that District's offer of FAPE as of January 2006 was substantively deficient because District should have offered services at his private preschool or placement in a mixed inclusion class at a nonpublic school preschool (NPS) accompanied by a one-to-one aide trained in applied behavioral analysis (ABA). According to Student, placement at the NPS was necessary to service his unique needs as an autistic child with speech and language delays and behavioral challenges. Student insists that only Student's proposed private or NPS program with ABA services satisfied the IDEA because as designed it was the only placement backed by peer-reviewed research.

District maintains that its offer of a SLDA provided Student a FAPE. District maintains that when the offer of placement is reviewed in the context of what information was available at the time, District's offer satisfies the substantive requirements of the IDEA. As designed, District's placement reflects Student's unique needs, provides an educational benefit and comports with his IEP. District's program provides intensive early intervention services by providing immersion in a speech and language based classroom structured as a typical preschool. At the time of the offer, the SLDA class was taught by a licensed speech pathologist with substantial experience teaching children with severe language

clarify his claims. His counsel insisted that he did not intend to move forward with a claim for reimbursement for any IEE secured by Student "at this time" and formulated the issue as a part of his claim that District's failure to comply with the procedures for responding to Student's request for IEEs denied Student a FAPE. Notwithstanding Counsel's remarks, the ALJ is responsible for formulating and deciding the issues raised in Student's due process complaint consistent with the IDEA.

delays and autism.⁴ With Head Start available to Student to provide exposure to typical peers, District was not obligated to offer Student a nonpublic school because it was able to offer Student interaction with typical peers in an appropriate public school program. District maintains that Student does not require the intensive one-to-one behavioral interventions in the classroom as Student suggests.

FACTUAL FINDINGS

BACKGROUND INFORMATION

1. Student was born on March 28, 2002, and is currently five years old. Student lives with his Parents within the boundaries of the District. Student is not enrolled in a District school. On December 15, 2005, he was found eligible for special education as a pupil with speech and language impairment. At Mother's request, his eligibility was changed to autistic-like behaviors (autism) on April 27, 2006. Student is currently attending a private preschool. He receives speech and language (LAS), occupational therapy (OT), and behavioral services through the Eastern Los Angeles Regional Center (ELARC)⁵ and private insurance.

2. ELARC diagnosed Student with a developmental receptive and expressive language disorder and developed an Individualized Family Service Plan (IFSP) for Student. ELARC's placed Student in a center-based, mixed inclusion, structured program at Almansor Center, three days a week, for the period April 19, 2004, through March 28,

⁴ Student withdrew his contention that the teacher was unqualified.

⁵ ELARC and District have distinct obligations to Student. ELARC provides support to children with disabilities and their families to enable them to better function in their daily lives and in their communities. District is required under the IDEA to focus on pupils' education, and programs and services which enhance Student's access to education.

2005. At Almansor, Student received behavior intervention services and speech and language therapy. Student also received private OT services twice a week. In April 2005, Mother placed Student in a private preschool, Altadena Christian Children's Center (Altadena) two days per week.

3. ELARC evaluated Student prior to his third birthday as part of a process to determine his continued eligibility for regional center services. On January 5, 2005, Ms. Randi Bienstock, Ph.D., (Ms. Bienstock), performed an extensive psychological and developmental assessment of Student for ELARC to assess his current level of intellectual and adaptive functioning. Ms. Bienstock diagnosed Student with a Mixed Expressive and Receptive Language Disorder; R/O (rule out) communication disorder and R/O autism disorder. As a result of Ms. Bienstock's assessment, ELARC determined that Student remained eligible for services beyond his third birthday. ELARC provided Student with LAS, one hour per week, OT, one time per week, social skills training, one hour per week, and community support, 10 hours per week.

4. ELARC referred Student to District in August 2004, as a pupil with cognitive and communication delays, and possible autism. ELARC's referral included reports that indicated that Student had significant behavioral concerns, for which behavioral intervention services were initiated. ELARC invited Mother to attend a transition meeting in September 2004 with ELARC and District at District's offices. The purpose of the transition meeting with Mother was to familiarize Mother with District programs and services, appease her anxiety about switching service agencies, and develop a transition plan for Student.

5. On March 9, 2005, District provided Mother with an assessment plan to determine whether Student was eligible for special education and related services. Mother did not consent to District's assessment plan. Mother discussed her decision with Frances Hampson Stearns (Ms. Stearns), Coordinator, Special Education, and Principal Moor Field Preschool Special Education Center (Moor Field). Mother indicated that she was not ready to place her child in special education at the District.

6. Seven months later, in a letter dated October 3, 2005, Mother contacted District to request that it conduct LAS and OT assessments of Student. She specified that particular attention be paid to his "expressive and receptive speech" as well as "fine motor skills." She indicated that she was concerned with his expressive and receptive language and his "struggles with fine motor development in the tripod grasp" of writing and cutting implements.

7. District timely provided Mother an assessment plan and informed Mother that District was obligated to assess Student in all areas of suspected disability. Mother authorized District to conduct tests in the area of academic/preacademic achievement, social/adaptive behavior, psycho-motor development, LAS, intellectual development and OT. Mother consented to the assessment plan and the assessments were timely completed. The initial IEP team meeting was scheduled for December 15, 2005. Mother attended parent workshops to prepare for the IEP team meetings.

PARENT'S REQUEST FOR INDEPENDENT EDUCATIONAL ASSESSMENTS

8. Student claims that District failed to appropriately respond to Student's IEE. To obtain an IEE, Mother must disagree with an assessment obtained by the public agency and request an IEE. Upon receipt of Mother's request, District has two options: file a due process complaint to request a hearing to show that its assessment is appropriate; or, ensure that the IEE is provided at public expense. If the District fails to do either, and the parents obtain their own assessments, District may only discharge its obligation if it shows that Student's independent assessment did not meet agency criteria. District may ask for Mother's reason why she objected to its assessments, but may not require an explanation.

9. Mother requested IEEs in the area of speech and language and occupational therapy during the January 10, 2006 IEP team meeting. Mother did not clearly state that she disagreed with District's assessments. Instead, she stated that she wanted someone with expertise in the area of auditory processing and in sensory integration. Ms. Hampson Stearns explained District's policies for IEEs, advising Mother that the request had to be in

writing and had to state that she was in disagreement with District's assessments.⁶

10. On January 25, 2006, Mother submitted a written request for assessment in the areas of speech and language, and occupational therapy, which expressly indicated her disagreement with District's assessments in those areas. She further specified the basis of her disagreement. Mother stated that she disagreed with the speech therapist's findings on the severity of Student's speech impairment. Mother disagreed with the occupational therapist's findings that Student adequately processed sensory information, particularly vestibular information, because of previous findings to the contrary. Mother provided the names of the agencies where the assessments would be conducted.

11. District did not fund Student's IEE or file a due process complaint.⁷ Instead, District elected to call an IEP meeting for the sole purpose of discussing Mother's IEE requests. District began a steady flow of communication to Mother to secure her attendance at an IEP meeting. Mother related that she was sick and failed to appear at a meeting scheduled for February 10, 2006, and informed District "she didn't intend to schedule anything else at this time." On March 2, 2006, District proceeded with an IEP team meeting without Mother solely for the purpose of discussing her IEEs. Ms. Hampson Stearns, Ms. Veronica Nieto, the school psychologist, Ms. Myrna Ramirez, the speech and language pathologist (SLP), and Ms. Lisa Nye, the occupational therapist, attended the meeting. District provided Mother with a detailed narrative of the meeting which memorialized District's reasons for denying the IEEs.

⁶ District and Mother engaged in a heated letter writing campaign about whether Mother actually showed Ms. Hampson Stearns a written request on January 10, 2006. This controversy is irrelevant to the determination of whether District was obligated to fund Student's IEE.

⁷ Ms. Hampson Stearns testified that District did not believe it had to file a due process complaint since Student was not enrolled in District.

12. Mother's letter also requested that a neuropsychological assessment be conducted to determine whether Student had a specific learning disability (SLD). She did not indicate that she had any disagreement with District's assessments. District had not conducted assessments to determine whether Student had a specific learning disability. In addition, District never conducted standard cognitive measures to confirm a specific learning difference due to restrictions on administering these tests to African American children.

13. Given District's failure to file a due process complaint, Student is entitled to an IEE in the areas of LAS and OT. The only way District could have avoided its obligations was to prove at a due process hearing that Student's IEEs were not conducted according to agency criteria. District was not entitled to discharge its obligation to pay for Student's IEEs by convening an IEP team meeting. Student is not entitled to a neuropsychological IEE to determine whether he had a specific learning disability, because District had not yet conducted an assessment specific to this area.

14. District's failure to provide an IEE at public expense as required does not constitute a per se substantive denial of FAPE. A substantive violation occurs only when the conduct impeded a pupil's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of a FAPE to the parent's child, or caused a deprivation of educational benefits. Mother was entitled to proceed with the assessments, whether or not District was ultimately held responsible for payment. District was required to consider Student's independent assessments. However, after Mother requested the IEEs, she did not present independent LAS or OT assessments of Student to the District for consideration. Without evidence that Student's unique needs, as reflected in Student's IEEs in LAS and OT differed from those identified by the District's assessments, requiring different services or placement, Student has not met his burden of proof that District's procedural violations denied him a FAPE.

PARENT'S REQUEST FOR A BEHAVIORAL ASSESSMENT

15. Student claims that District failed to appropriately respond to Mother's request for a behavioral assessment at an IEP team meeting on May 3, 2006.

16. District assessed Student's behavior as part of its initial assessment plan. District made its offer of placement and services on January 10, 2006. (Factual Finding 38.) Mother had not accepted District's offer and Student remained in his private preschool. Mother claimed that Student's behaviors became more pronounced in the three intervening months. At the May 3, 2006 IEP team meeting, Ms. Weise-Minter explained that Student's behaviors might be the result of his inappropriate private preschool placement and that it would not be possible to obtain accurate results until he was in an appropriate placement. District stated that once Student is in an appropriate placement it would consider conducting a behavioral assessment if Student displays behaviors that can not be controlled within the classroom management system. District memorialized its response in the narrative to the IEP team document which was provided to Mother.

17. The above facts also support a finding that District's refusal to conduct a behavioral assessment did not impede Student's right to a FAPE, parent's opportunity to participate in the decision making process, or cause a deprivation of educational benefits. District was not required to develop a behavioral intervention plan unless Student exhibited behaviors which significantly interfered with District's ability to implement the goals of his IEP. Until Student participated in an appropriate preschool setting, his behaviors could not be accurately assessed.

UNTIMELY AUDIOLOGICAL ASSESSMENT

18. Mother claims that District unnecessarily delayed its audiological assessment, first failing to conduct an audiological assessment of Student as part of its initial assessment plan, and then failing to follow the required timelines for completing the audiological assessment. The purpose of the audiological assessment was to rule out a hearing problem and related medical problems.

19. In Ms. Bienstock's report to ELARC in January 2005, (Factual Finding 3), she recommended that Student be given a comprehensive hearing assessment. District did not include this assessment in its assessment plan. At the initial December 15, 2006 IEP team meeting Mother signed an additional assessment plan authorizing the District to conduct an audiological assessment.

20. Assessments must be completed and an IEP team convened no later than 60 days from parental consent, excluding school vacation in excess of five school days. Mr. William H. Ritchie, a licensed audiologist conducted the assessment on March 3, 2006, 70 days (excluding school holidays) after Mother executed the assessment plan. Mr. Ritchie could not have completed the assessment earlier because he had difficulty securing an appointment with Mother. District attempted to schedule a meeting on March 29, 2006, to discuss the audiological assessment, but Mother was not available. After a series of communications, District and Mother agreed to convene an IEP team meeting on April 27, 2006. The results of the assessment were discussed at the April 27, 2006 IEP team meeting. Mr. Ritchie ruled out a hearing problem. He could not complete a comprehensive audiological assessment because he could not get Student to comply with testing procedures. He concluded that the Student's speech and language difficulties did not appear to be hearing related, but required the attention of the speech and language pathologist (SLP).

21. Student claims that Mr. Ritchie's untimely audiological assessment denied him a FAPE. Student has not produced any evidence suggesting that Mr. Ritchie's tardy assessment impeded Student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision making process, or caused a deprivation of educational benefits.

OTHER PROCEDURAL VIOLATIONS THAT MAY CONSTITUTE A DENIAL OF FAPE

22. Student claims that District committed specific procedural violations which prevented him from receiving a FAPE. However, not every procedural violation constitutes

a denial of FAPE. Procedural flaws that result in the loss of educational opportunity, seriously infringe upon the parents' opportunity to participate in the IEP formulation process, or cause a deprivation of educational benefits will constitute a denial of FAPE.

Failure to Involve Parent in the Development of the IEP

23. Student claims that Mother was not provided a sufficient opportunity to participate in the development of the IEP. Student claims that District's IEP team meetings were rushed and provided limited opportunity for meaningful parent participation. Student contends that Mother was not able to share her views of Student's needs, comment on the appropriateness of Student's goals, or ask questions about the proposed placement.

24. Among the most important of procedural safeguards are those that protect parents' rights to be involved in the development of their child's IEP. A parent is a required member of the IEP team and the team must consider the concerns of the parents throughout the IEP process. A parent has meaningfully participated in the development of an IEP when she is informed of her child's problems, attends the IEP meeting, expresses her disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. A parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way. While the IEP team should work toward reaching a consensus, the school district has the ultimate responsibility to determine that the IEP offers a FAPE.

25. Mother participated in four IEP team meetings to discuss Student's assessments, eligibility, unique needs, goals and objectives, and placement and services.⁸ IEP team meetings were held on December 15, 2005, January 10, 2006, April 27, 2006, and May 3, 2006. At the end of each IEP team meeting, Ms. Hampson Stearns read the

⁸ Mother did not participate in the March 2, 2006 IEP meeting. District convened this meeting to discuss her request for IEEs.

narrative of the meeting to team members and they were invited to amend it. Mother was also provided with a copy of the IEP.

26. The first IEP team included: Mother; Ms. Hampson Stearns, Ms. Weise-Minter; District's learning specialist; Ms. Nye, the occupational therapist; Ms. Ramirez, the SLP; Veronica Nieto, School Psychologist; a District nurse; and Mary Rodell, Student's teacher at Altadena.

27. During the December 15, 2005 IEP team meeting, the team reviewed the results of the initial assessments, determined Student's eligibility for special education, identified Student's unique needs, and drafted annual goals.

28. Mother had ample opportunity to share her observations about Student with the IEP team at the December 15, 2005 IEP team meeting. At this meeting Mother was mainly concerned about Student's communication-related deficits in the areas of speech, ability to participate in reciprocal conversation and to share ideas, and social interaction with peers. She also expressed concerns about his motor planning skills and frustration. She told the team of Student's interest in learning, his affection and comfort with adults, and the ease with which he accepts redirection. Mother asked a lot of questions.

29. The IEP team members explained their assessments and shared their observations about Student. The assessments were conducted in November and December 2005 in the areas specified in the assessment plan: a psychoeducational assessment (which comprised standardized tests, observations and parent interviews); an LAS assessment; an OT assessment; and a preschool pre-academic readiness assessment.

30. The school psychologist found Student eligible for special education and related services as a pupil with a speech and language impairment. She determined his particular areas of unique needs to be auditory processing, communication, small motor and social skills development. The IEP team, including Mother, agreed.

31. Mother was an active participant in the development of annual goals. With her input, 12 goals were drafted at the December 15, 2006 IEP Team meeting.

32. The December 15 IEP team meeting concluded after four hours. The meeting adjourned without completing the IEP due to District's stated contractual requirements to provide District staff with a lunch break. The IEP was continued until Tuesday, January 10, 2006. Mother was advised about the IEP process and provided a written statement of procedural safeguards.

33. At the conclusion of the meeting, District provided Mother with a 20-page, multi-part document including: a section of form-generated checklists which summarized Student's eligibility and current placement, a narrative of the IEP team's discussion, and; a section that contained the IEP team's draft goals.

34. On January 10, 2006, the IEP team finalized Student's goals and objectives and District offered Student placement and services for the IEP year beginning January 10, 2006, and ending January 9, 2007. District offered Student extended school year placement in its SLDA special day class five times weekly, three hours and forty-five minutes a day, clinic-based OT, 50 minutes a week, an OT classroom consultation for fifteen minutes, once per month, and a monthly parent support group. District also offered Student access to Head Start,⁹ so that he could be exposed to typical peers. District doesn't operate a general education preschool. Head Start, a federally funded general education preschool program, is the public preschool for pupils found eligible for special education in the District. Head Start is not on the Moor Field campus. District's offer included transportation.

35. A total of fourteen annual goals were finalized for Student with Mother's input. Mother requested a goal which would encourage the development of skills that involved social exchange with peers. Her request was incorporated in the goal for interactive play skills, particularly improvement of eye contact and conversational posturing. A goal was developed to address Student's recognition of feelings. An

⁹ The Head Start program available to District pupils is called ABC Child Development. It shall be referred to as Head Start.

additional language goal was developed in response to Mother's request for a more specific goal in the area of play skills so that Student was required to attach language to what he was doing. An additional goal was developed to address Student's need to follow more complex questions and directives. District did not adopt every recommendation from Mother, but did discuss her recommendation. Mother disagreed as to whether Student is prepared for a goal to speak about recent experiences. District disagreed with Mother's request to develop a goal to address Student's vestibular processing skills given that Student did not appear to have vestibular processing difficulties at that time.

36. At the January 10, 2006 IEP team meeting Mother had the opportunity to share her concerns about the December 15, 2006 IEP team report. Attendees included Ms. Hampson Stearns, Ms. Weise-Minter, Ms Nieto, the SLP, the occupational therapist, a special education teacher and the school nurse. Mother corrected the description of Student's current program and level of support at his private preschool, and provided further input on the goals she did not address at the December 15, 2005 IEP team meeting. Mother's corrections were recorded in the narrative and the goals and objectives made part of the January 10, 2006 IEP team meeting document. According to Mother, District downplayed Student's behaviors. His tantrums occurred at a much greater frequency than indicated by Ms. Nieto's report of her Parent interview. The IEP narrative didn't list throwing or hitting as reported by his teacher. Mother testified that she also expressed concern that he had an auditory processing disorder and wondered why District didn't administer a test for auditory processing. Mother requested IEEs. (Factual Findings 18 through 21.)

37. The January 10, 2006 IEP contained District's complete offer. Mother did not sign the IEP because she did not agree with District's offer of placement in the special day class. The meeting concluded after two hours. Mother was provided with the 22- page IEP report which included the offer of placement and services, an extensive narrative of the meeting, and 14 goals.

38. Mother was also an active participant in two additional IEP team meetings.

On April 27, 2006 the IEP team met to discuss the results of District's audiological assessment and to consider Student's independent neurodevelopment assessment conducted by Diane M. Danis, M.D., M.P.H, (Dr. Danis), developmental and behavioral pediatrician. An ELARC representative attended and an educational advocate accompanied Mother. At Mother's request the IEP team agreed to change the basis for Student's eligibility from speech and language delayed to autism; however, District representatives were clear that Student's unique needs remained the same. The IEP team reviewed District's offer again. The IEP team addressed Mother's concern that the SDLA would not provide Student with opportunities to model the speech of typical peers. She expressed concern with placing him in two separate programs, the SLDA and Head Start. Mother discussed Dr. Danis's recommendation to place Student in a nonpublic school, Villa Esperanza, and her preference for placing student in this program. They discussed ELARC's inquiry about whether District would consider working with Student using ABA one-to-one discrete trial training techniques. A six page IEP team report was generated and distributed. The meeting lasted two hours.

39. At Mother's request, the IEP team reconvened on May 3, 2005, to re-visit District's offer of placement. An ELARC representative attended as well as Mother's educational advocate. Mother wanted services to reflect Student's diagnosis of autism. She wanted more goals to address his behavioral needs. The SLP explained that Student's primary area of need is speech and language, not behavior or transitioning. District's approach to behavior interventions was discussed. (Factual Finding 16.) Mother again expressed her concern about placing Student in two programs, the SLDA and Head Start. A three-page team report was generated. The meeting concluded after two hours.

40. From the time District initially approached her in March 2005, Mother's involvement in assessments, eligibility and formulation of Student's goals and objectives was extensive. Mother's perception that the December 15, 2005 IEP team meeting was rushed and prematurely terminated is understandable given that this was her first IEP team meeting. The December 15, 2005 IEP team clearly identified Mother's general

concerns as: speech and language, socialization, motor planning, conversational skills, fine motor skills, behavior and frustration levels, and self-help. Mother had an opportunity to correct the IEP document which she did at the January 10, 2006, IEP team meeting. After the January 10, 2006 IEP team meeting, Mother attended two additional IEP team meetings to review District's offer of placement and services. In total, the IEP team met for ten hours to discuss Student's assessments, eligibility, unique needs, annual goals, and placement.

41 In sum, factual findings 23 through 40 demonstrate that Mother was provided the opportunity to meaningfully participate in determining Student's eligibility, his unique needs, and his goals and objectives. No procedural errors were evident.

Failure to Include Student's Private Preschool Teacher as a Necessary Team Member

42. Student contends that failure to include Student's private preschool teacher at the January 10, 2006 IEP team meeting denied him a FAPE. The failure to include a pupil's private school teacher in the IEP process, where the pupil is presently attending a private school, constitutes a procedural violation of the IDEA which results in a denial of FAPE to the pupil, unless the failure to do so is the result of harmless error. Parents may waive District's obligation in writing.

43. There is no dispute that Student's private preschool teacher, Ms. Mary Rodell, attended the first IEP team meeting of December 15, 2006.¹⁰ Student and District also do not dispute that Ms. Rodell contributed her observations about Student to the IEP process. Ms. Rodell's views were included in the assessment reports that were reviewed at the IEP team, specifically, her interview with Ms. Weise-Minter. Ms. Rodell was present

¹⁰ Both District and Student claim credit for inviting Student's private preschool teacher. District did not include Student's private preschool teacher in its initial IEP team meeting notice, but separately invited her. Mother testified that she also invited her.

when the assessments were reviewed and there is no evidence that she contradicted Ms. Weise- Minter's report. Both parties acknowledge that Ms. Rodell indicated that Student was having difficulty participating in a general education preschool class at the time of the IEP team meeting. Each party interpreted Ms. Rodell's statements differently. Mother heard Ms. Rodell indicate that Student needed assistance to be successful in her general education preschool and Ms. Stearn's heard her say, "I don't know what to do with him." Ms. Stearn's characterization of Ms. Rodell's remark is probably accurate since Mother removed Student from Altadena.

44. District presented its offer of placement at the January 10, 2006 IEP team meeting.¹¹ There is no dispute that Ms. Rodell did not attend this meeting and that no one appeared on her behalf. It is also undisputed that District did not request, and Parent did not provide, a written waiver of District's obligation.

45. At the January 10, 2006 IEP team meeting, the team completed its preparation of Student's initial IEP, which it began on December 15, 2005. Ms. Rodell's views as to Student's current level of performance in her preschool were well known and had already been considered. Her presence at the January 10, 2006 IEP team meeting was not necessary to provide Mother with an opportunity to participate, or to ensure educational benefits to Student. Ms. Rodell's attendance was not required, but even if it was, her absence from this meeting was harmless error.

Failure to Include a Head Start Teacher as a Necessary Team Member

46. Student contends that the absence of a Head Start teacher from the IEP team denied Student a FAPE. When convening an IEP team meeting, the District is required to invite not less than one general education teacher either from the Student's

¹¹ Student's placement in his current general education private preschool was not the focus of the April 27, 2006, and the May 3, 2006 IEP team meetings, so Ms Rodell's absence from these meetings is not an issue.

current or future educational placement, if the student is, or may be, participating in the general education environment. On January 10, 2006, District offered Student access to Head Start. It is undisputed that a teacher from Head Start was not invited to the IEP team meeting of January 10, 2006.

47. District does not operate a regular education preschool and, therefore, District does not have a general education teacher assigned to a regular education preschool. Through a memorandum of understanding (MOU) with Head Start, District provides opportunities for special education pupils to participate with typical peers. District remains responsible for developing the IEP. (Factual Findings 85-86.)

48. A regular education teacher of a pupil with special needs participates in the development, review, and revision of the pupil's IEP. The preschool teachers at Head Start are not required to be general education teachers. Ms. Rebecca Martinez, a long time teacher at Head Start, testified that she has an associate degree in child development and a Children's Center permit. She is not an employee of District. She follows the IEP developed by District. She does attend IEP meetings after the Student is enrolled in Head Start. Student is not yet enrolled in Head Start. For these reasons, the attendance of a Head Start teacher was not required at Student's IEP team meetings.¹²

Failure to Consider Student's Expert Assessments

49. Student claims that District committed a procedural violation when it failed to consider Student's expert assessments. The results of IEEs obtained at private expense must be considered by District in any decision made with respect to the provision of FAPE.

¹² Ms. Hampson Stearns is the District administrator responsible for coordinating District special education programs with Head Start. She signed the MOU with Head Start on behalf of the District. She attended the IEP meetings with Mother. Even if a Head Start teacher was required, the failure to invite a Head Start teacher was harmless error because District's administrator, Ms. Hampson Stearns, was present.

50. Mother only provided one independent assessment to District, the neurodevelopmental assessment of Dr. Danis. District did consider Dr. Danis's recommendations at two IEP team meetings held on April 27 and May 3, 2006. District's IEP team members reviewed Dr. Danis's eight page assessment and recommendations. Dr. Danis was invited to attend the the April 27, 2006 IEP team meeting, but did not. District members communicated their disagreements with Dr. Danis's report, and did so again at the May 3, 2006 IEP team meeting. Ms. Hampson Stearns candidly testified that she is distrustful of Dr. Danis's reports because her reports have been submitted for many pupils and generally contain the same recommendations. Nevertheless, at Mother's request, and as a result of Dr. Danis's report, District agreed to change Student's eligibility to autism. Dr. Danis was invited to attend the meeting, but did not. Detailed IEP team reports were generated for each meeting and distributed to Mother. The above facts support a finding that Dr. Danis's report was considered by the District as required. No procedural violation occurred.

Failure to clearly delineate the specific times and location and manner of delivery of services

51. Student contends that District failed to make a formal written offer that clearly identified the proposed program and services. Parents' procedural right to participate in the IEP process includes the school district's obligation to make a formal written offer that clearly identifies the proposed program. One of the reasons for requiring a formal written offer is to provide parents with the opportunity to decide whether the offer of placement is appropriate and whether to accept the offer.

52. On January 10, 2006, District finalized its offer in a detailed report provided to Mother. The January 10, 2006 IEP report specified the offer of the Moor Field SLDA and related OT and parent support services. (Factual Finding 38.). It contained fourteen goals and objectives. Each goal and objective identified Student's need, his present level of performance, and the annual and short term objectives. District also identified who would

be monitoring each goal. The goals were created with Mother at two IEP team meetings. (Factual Findings 34-35.)

53. District's offer of placement in the SLDA with related services was clearly delineated in Box 6 of the IEP team document, entitled "Special Education & Related Services & Supplemental Aids & Services Recommended." District also offered access to Head Start in the narrative. District's offer of Head Start is based upon Ms. Nieto's recommendations of placement and services as recorded in the narrative.

(t)he psychologist recommended that [Student] be enrolled in the severe language disorders classroom at Moor Field Preschool Early Education Center.

□

The psychologist stated that [Student] has also benefited from his preschool experience with typically developing students.

Immediately following Ms. Nieto's recommendations the IEP narrative memorializes District's offer:

The district is able to offer him access to the Head Start Preschool which is the public school option for preschool aged students. The Head Start program is federally funded and its funding includes a component for inclusion of students with identified disabilities. They have an inclusion specialist on their staff as well as a speech/language pathologist. The District is able to offer facilitation of enrollment in that program should parents so choose. It was explained to mother that District is unable to fund private preschool.

54. District's witnesses provided testimony that conflicted with the IEP document. Ms. Deborah Weise-Minter testified that District's offer provided Student a FAPE without Head Start. She stated that District's offer was restricted to what was written in Box 6 of the IEP team document and did not extend to the narrative. At the hearing, Ms. Hampson Stearns explained that since general education preschool is not compulsory or a "special education service," it is not a required part of the IEP. Notwithstanding the testimony of District's witnesses, the language of the IEP document clearly states that District will facilitate enrollment for Student.

55. District witnesses agreed that Head Start supplemented District's offer. As set forth in the January 10, 2006 IEP documents, the goals and objectives of the IEP were being implemented at Moor Field. Ms. Nieto described Head Start as an "adjunct" to the placement, but not part of the IEP. She explained that in some cases students go to Head Start with designated instructional services (DIS), but in that case, the DIS is the offer, not Head Start. Both Ms. Nieto and Ms. Weise-Minter testified that the special education goals are implemented by the classroom teacher at the SLDA, not Head Start. According to Ms. Weise-Minter, Head Start is given the IEP to "work toward the goals."

56. From the IEP document, Mother knew that District's offer of access to Head Start was part of the IEP¹³ but for some time she was uncertain about how Head Start would work with Student's placement at Moor Field SLDA. The IEP team narrative indicated that Head Start had a speech pathologist (it does not). This comment suggested that Student might be getting special education services at Head Start. District did not do much to facilitate Student's enrollment in Head Start. At the January 10, 2006 IEP team meeting, District recommended that Mother contact Head Start and visit its facilities. Mother speaks English. District did not have any English-language brochures available and provided Mother with a Spanish-language brochure so that she could identify the

¹³ Her counsel's leading questions to her regarding her understanding of Head Start affected the weight of Mother's testimony.

locations and phone numbers of Head Start. Mother was left to conduct her own investigation of Head Start. At the April 27, 2006 IEP team meeting, District and Mother again reviewed Head Start, reflected in the IEP document as follows:

Mother expressed concerns about sending [Student] to two separate places where one class has a small ratio of children and then to a class that is huge and [Student] could be easily distracted. She expressed that this would be particularly hard for [Student] since he would be coming from a class of such a small number. She also feels that the day is too long. The District explained that the length of the day can be modified and the Head Start Program often does modify the length of the day. Mom is concerned that if the day is modified then [Student] will lose time with typical peers.

At that IEP team meeting, Ms. Hampson Stearns clarified that District "collaborates" with Head Start "for full inclusion with typical peers."

57. At the May 3, 2006 IEP team meeting, "Mother asked again about the 2-program model," the lack of typical peers at Moor Field and the "two different settings for the two classes."

58. Mother did understand that District was offering access to Head Start. After the January 10, 2006 IEP, Mother did have an opportunity to visit Head Start. She also visited the SLDA. She was in continuous contact with District for a substantial period of time. (Factual Findings 23-40.) Mother may not have been convinced that the two programs were suited for Student, but she understood District's offer as set forth in the IEP narrative. For this reason, the IEP document as drafted did not result in a procedural violation of Student's right to a FAPE.

59. Student also claims that behavior interventions are not clearly identified. In the IEP document District indicated that it would use its classroom management system,

address behavioral issues through the goals and objectives and have Mother assist with transition. In addition, District indicated that it would provide modifications to the program in the form of “repetition of directions to an adult to assure understanding” “and seat[ing] Student next to positive role models.” The IEP document provides sufficient information about behavior interventions, especially in view of Mother’s active participation in the development of the IEP and her interaction with District.

Failure to provide prior written notice

60. Student contends that District consistently failed to provide prior written notice of its decisions. District’s are required to provide prior written notice whenever it proposes to initiate or change the identification, assessment, or educational placement, or provision of FAPE, to the pupil.

61. This was Student’s initial placement in District. District provided Mother with written assessment plans. District provided Mother with extensive documentation in the form of written IEP team reports which explained its assessments, and goals and objectives. (Factual Findings 23-40.) It provided Parent with a detailed report of its reasons for rejecting her IEE requests. (Factual Findings 11.)

62. Mother claims that she was never notified of the reasons for District’s rejection of Dr. Danis’s recommendation. Mother convened the IEP team meeting where Dr. Danis’s recommendations were discussed. Before reviewing Dr. Danis’s report, the IEP team engaged in an extensive discussion regarding District’s offer of placement and services. Mother remarked that she appreciated the quality of the SLDA program, but she did not think it was for Student. Mother requested that District immediately adopt Dr. Danis’s recommendations which included: placement in a nonpublic school, Villa Esperanza; occupational therapy; individual speech and language therapy, a minimum of twice a week; and 30 hours per week of in home ABA intervention. The reasons District rejected Dr. Danis’s recommendations were clearly related to its offer.

63. In sum, Student failed to prove that District’s written notifications denied

Student a FAPE, impeded Mother's participation in the IEP process or resulted in his loss of educational benefits.

ADEQUACY OF DISTRICT'S FAPE OFFER OF PLACEMENT AND SERVICES

64. Student alleges that District failed to offer Student a FAPE in the least restrictive environment. District has provided a FAPE if its program or placement was designed to address student's unique educational needs and was reasonably calculated to provide some educational benefit in the least restrictive environment. If District's program met the substantive factors, then District provided a FAPE, even if Student's parents preferred another program and even if her parents' preferred program would have resulted in greater educational benefit. District's offer is evaluated in light of the information available at the time it was developed, it is not judged in hindsight.

Unique Needs

65. Student contends that District's offer of services and placement failed to adequately consider Student's unique needs in the areas of speech, transition, and behavior. Specifically, Mother objects to District's determination that Student does demonstrate significant receptive language delays and does not demonstrate significant transition or behavior problems.

66. District's assessed Student in all areas of suspected disability. (Factual Findings 7 and 16.) District and Mother agreed that Student's unique needs were in the areas of auditory processing, communication, small motor and social skills development. (Factual Finding 33-34.) At the December 15, 2006 IEP meeting Mother agreed with his eligibility as speech and language delayed. (Factual Finding 30.)

67. Mother initially approached District for an assessment of Student's "expressive and receptive speech." (Factual Finding 6.) However, she disagreed with the SLP's conclusion that Student had significant receptive speech delays. Ms. Ramirez, District's SLP, conducted Student's LAS. She relied upon information provided by Mother,

the results of standardized tests, and her observations.¹⁴ She found significant delayed receptive language and moderately delayed expressive language, and noted deficits in auditory processing. In reaching her opinion that Student has significantly delayed receptive language, Ms. Ramirez acknowledged Mother's report of Student's tendency to repeat questions, instead of responding to them. Ms. Ramirez also considered Mother's estimate of Student's word fluency in reaching her opinion that Student was moderately delayed in the area of expressive language.

68. Student's receptive delays were evident in previous assessments as well. In 2004, Ms. Hendricks-Bacon, an SLP, also concluded that Student had significant receptive language delay demonstrated by "his lack of consistent interest in engaging people other than his family." She determined that his expressive delays were significant, although "more scattered and inconsistent" than his delays in receptive language. She diagnosed him with a developmental receptive and expressive language disorder. Ms. Ramirez's diagnosis was also consistent with Ms. Randi Bienstock, Ph.D. diagnosis of Student in January 2005. (Factual Finding 3.). ELARC earlier diagnoses of Student also indicated that Student had receptive speech difficulties. (Factual Finding 2-4.) In sum, District correctly identified Student's unique needs in the area of receptive language at the time of its January 10, 2006, offer of placement and services.

69. Student's transition needs were also accurately identified at the time of the

¹⁴ District assessors did not have many of Student's previous assessments in their possession at the time of their assessments. At the hearing the parties stipulated that many assessments were not provided to District. There was much testimony about which party was responsible for obtaining the assessments. Student was under four years of age at the time of District's assessments. Many of the assessments were dated. Of relevance to this proceeding is what the District knew at the time. Where the District's assessments clearly refer to the contents of previous assessments, it was assumed the assessors had them in their possession.

January 10 offer. Student did not display significant transition problems at the time of the January 10, 2006 offer. The District nurse recorded Mother's observation that Student easily separates from her when he attends preschool. The multidisciplinary assessment team assembled to assess Student in November 2005 found it easy to redirect Student. Ms. Weise- Minter observed Student in his private preschool placement transition easily between each activity with verbal prompts. District did not have sufficient information at the time of the offer to conclude that Student would have a problem with transitions in an appropriate placement that could not be resolved with the help of an experienced classroom aide.

70. Mother also contends that District severely underestimated Student's behavioral needs. As set forth in Factual Finding 36, Mother and District have disagreed on this point from the initial IEP team meeting. However, when Mother first approached District she was concerned with Student's communication delays, not his behavior. Mother indicated in her parent interview with Ms. Nieto in late November and December 2005 that Student often withdraws in social situations, but seldom responded negatively or with temper tantrums. In her health screening report, Roslyn Jones, District's nurse, recorded Mother's concern that Student's language delays might be a possible cause of Student's frustration and distraction.

71. At the time of its offer, District did not observe behaviors that indicated a need for aggressive behavioral interventions in a school setting. In her preacademic assessment, Ms. Weise-Minter found weaknesses in Student's social/emotional development. She noted that he had significant "autistic-like behaviors" in peer relations and social reciprocity, but no other significant behaviors. His private preschool's report of recent hitting behaviors did not impress Ms. Weise-Minter. Student's teacher reported recent incidents of hitting other children unprovoked, three to four times a day. She was aware that he had been provided with behavior intervention assistance from ELARC. However, she considered his behaviors to be related to his inappropriate placement and newly instituted dietary changes that isolated him from his peers.

Annual Goals

72. Mother and District reached agreement on the goals and objectives set forth in the January 10, 2006 IEP. (Factual Finding 35 and 39) District refused to add a goal for Student's vestibular processing because Ms. Nye didn't observe vestibular processing difficulties. Goals were written for each area of need identified by the IEP Team. Student's speech and language needs were addressed in two goals for auditory processing (following directions and answering questions), a communication, sentence formulation goal, a social language, pragmatics goal, and a communications skills goal for expressive language. Each of these goals are monitored by the speech/language specialist

73. A goal addressed for Student's transition need with the objective being to have Student transition throughout the school day with no more than two verbal reminders.

74. Three goals addressing Student's social/emotional needs were developed: two play goals addressed Student's interaction with other pupils and one goal addressed Student's attention.

75. The goals and objectives were responsive to the needs identified by the IEP team and were appropriate.

Services and Placement

76. District's offer of placement in the SLDA focuses on Student's speech and language delays. Student's expected teacher, Ms. Kimiko Suehira is a speech and language pathologist. Her classroom utilizes a typical preschool structure to provide intensive speech and language interventions. The class comprises cognitively typical pupils with speech and language problems. Pupils engage in a variety of general education preschool activities that emphasize preacademic and social skills, including circle time and snack time. Enrollment in the class is limited to 12 pupils. At the time of the offer there were only five pupils in the class. Ms. Suehira uses a variety of approaches which she insists work for pupils with severe language delays. She is able to direct the

pupils and engage them with the assistance of two experienced aides. As a speech pathologist she is able to attend to her pupils' speech and language deficits as set forth in their IEPs on a daily basis. Ms. Suehira views behavior problems as a reaction to language deficits. Ms. Suehira is familiar with the behavioral techniques used with autistic children. She received training at the Lovaas program at UCLA in ABA techniques, and is experienced dealing with teaching pupils with severe language delays, including autistic pupils. Ms. Suehira is assisted by two classroom assistants who have worked with pupils in that classroom for many years. The aides received training in behavior interventions. Ms. Suehira was a credible and sincere witness. Her hands-on classroom experience was given great weight.

77. District's witnesses maintained that Student will receive an educational benefit in the SLDA without the behavior interventions recommended by Dr. Danis or ABI. (Factual Finding 16.) They testified that ABA interventions are extremely restrictive because they require one-to-one work and isolate pupils from their classmates. District did not foreclose applying more intensive behavioral interventions in the future. Ms. Weise- Minter told Mother that District first had to observe Student in an appropriate placement.

78. Student contends that his unique needs can not be served in District's SLDA. From Student's perspective, his placement must be driven by his unique behavioral needs. However, at the time of the January 10, 2006 IEP, his needs were determined to be language- based, not behavioral.

79. Student presented a persuasive argument for the application of peer-reviewed ABA methodologies to preschool children with autism. District is required to use peer- reviewed research-based methodologies to the extent practicable. Student's experts from ABI,¹⁵ testified to the singular appropriateness of peer-reviewed ABA

¹⁵ ABI assessed Student in July 2006, after District made its offer, and their assessment was not provided to the District until the due process hearing. ABI provides

methodology. They cited peer-reviewed research that condemned "eclectic" programs utilizing more than one type of instructional methodology, such as a combination of ABA and Floortime, as ineffective. According to ABI, research indicates that children with autism first require intensive one-on-one intervention, ideally 40 hours per week, to teach them to handle basic skills and to prepare them for social interaction. All their activities are broken down into small steps and they are brought through each step with the use of such interventions as discrete trial training. (DTT) In its purest form, pupils would engage in one-on-one activities for several years before they transition into group activities. To the ABI experts, the preschool classroom was in an inclusion opportunity, an adjunct to the one-on-one training. The preschool classroom provided an opportunity for exposure to typical peers and opportunities for advancing social skills in higher functioning autistic preschoolers. Student is currently participating in 20 hours a week of ABA training through ELARC and ABI reports that it has been quite effective at home. At the May 2, 2006 IEP team meeting ELARC requested District if it would provide additional ABA in the form of DTT. Ms. Saltzman and Ms. Erickson were well-qualified and credible experts about ABA. Their testimony ignored Student's identified educational needs as of January 20, 2006. Ms. Saltzman and Ms. Erickson never observed Moor Field's SLDA class. Furthermore, they observed Student in his unstructured general education preschool. For this reason their testimony as to the inappropriateness of District's placement offer was not persuasive.

80. Student rejects District's SLDA because it conflicts with the rationale that his autistic behaviors, not his language deficits, govern his placement. According to the ABI experts Student does not need a language-based program because he is verbal.

intervention services to Student today. They also produced a January 2007 report which is one year outside the "snapshot" of District's offer that was being considered. The July 2006 report, six months from District's offer, supplemented ABI's expert testimony, but its weight also was limited by its timing.

However, as of the January 10, 2006 offer, Student's unique needs were language-based and were not driven by his behavior. The IEP must be viewed in a snapshot of time. The testimony of District's witnesses, including, Ms. Kimiko, Ms. Weise-Minter and Ms. Hampson Stearns, established that District's small language-rich SLDA taught by a speech pathologist met Student's unique needs and provided an educational benefit, at the time of the offer.

81. Student also contends that he should not be in an SLDA with other LAS delayed pupils because he needs to model language from typical peers. Student's SLP expert Ms. Lucy Bloom testified that children with speech and language delays mimic the behaviors of their peers, not language. Ms. Suehira confirmed that the children in the SLDA model her, not other children. Pupils are more likely to imitate tantrums, odd noises, or rocking. Ms. Bloom agreed that Student required intensive intervention in LAS. Ms. Bloom was concerned that Student would not be able to focus in a group situation. She had observed him in the past in an intensive language-based summer program where he was not able to focus. She had not observed Moor Field's SLDA, however, so her opinion about the appropriateness of the SLDA was discounted.

82. Student conceded that a mixed inclusion structured preschool at a nonpublic school was an appropriate alternative to private preschool. (Factual Finding 62.) Dr. Danis recommended Villa Esperanza, because many of her clients attended, but she hadn't visited in many years and didn't know the ratio between typical and special needs children. Villa Esperanza is a certified nonpublic school. Only the preschool class has both typical and special education children. All other classes at Villa Esperanza are devoted to special education pupils. At the preschool level typical pupils mix with special education pupils in a structured class. Dr. Danis considered the teachers and aides at Villa Esperanza to be very experienced so she did not think Student would require an aide. She also thought it would be easier for Student to attend Villa Esperanza because his related services, like LAS, could be provided on one campus. Dr. Danis had never visited Moor Field or Head Start. She too maintained that Student needed to model language from

typical peers. She admitted that Head Start could provide the structured mixed inclusion program that Student needed, assuming there were experienced aides, and English speaking pupils. Dr. Danis's testimony on modeling language was contradicted by Student's SLP expert, Ms. Bloom. Her testimony was also limited by the fact that she has not directly observed these classrooms.

Exposure to Typical Peers

83. Student contends that District's offer does not provide interaction with typical peers. There is no dispute that Student benefits from exposure to typical peers. School districts are not compelled to establish a preschool program for typical children just to provide peer interaction for pupils with special needs. Where Districts do not operate regular preschool programs their obligations to provide placement with typical children can be satisfied by offering participation in Head Start. District offered participation in Head Start and satisfied its obligation to offer Student exposure to typical peers in the least restrictive environment.

84. District's SDCs are housed on one campus. Ms. Weise-Minter spoke of her hopes for a general education preschool at Moor Field. For now, inclusion of special education children with their typical peers is accomplished through a collaborative relationship with Head Start. Ms. Hampson Stearns is the District coordinator for Head Start. District and Head Start have a reciprocal relationship that is memorialized in a memorandum of understanding (MOU) which was signed by Ms. Hampson Stearns. Section 5 of the MOU sets forth District's obligations with regard to placement of special education students in Head Start, including, its obligation to:

- A. Make every effort to place children in Head Start if it is determined appropriate by the IEP Team.
- B. Refer children with disabilities to Head Start if it is determined appropriate by

the IEP team.¹⁶

- C. Consider a dual enrollment in District and Head Start program, giving careful consideration to the total number of days and total number of hours per day child will be involved in the dual program.

85. The MOU makes clear that the goal of the collaboration between Head Start and District is to provide inclusion opportunities for District's special education preschoolers. Ms. Ramirez of Head Start testified about the Head Start program. She confirmed that Head Start provides mainstreaming opportunities only, not special education programs or services. Head Start's disability coordinator oversees the inclusion program. Ms. Ramirez oversees a typical preschool classroom of 20 pupils and two aides. She described the classroom as having typical preschool routines. Although not credentialed in special education and behavior interventions, the Head Start staff receives training from District. Head Start also has a behaviorist coordinator who provides support for pupils that are having problems. Head Start institutes its own behavior program in consultation with the family and other outside agencies. Head Start reviews IEPs, attends IEP meetings after the Student is enrolled, and meets personally with all families of pupils enrolled with an IEP at their homes so that it can better understand its pupils' needs. Ms. Ramirez confirmed that all special education services are provided by Moor Field. She also confirmed that while Head Start strives for consistency with pupils' IEP goals, Head Start is not responsible for the goals. Ms. Ramirez found little reason to call District, and only did so once, when there was a problem with the bus schedule. Not one child in her class has ever been accompanied by a one-to-one aide.

86. Mother preferred Villa Esperanza because she believed Student needed social skills training on an ongoing basis, not a language-rich SDC. She wanted Student to be part of one preschool setting and one classroom. She was concerned about him

¹⁶ This section of the memorandum of understanding refers to procedures to be developed to assist referrals and enrollments.

being in two different locations where one class, the SLDLA, is small, and the other, Head Start, is large. Although Villa Esperanza might be preferable to Mother, District's offer is appropriate because it also provides exposure to typical peers, social skills training, and a language rich SDC. Although participating in Head Start and the SDLA provides some logistical challenges, many pupils on the Moor Field campus attend Head Start. At the time of the offer, Student did not have transition problems which would prevent him from participating in two programs. Given Student's LAS needs at the time of the offer and the availability of an in-class SLP, Ms. Suehiro, Student's needs would be met in her class.

Least Restrictive Environment

87. Student initially maintained that he should remain in his private school placement with supports. District is not required to provide an exclusively mainstream environment in every case. When it became apparent to his own experts that he could not function in an unstructured regular education preschool, Mother requested a mixed inclusion nonpublic preschool, Villa Esperanza. The SLDA with the speech pathologist provides an educational benefit to Student and non-academic social benefits. Villa Esperanza is not a speech and language based program. LAS and OT are provided on campus. As a mixed inclusion preschool on a special education campus, it is not any more or less restrictive than District's offer of the SLDA and Head Start.

LEGAL CONCLUSIONS

APPLICABLE LAW

BURDEN OF PROOF

1. The Student, as the petitioning party seeking relief, has the burden of proof. (*Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528, 163 L.Ed.2d 387].)

THE GENERAL PRINCIPLES OF THE IDEA

2. Under both the IDEA and state law, students with disabilities have the right

to a FAPE. (20 U.S.C. § 1400 and 1412(a)(1)(A); Ed. Code, § 56000.) FAPE means special education and related services that are available to the student at no charge to the parent or guardian, that meet the state educational standards, and that conform to the student's individualized education program. (20 U.S.C. § 1401(9).)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034, 73 L.Ed. 2d 690] (hereafter *Rowley*), the United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the requirement of the IDEA. The Court determined that a student's IEP must be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities. (*Id.* at pp. 198-200.) The Court stated that school districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instruction and related services that are individually designed to provide educational benefit to the student. (*Id.* at p. 201.)

4. California's definition of special education includes both specially designed instruction to meet the unique needs of individuals with exceptional needs and related services to enable them to benefit from such specially designed instruction. (Ed. Code, § 56031). Related services may be referred to as designated instruction and services (DIS). (Ed. Code, § 56363, subd. (a).)

PROCEDURAL VIOLATIONS

5. The congressional mandate to provide a FAPE to children includes both a procedural and a substantive component. In *Rowley, supra*, 458 U.S. 176 at p. 205, the United States Supreme Court utilized a two-prong test to determine if a school district had complied with the IDEA. First, the district is required to comply with statutory procedures. Second, a court will examine the child's individual education program (IEP) to determine if it was reasonably calculated to enable the student to receive some

educational benefit (*Rowley*, at p. 205; see also, *W.G. v. Bd. of Trustees of Target Range Sch. Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1483 (*Target Range*).

6. The IDEA requires that a due process decision be based upon substantive grounds when determining whether the child received a FAPE. (Ed. Code, § 56505, subd. (f)(1).) A procedural violation therefore only requires a remedy where the procedural violation impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of a FAPE to the parent's child, or caused a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E); Ed. Code, § 56505, subd. (j); *Rowley*, *supra*, 458 U.S. at pp. 206-07; see also *Amanda J. v. Clark County School Dist.* (9th Cir. 2001) 267 F.3d 877.) Procedural violations which do not result in a loss of educational opportunity or which do not constitute a serious infringement of parents' opportunity to participate in the IEP formulation process are insufficient to support a finding that a pupil has been denied a free and appropriate public education. (*Target Range*, *supra*, 960 F.2d at p. 1482.)

7. Procedural errors during the IEP process are subject to a harmless error analysis. (*See M.L., et al., v. Federal Way School District* (9th Cir. 2004) 394 F.3d 634, 650-652 and fn. 9.) (Using the harmless error analysis, the court determined that a defective IEP team was negatively impacted in its ability to develop a program that was reasonably calculated to enable M.L. to receive educational benefits.)

PARENTAL PARTICIPATION IN THE IEP PROCESS

8. A parent is a required and vital member of the IEP team. (20 U.S.C. § 1414 (d)(1)(B)(i); 35 C.F.R. § 300.344(a)(1); Ed Code, § 56341, subd. (b)(1).) The IEP team must consider the concerns of the parent for enhancing his or her child's education throughout the child's education. (20 U.S.C. §§ 1414(c)(1)(B) [during assessments], (d)(3)(A)(i) [during development of IEP], (d)(4)(A)(ii)(III) [during revision of IEP]; 34 C.F.R. §§ 300.343(C) (2)(III) [during IEP meetings], 300.533(a)(1)(i) [during assessments]; Ed. Code, § 56341.1 subds. (a)(1) [during development of IEP], (d)(3) [during revision of IEP], & (e) [right to participate

in an IEP].)

9. In order to fulfill the goal of parental participation in the IEP process, the school district is required to conduct, not just an IEP meeting, but also a meaningful IEP meeting. (*Target Range, supra*, 960 F.2d at p. 1485.) A parent has meaningfully participated in the development of an IEP when she is informed of her child's problems, attends the IEP meeting, expresses her disagreement regarding the IEP team's conclusions, and requests revisions in the IEP. (*N.L. v. Knox County Schools* (6th Cir. 2003) 315 F.3d 688, 693; *Fuhrmann v. East Hanover Bd. of Educ.* (3d Cir. 1993) 993 F.2d 1031, 1036 [parent who has an opportunity to discuss a proposed IEP and whose concerns are considered by the IEP team has participated in the IEP process in a meaningful way].)

10. Parents' procedural right to participate in the IEP process includes the school district's obligation to make a formal written offer that clearly identifies the proposed program. (*Union Sch. Dist. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526.) In *Union*, the Ninth Circuit noted that one of the reasons for requiring a formal written offer is to provide parents with the opportunity to decide whether the offer of placement is appropriate and whether to accept the offer. (*Ibid.*)

PARTICIPATION OF A STUDENT'S PRIVATE SCHOOL TEACHER AT THE IEP MEETING

11. The Ninth Circuit has found that a school district's failure to include a representative from a private school that a child is currently attending violates the procedural mandates of the IDEA. (*Target Range, supra*, 960 F.2d at p. 1484.) In *Shapiro v. Paradise Valley Unified School District No. 69* (9th Cir. 2003) 317 F.3d 1072, 1074) The Ninth Circuit held that failure to include the pupil's private school teacher at the IEP was a FAPE denial. The Court made this finding even though the child had been attending a private school in another state. The *Shapiro* court reasoned that the statute required the teacher of the student be present at the IEP, and even though the child was receiving services in another state, the current teacher of the child was required to attend. (*Id.*)

PARTICIPATION OF A GENERAL EDUCATION TEACHER AT AN IEP MEETING

12. Education Code section 56341, subdivision (b)(2), provides that the IEP team shall include not less than one regular education teacher of the pupil, "if the pupil is, or may be, participating in the regular education environment." The regular education teacher shall, "to the extent appropriate," participate in the development, review, and revision of the pupil's IEP, "including assisting in the determination of appropriate positive behavioral interventions and strategies for the pupil and supplementary aids and services and program modifications or supports" pursuant to 20 U.S.C. § 1414(d). In *M.L., et al., v. Federal Way School District, supra*, 394 F.3d 634, the Court of Appeals for the Ninth Circuit concluded that as long as a general education placement was a possibility, the participation of a general education teacher in the creation of the IEP was required, and the absence of such a teacher constituted a denial of FAPE. In *Clyde K. v. Puyallup School District No. 3* (9th Cir. 1994) 34 F. 3d 1396, the Ninth Circuit found that either a teacher from a student's current placement, or one from his or her proposed placement, was required to participate in the IEP process.

13. Current law expressly permits a parent to waive the participation of a regular IEP team member even if that member's area of curriculum or related services is being modified or discussed at the meeting. However, both of the following must occur: (1) the parent and the local educational agency consent to the excusal after conferring with the IEP team member and (2) the member submits in writing to the parent and the individualized education program team, input into the development of the individualized education program prior to the IEP meeting. The parent's consent must be in writing. (20 U.S.C. § 1414 (d)(1)(C); Ed. Code, § 56341, subds. (g) & (h).)

INDEPENDENT EDUCATIONAL ASSESSMENTS/PUBLIC EXPENSE AND PRIVATE ASSESSMENTS

14. The procedural safeguards of the IDEA provide that under certain conditions a student is entitled to obtain an IEE at public expense. (20 U.S.C. § 1415(b)(1); 34 C.F.R. §

300.502 (a)(1); Ed. Code, § 56329, subd. (b) [incorporating 34 C.F.R. § 300.502 by reference]; Ed. Code, § 56506, subd. (c) [parent has the right to an IEE as set forth in Ed. Code, § 56329; see also, 20 U.S.C. § 1415(d)(2) [requiring procedural safeguards notice to parents to include information about obtaining an IEE].) “Independent educational assessment means an assessment conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question.” (34 C.F.R. § 300.502(a)(3)(i).) To obtain an IEE, the student must disagree with an assessment obtained by the public agency and request an IEE. (34 C.F.R. § 300.502(b)(1), (b)(2).)

15. The provision of an IEE is not automatic. Code of Federal Regulations, title 34, section 300.502(b)(2), provides, in relevant part, that following the student’s request for an IEE, the public agency must, without unnecessary delay, either:

- (i) File a due process complaint to request a hearing to show that its assessment is appropriate; or
- (ii) Ensure that an independent educational assessment is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§ 300.507 through 300.513 that the assessment obtained by the parent did not meet agency criteria.

(See also, Ed. Code, § 56329, subd. (c) [providing that a public agency may initiate a due process hearing to show that its assessment was appropriate].) The public agency may ask for the parent’s reason why he or she objects to the public assessment, but may not require an explanation, and the public agency may not unreasonably delay either providing the independent educational assessment at public expense or initiating a due process hearing. (34 C.F.R. § 300.502(b)(4).) In other words, when a parent requests an IEE, and the district neither files its own due process complaint nor provides the IEE, the burden of proof is on the district to demonstrate that the parent’s privately obtained IEE did not meet agency criteria. (See 34 C.F.R. § 300.502(b)(2)(ii); *Schaffer v. Weast, supra*, 126 S.Ct. at p. 534 [“When we are determining the burden of proof under a statutory cause of action, the touchstone of our inquiry is, of course, the statute.”])

16. If a parent obtains an independent educational assessment at private expense the results of the assessment must be considered by the public agency if the assessment meets agency criteria in any decision regarding the provision of FAPE, and may be presented as evidence at a due process hearing. (34 C.F.R. § 300.502(c)(1)(2).)

BEHAVIORAL ASSESSMENTS

17. In the case of a child whose behavior impedes his learning, or that of others, the IEP team shall consider, if appropriate, strategies, including positive behavior interventions, strategies and supports to address that behavior. (34 C.F.R. § 300.346 (a)(2)(i).) Behavioral intervention plans must be based upon functional analysis assessments and these assessments shall occur only after the IEP team finds that functional/ behavior approaches specified in the Student's IEP have been ineffective. (Cal. Code Regs., tit. 5, § 3052, subd (b).)

TIMETABLE FOR ASSESSMENTS

18. A school district must develop an individualized education program required as a result of an assessment no later than 60 calendar days from the date of receipt of the parent's written consent to assessment, unless the parent agrees in writing to an extension. (Ed. Code, §56043, subd. (d).) The 60 day period does not include days between regular school sessions, terms, or school vacation in excess of five schooldays. (Cal. Code Regs., tit. 5, § 56043, subd. (f)(1)).

ADEQUACY OF DISTRICT'S OFFER OF PLACEMENT AND SERVICES

19. To determine whether the District offered Petitioner a FAPE, the analysis must focus on the adequacy of each district's proposed program. (*Gregory K. v. Longview School District* (9th Cir. 1987) 811 F.2d 1314) If the school district's program was designed to address Petitioner's unique educational needs, was reasonably calculated to provide him some educational benefit, and comported with his IEP, then the District provided a

FAPE, even if Petitioner's parents preferred another program and even if his parents' preferred program would have resulted in greater educational benefit. School districts are also required to provide each special education student with a program in the least restrictive environment, with removal from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily. (20 U.S.C. § 1412, subd. (a)(5)(A); Ed. Code, § 56031; *see Board of Education of La Grange School District v. Illinois State Bd. Of Educ.*, (7th Cir. 1999) 184 F.3d 912.)

IEP

20. The IEP is defined in the IDEA as "a written statement for each child with a disability that is developed, reviewed, and revised in accordance with section 1414(d) of this title." (20 U.S.C. §§ 1401(11) and 1414(d)(1)(A); see also, 34 C.F.R §300.346; *M.L. v. Federal Way School Dist.*, *supra*, 394 F.3d at p.634,642.) A district must make a formal written offer in the IEP that clearly identifies the proposed program. (*Union Sch. Dist. v. Smith* (9th Cir. 1994) 15 F.3d 1519, 1526.) The IEP is the blueprint for successfully formulating and achieving the goal of the IDEA. (*Murray v. Montrose County School Dis.* (10th Cir. 1995) 51 F.3d 921, 925; see also, 20 U.S.C. § 1401(11).) An IEP is evaluated in light of the information available at the time it was developed, and is not to be evaluated in hindsight. "An IEP is a snapshot, not a retrospective." (*Adams v. Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)

21. Federal and state law specify in detail what an IEP must contain. (20 U.S.C. § 1414(d)(1)(A)(i); 34 C.F.R. § 300.347(a); Ed. Code, § 56345.) Those statutes may not be construed to require that something be contained in an IEP beyond that expressly required by the statutes themselves. (20 U.S.C. § 1414(d)(1)(A)(ii); Ed. Code, § 56345, subd. (i).) An IEP must include, in pertinent part, the child's present levels of educational performance, measurable annual goals, the special education, related services, and supplementary aids and services to be provided, as well as a statement of how the child's

progress toward the annual goals will be measured. (20 U.S.C. § 1414(d)(1)(A)(i), (ii), (iii), (vii) (I); 34 C.F.R. § 300.347, subd. (a)(1), (2), (3) & (7)(i); Ed. Code, § 56345, subds. (a)(1), (2), (3) & (9).) Measurable annual goals enable the student, parents, and educators to monitor progress and to revise the IEP consistent with the student's instructional needs. (Appen. A to 34 C.F.R. part 300, Notice of Interpretation, 64 Fed. Reg. 12471 (Mar. 12, 1999).) For preschool children, the IEP must include, where appropriate, the manner in which the student's disability affects his or her involvement and progress in appropriate activities, which suggests that the goals should be geared towards making progress in involvement and making progress in appropriate activities for preschoolers. (20 U.S.C. § 1414(d)(1)(A)(I)(bb); Ed. Code, § 56345, subd. (a)(1)(B).) While the required elements of the IEP further important policies, "rigid 'adherence to the laundry list of items [required in the IEP]' is not paramount." (*Target Range*, supra, 960 F.2d at p. 1484, citing *Doe v. Defendant I* (6th Cir. 1990) 898 F.2d 1186, 1190-1191.) 13.

METHODOLOGY

22. An IEP must also contain a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child. (20 U.S.C. § 1414(d)(1)(A)(i)(IV), Ed. Code, § 56345, subd. (a)(4).) As long as a school district provides an appropriate education, methodology is left up to the district's discretion. (*Rowley*, supra, 458 U.S. at p.208.) This rule has been applied in situations involving disputes regarding methodologies for educating children with autism. (See *Adams*, supra, 195 F.3d at p.1141, 1149; *Pitchford v. Salem- Keizer Sch. Dist.* (D.Ore. 2001) 155 F.Supp.2d 1213, 1230-32; *T.B. v. Warwick Sch. Comm.* (1st Cir. 2004) 361 F.3d 80, 84.) Courts are ill-equipped to second-guess reasonable choices that school districts have made among appropriate instructional methods. (*T.B.*, supra, 361 F.3d at p. 84.) In *Adams*, parents of a toddler with autism

sought a one-on-one, 40 hour per week ABA/DTT¹⁷ program modeled after the research of Dr. O. Ivar Lovaas. In that case, the Ninth Circuit Court of Appeal explained:

Neither the parties nor the hearing officer dispute the fact that the Lovaas program which Appellants desired is an excellent program. Indeed, during the course of proceedings before the hearing officer, many well-qualified experts touted the accomplishments of the Lovaas method. Nevertheless, there are many available programs which effectively help develop autistic children...IDEA and case law interpreting the statute does not require potential maximizing services. Instead the law requires only that the IFSP in place be reasonably calculated to confer a meaningful benefit on the child. (Adams, supra, 195 F. 3d at pp. 1149-1150.)

LEAST RESTRICTIVE ENVIRONMENT WITH PRESCHOOL PLACEMENT OPTIONS

23. School districts are also required to provide each special education student with a program in the least restrictive environment (LRE), with removal from the regular education environment occurring only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services could not be achieved satisfactorily. (20 U.S.C. § 1412 (a)(5)(A); Ed. Code, § 56031.)

24. The courts have considered the following factors in determining whether a proposed placement satisfies LRE requirements: 1. Educational benefit available to the student in a regular classroom setting, supplemented with appropriate aids and services, compared to educational benefits of a special education classroom; 2. Nonacademic

¹⁷ DTT is the acronym for discrete trial training.

benefits to the disabled child of interaction with nondisabled children; 3. The effect of the presence of the disabled child on the teacher and other children in the regular education classroom; and 4. The costs of supplemental aids and services necessary to mainstream a disabled student in a regular classroom setting. (*Sacramento City Unified School District v. Rachel Holland* (9th Cir 1992) 786 F.Supp. 879.)

25. School Districts are not compelled to establish a preschool program for typical children just to provide peer interaction for pupils with special needs. Where Districts do not operate regular preschool programs the Office of Special Education Policy has taken the position that the obligations to provide placement with typical children can be satisfied by considering alternative methods for meeting the child's unique needs in the least restrictive environment, including:

- (1) providing opportunities for the participation (even part-time) of preschool support children with disabilities in other preschool programs operated by public Agencies, such as Head Start;
- (2) placing children with disabilities in private school programs for nondisabled preschool children or private preschool programs that integrate children with disabilities and nondisabled children; and
- (3) locating classes for preschool children with disabilities in regular Schools.

Letter to Neveldine Office of Special Education Interpretive Letter (May 28, 1993), 20 IDELR 181 (*citing Note to 34 Code of Federal Regulations 300.552*)

PRIOR WRITTEN NOTICE

26. A school district must provide parents with prior written notice when it refuses to initiate or change the identification, assessment, or educational placement of a child or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(3).)

DETERMINATION OF ISSUES

Based on the factual findings and applicable law, it is determined as follows:

Issue 1: Whether District failed to appropriately respond to Mother's request for independent assessments at public expense.

27. As is stated in Legal Conclusions 5 through 7 and 14 through 15, Student is entitled to independent educational assessments at public expense in OT and LAS. Based upon Factual Findings 8 through 13, District did fail to appropriately respond to Mother's request for an IEE. As is further stated in Legal Conclusion 6 and Factual Finding 14, District's conduct did not deny Student a FAPE.

Issue 2: Whether District failed to appropriately respond to Mother's request for a behavioral assessment.

28. As is stated in Legal Conclusions 5 through 7 and 17, and Factual Finding 17. District appropriately responded to Mother's request for a behavioral assessment. As further set forth in Legal Conclusion 7, and Factual Finding 17, District's failure to provide a behavioral assessment did not deny Student a FAPE.

Issue 3: Whether District failed to timely conduct an audiological assessment.

29. As is stated in Legal Conclusions 5 through 7 and 18, and based upon Factual Findings 18-20, District's delay in conducting the audiological request was excusable. District did not deny Student a FAPE for its delay in completing the audiological assessment.

Issue 4(A): Whether District failed to offer a (FAPE) as of January 10, 2006, in formulating Student's individualized Education Program (IEP) due to procedural violations that included District's failure to involve Parent in the development of the IEP.

30. As set forth in Legal Conclusion 6 through 7, a procedural violation requires a remedy where the procedural violation impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of a FAPE to the parent's child, or caused a deprivation of educational benefits. Based upon Factual Findings 22 through 63, District did not deny Student a FAPE.

Issue 4(B): Whether District failed to offer a free and appropriate public education

(FAPE) as of January 10, 2006, in formulating Student' individualized Education Program (IEP) due to procedural violations in formulating Student's IEP that included District's failure to include a private school teacher as a necessary team member.

31. As is stated in Legal Conclusions 1 through 13, and based upon Factual Findings 42 through 45, the absence of Student's private school teacher did not deny Student a FAPE.

Issue 4(C): Whether District failed to offer a free and appropriate public education (FAPE) as of January 10, 2006, in formulating Student's individualized Education Program (IEP) due to procedural violations in that included District's failure to include a Head Start teacher as a necessary team member.

32. As is stated in Legal Conclusions 12 through 13, a general education teacher must participate in the IEP team meeting, unless there is a written waiver, or her absence is harmless error because it did not affect parent's right to meaningfully participate in the IEP or result in the denial of educational benefits. Based upon Factual Findings 46 through 48, the absence of the Head Start teacher did not deny Student a FAPE.

Issue 4(D): Whether District failed to offer a free and appropriate public education (FAPE) as of January 10, 2006, in formulating Student's Individualized Education Program (IEP) due to procedural violations in that included District's failure to consider the findings of Mother's private experts.

33. As is stated in Legal Conclusions 5 through 7 and 16, and based upon Factual Findings 49 through 50, District considered the findings of Mother's private experts.

Issue 4(E): Whether District failed to offer a free and appropriate public education (FAPE) as of January 10, 2006, in formulating Student's individualized Education Program (IEP) due to procedural violations in that included District's failure to clearly delineate the specific times and location and manner of delivery of services.

34. As is stated in Legal Conclusions 1 through 13 and Factual Findings 51

through 59, District clearly delineated the specific time and location and manner of delivery of services.

Issue 4(F): Whether District failed to offer a free and appropriate public education (FAPE) as of January 10, 2006, in formulating Student's individualized Education Program (IEP) due to procedural violations in that included District's failure to provide prior written notice.

35. As is stated in Legal Conclusions 26 and Factual Findings 60 through 62 District provided prior written notice.

Issue 5(A): Whether District failed to substantively offer a FAPE as of January 10, 2006, in the least restrictive environment, by offering Student a placement in its preschool SLDA special day class when it failed to provide appropriate behavior, speech and transition services.

36. As is stated in Legal Conclusions 1-4, 19-25 and Factual Findings 64 through 88, District's offer of services provided Student a FAPE.

Issue 5(B): Whether District failed to substantively offer a FAPE as of January 10, 2006, in the least restrictive environment, by offering Student a placement in its preschool SLDA special day class that did not provide a placement which afforded Student typical peer interaction.

37. As is stated in Legal Conclusions 23 through 29 and Factual Findings 84 through 87, District's offer afforded Student typical peer interaction in the least restrictive environment.

ORDER

1. Student is entitled to independent educational assessments in occupational therapy and speech and language at public expense. Independent assessments must be completed within ninety days of this decision or shall be deemed waived.

2. Student's other requests for relief are denied.

PREVAILING PARTY

Education Code section 56507, subdivision (d), requires that this Decision indicate the extent to which each party prevailed on each issue heard and decided in this due process matter. Pursuant to this mandate, it is determined that the Student prevailed on Issue 1. District prevailed on Issues 2, 3, 4(A), 4(B), 4(C), 4(D), 4(E), 4(F), and Issue 5(A) and 5(B).

RIGHT TO APPEAL THIS DECISION

This is a final administrative decision, and all parties are bound by this Decision. Pursuant to Education Code section 56505, subdivision (k), any party may appeal this Decision to a court of competent jurisdiction within ninety (90) days of receipt.

DATED: April 10, 2007



EILEEN M. COHN

Administrative Law Judge

Office of Administrative Hearings

Special Education Division