

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

In the Matter of:

STUDENT,

Petitioner,

v.

FREMONT UNIFIED SCHOOL DISTRICT,

Respondent.

OAH CASE NO. N 2006110101

DECISION

Administrative Law Judge (ALJ) Peter Paul Castillo, Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter in Oakland, California on September 4-5 and 11, 2007, and in Fremont, California on September 6-7, 2007.

Susan Foley, Attorney at Law, represented Student. Linda Hughes, Education Advocate, assisted Ms. Foley during the hearing. Damara L. Moore, Attorney at Law, represented the Fremont Unified School District (District).

Student's Father was present during the entire hearing. Student's Mother was present on September 4, 6 and 7, 2007. Also present throughout the hearing was Jack Bannon, District's Special Education Program Director. Charlene Okamoto, District's Special Education Assistant Director, was present the afternoon of September 6, 2007.

On November 6, 2006, Student filed his request for due process hearing. OAH granted a request to continue the hearing on November 22, 2006. At the close of the hearing, the parties requested time for written argument. The parties filed their closing briefs on October 1, 2007, and the matter was submitted that day.

## ISSUES<sup>1</sup>

1. For the 2005-2006 school year, did the District:
  - A. Fail to fulfill its child find obligations to identify, locate, and evaluate Student?
  - B. Fail to develop a proposed assessment plan within 15 days of Student's assessment request and hold a timely Individualized Education Program (IEP) meeting?
2. Did the District deny Student a free and appropriate public education (FAPE) during the 2006-2007 school year by:
  - A. Failing to develop an IEP that contained appropriate, objective and measurable goals, and were related to Student's present levels of academic and functional performance?
  - B. Failing to meet Student's unique needs for an in-home Applied Behavioral Analysis (ABA) program, occupational therapy (OT) to address his fine and gross motor deficits, and speech and language therapy to address his articulation deficits?
  - C. Predetermining the offer of Student's placement and services prior to the September 6, 2006 IEP team meeting and failing to consider the results of an independent educational evaluation by Michael Jones, Ph.D., which interfered with Parents' opportunity to participate in the decision-making process?<sup>2</sup>

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<sup>1</sup> These issues are those framed in the August 24, 2007 Order Following Prehearing Conference. The ALJ has slightly reorganized the issues by consolidating Student's challenge of the District's proposed goals into a single issue.

<sup>2</sup> Student argued in his closing brief that District denied him a FAPE by failing to make a clear and concise offer of services and placement at the September 6, 2006 IEP meeting, and not permitting Parents to inspect possible preschool placements before the

## REQUESTED REMEDIES

Student requests reimbursement for the private home ABA program, and speech and language and OT services Parents have provided him. Student requests for the 2007-2008 school year a 30 hour per week ABA home program with three hours per month ABA consultation and six hours per month of ABA supervision.

## CONTENTIONS OF THE PARTIES

Student asserts that the District failed to timely locate and serve Student as a child who may need special education services, and did not provide Parents with a timely assessment plan after Parents requested an assessment. The District asserts that its failure to timely provide the assessment plan did not interfere with Parents' ability to participate in the educational decisionmaking process because it timely completed Student's assessments and timely held an IEP team meeting.

Student also contends that the District's September 6, 2006 IEP did not provide Student a FAPE because Student required an intensive ABA program at home due to his significant cognitive, speech and language, sensory processing, fine and gross motor, and pre-academic skills deficits. Student asserts that the District's proposed placement in the Special Day Class (SDC) for autistic preschool children did not meet his unique needs because of its eclectic methodology. Student also argues that the IEP failed to offer adequate speech and language, OT and consultative services to meet his unique needs. Student contends that the District did not offer adequate goals in the areas of academics, speech and language, social skills, gross and fine motor skills, and behavior. Student

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September 6, 2006 IEP meeting. However, Student did not allege these as issues for hearing in the November 6, 2006 due process complaint or Student's prehearing conference statements. Therefore, these issues cannot be heard and decided here. (Ed. Code, § 56502, subd. (i).)

contends that the District did not base its proposed goals, related services and placement on the assessment information before the IEP team, and that the goals are not objective or measurable. Finally, Student contends that the District predetermined his placement and goals before the September 6, 2006 IEP team meeting, and did not consider information presented by Student's IEP team members.

The District contends that its offer of placement and services in the September 6, 2006 IEP is reasonably calculated to provide Student a FAPE. The District asserts that the proposed SDC placement would provide Student with intensive services reasonably calculated to meet Student's significant academic, speech and language, and social skills needs. The District argues that its goals are adequate and measurable in light of the short-term objectives they contain. The District also asserts that it did not predetermine Student's placement before the first IEP meeting, and that it revised the proposed goals based on information from Student's IEP team members.

## FACTUAL FINDINGS

### BACKGROUND

1. Student, born November 22, 2002, lives with his Parents within the District boundaries. The parties agree that Student is eligible for special education services under the criteria of Autistic-Like Behaviors based on the parties' assessments. Student has never attended a school operated by the District.

### CHILD FIND

2. The term "child find" refers to a school district's affirmative, ongoing obligation to identify, locate, and assess all children residing within its jurisdiction who are suspected of having disabilities and who may need special education as a result of those disabilities. Specifically, if the District had reason to suspect that Student had a disability and that he may have needed special education and services to address his disability, the

District would have had an obligation to assess him, as a first step in providing a FAPE. The relevant inquiry is whether the child should be assessed, not whether the student will ultimately qualify for services. The failure to assess is a procedural violation of IDEIA.

3. The District did not have a reason to suspect that Student had a disability and might need special education services before receiving Father's April 17, 2006 letter. Student did not attend preschool or receive Early Start or any other Regional Center service, which might have put the District on notice that he might have a disability before April 17, 2006. Although the District knew that Student might possibly require special education services shortly after April 17, 2006, and failed to timely commence the assessment process, the District did not deny Student any education benefit and did not significantly impede Parents' ability to participate in Student's educational decisionmaking process. As discussed below, the District completed the assessment process and held a timely IEP meeting to discuss Student's eligibility and the District's offer of services and placement.

#### TIMELINESS OF THE DISTRICT'S PROPOSED ASSESSMENT PLAN

4. Before a school district takes any action with respect to the initial placement of a student with exceptional needs in special education, the district must conduct an individual assessment of a student's educational needs, which the district shall document. The district must deliver an assessment plan to a parent within 15 days of the assessment request. An IEP meeting to review the assessment results must occur within 60 days of the receipt of parental consent for the assessment, not counting days between the student's school sessions and vacations in excess of five schooldays. If the IEP team determines that the student is eligible for special education services, the district must convene an IEP meeting within 30 days to develop a proposed placement and services for the student's initial IEP.

## Parents' Assessment Request

5. The parties dispute whether Father sent a request for an initial assessment to the District on April 17, 2006 or May 11, 2006. Father stated that he mailed a letter to Mr. Bannon on April 17, 2006, requesting that the District assess Student because he exhibited significant communication and social delays. The District claimed that it never received Father's April 17, 2007 letter, and that it first became aware of Father's assessment request on May 11, 2006, when Father faxed a cover letter and a copy of the April 17, 2006 letter to the District.<sup>3</sup>

6. Father credibly testified that he wrote the assessment request letter, using language from a form letter from a parent support group, and mailed it to Mr. Bannon's attention on Monday, April 17, 2006. The District contended that Father could not have mailed the letter on April 17, 2006, because the District has no record of its receipt. However, the District was on Spring Break when Father mailed the letter, and did not return until April 24, 2006. Mr. Bannon stated that he first saw Father's April 17, 2006 letter on May 11, 2006. Mr. Bannon and his secretary then searched the District's special education office for the original letter, but could not find it. The fact that the District could not find Father's letter does not mean that Father did not send the letter on April 17, 2006 as Father credibly testified to writing and mailing the letter. Therefore, the evidence established that Father mailed the request for a special education assessment on April 17, 2006.

7. Even if the District received Father's assessment request as late as May 11, 2006, the District was required to provide Parents an assessment plan by May 26, 2006. However, the District did not send the assessment plan until June 20, 2006. It began planning for Student's assessment on May 12, 2006, when the District telephoned Father

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<sup>3</sup> While the cover letter is dated May 10, 2006, the facsimile transmittal information established that the District received Father's fax on May 11, 2006.

to ask background questions about Student, and the areas of suspected disability. Mr. Bannon's office forwarded Father's correspondence and the Child Find Questionnaire to the District's Preschool Assessment Team.

8. Diane Dooley is a District Education Specialist and Autism Coordinator for preschool age children. Ms. Dooley has had this position since 2000, and she had the responsibility to develop Student's assessment plan. Ms. Dooley admitted that she did not develop Student's assessment plan until June 20, 2006. Ms. Dooley stated that she delayed sending the assessment plan to Parents because the end of the school year is a busy period for the District's Preschool Assessment Team, and the District could still timely assess Student and hold an IEP meeting even if the plan was delayed. Ms. Dooley drafted the assessment plan after Timothy A. Adams, Student's then attorney, wrote Mr. Bannon on June 15, 2006, inquiring about the assessment request. Mr. Bannon forwarded Mr. Adams's letter to George Anich, the District's then Coordinator Special Services, Early Childhood.

9. On July 3, 2006, Mr. Adams faxed a letter to Mr. Bannon stating that Parents were making a unilateral private placement to provide Student with ABA, OT and speech and language services due to the District's failure to timely refer Student for an assessment. Parents had not signed and returned the assessment plan by the time of Mr. Adams's letter. Mr. Bannon responded to Mr. Adams on July 5, 2006, and offered to assess Student on July 13, 2006. Parents signed and returned the assessment plan on July 10, 2006.

10. The District conducted its psychoeducational and speech and language assessments on July 13 and 14, 2006, and the OT assessment on August 30, 2006. The District held Student's initial IEP team meeting on September 6, 2006, to determine Student's eligibility for special education services, and to make an offer of services and placement for the 2006-2007 school year (SY) and 2007 Extended School Year (ESY).

11. Father mailed the assessment request on April 17, 2006. Because the District was on Spring Break from April 14 through 23, 2006, the 15 day period for the District to

provide Parents an assessment plan started on April 24, 2006, when the District would have received the assessment request. The District had until May 9, 2006, to provide the plan. Even if Parents had signed and returned the assessment plan the same day, the District had until September 19, 2006, to hold Student's initial IEP team meeting regarding his eligibility. The District had until September 19, 2006, because the 60 day time period did not include the days between school sessions and vacations in excess of five schooldays, which includes the District's summer break, from June 16, 2006 through August 29, 2006. By holding the IEP meeting on September 6, 2006, the District assessed Student and held a timely initial IEP meeting to discuss Student's eligibility and the District's offer of services and placement. Therefore, while the District did not timely provide Parents with an assessment plan, the District still held a timely IEP meeting.

#### Parents' Ability to Participate in Student's Educational Decisionmaking Process

12. A school district must comply both procedurally and substantively with the Individuals with Disabilities Education Improvement Act (IDEIA). While not every procedural flaw constitutes a denial of FAPE, one that impedes a student's right to receive a FAPE, significantly impedes a parent's opportunity to participate in the IEP process, or causes a deprivation of educational benefit to a student, constitutes a denial of FAPE.

13. While the District did not timely provide Parents an assessment plan, the District did timely hold Student's initial IEP team meeting to determine Student's initial eligibility and to make an initial offer of placement and services. Student did not establish that the District's delay significantly impeded Parents' ability to meaningfully participate in Student's educational decisionmaking process. Additionally, because the District timely held the IEP meeting, Student's right to receive a FAPE was not impeded and he was not deprived of any educational benefit. Therefore, the District's failure to timely provide Parents an assessment plan did not deny Student a FAPE.



## OFFER OF FAPE

14. Student asserted that the District did not have complete information regarding Student's abilities, which would have shown that Student needed a home ABA program. Therefore, Student argued, the District's offer of services, placement and proposed goals was not rationally related to Student's actual present levels of performance, unique needs, and readiness to learn in a group environment. A school district must offer a student eligible for special education an IEP that is reasonably calculated to afford her some educational benefit.

## UNIQUE NEEDS

### Psychoeducational Assessment

15. Gang Julie Xie, Ph.D., has worked as a school psychologist for the District since August 2000, except for the SY 2002-2003 when she was a school psychologist for another school district. Dr. Xie is a licensed educational psychologist and has a pupil personnel services credential, with a specialization in school psychology. Dr. Xie conducted her assessment on July 13, 2006. She administered the Wechsler Preschool and Primary Scale of Intelligence-Third Edition (WPPSI-III) and the Differential Ability Scales (DAS), and interviewed Parents to complete the Developmental Profiles-II (DP-II) and Gilliam Autism Rating Scales (GARS). Dr. Xie also observed Student during the other District assessments.

16. Dr. Xie did not know before she began her assessment that in March 2006, Michael Jones, Ph.D., had diagnosed Student as having an autism spectrum disorder. Parents did not share this information with the District's Preschool Assessment Team during any parent interview. Mr. Adams's June 15, 2006 letter to Mr. Bannon provided this information, but that letter was never relayed to the District's Preschool Assessment Team. The District's Preschool Assessment Team did not obtain Dr. Jones's assessment report until the evening before the September 6, 2006 IEP meeting.

17. As part of the assessment process, Parents completed the Preschool Assessment Team's Parent Questionnaire on July 13, 2006, and disclosed that they were providing home ABA services to Student. The District did not ask Parents for information regarding these ABA services until the September 6, 2006 IEP meeting. The information that Dr. Xie presented in her report came from her testing, observations and information provided by Parents, and did not include or consider any information from Dr. Jones's report.

18. Dr. Xie could not obtain a score measuring Student's cognitive ability due to Student's inability to follow directions. Dr. Xie attempted to administer the WPPSI-III Object Assembly subtest because preschool children are normally very interested in using manipulatives. However, she could not administer this subtest due to Student's inability to follow directions, even with Mother's assistance. Dr. Xie did not attempt to administer other WPPSI-III subtests due to Student's language delays.

19. Dr. Xie administered the DAS, which is a non-verbal test designed to measure the cognitive abilities of a child from 2 and one-half through 17 years old. She had trouble administering this test due to Student's difficulty in following directions. Dr. Xie noted that Student could follow some directions that had concrete cues. She observed that Student required instructions to be broken down into small steps. On the DAS subtests that Dr. Xie could administer, Block Building and Picture Similarities, Student scored in the first percentile, placing him in the deficient range. However, Dr. Xie believed that Student's scores were not indicative of his cognitive abilities due to his inability to follow directions stemming from his joint attention and language deficits, which depressed his scores. Dr. Xie believed that a better reflection of Student's cognitive abilities could be obtained after Student received special education and services, and improved his ability to be tested.

20. To measure Student's adaptive functioning skills, Dr. Xie completed the DP-II by interviewing Parents. The DP-II results indicated that Student had significant delays in

all areas of adaptive functioning, including, physical development, self-help and social development. Dr. Xie found that Student's physical skills were approximately at an age equivalent of 20 months. Student could not jump, hop, or ride a tricycle, which are gross motor skills. In testing for fine motor skills, Student had trouble properly holding scissors and did not copy shapes. Student was approximately at an age equivalent of 18 months in self-help. In his social development, Student's skills were about those of a 16 month child due to his difficulty in communicating with others. Parents noted that Student showed interest in other peers in a playgroup setting and would approach them and tap them on their shoulders. However, Student had difficulty in sustaining interaction with other children, and was rarely interested in toys and games typical for his age.

21. Dr. Xie administered the GARS because her observations and testing indicated that Student exhibited possible signs of autism, such as inability to make eye contact and lack of social and communicative skills. The GARS looks for stereotypical behaviors in individuals with autism spectrum disorder, and is normed on children diagnosed with Autism Spectrum Disorder. Dr. Xie obtained data for the GARS through a parent interview. According to Parents, Student exhibited stereotypical autistic behaviors, such as failure to make eye contact with others, self-stimulatory vocalizations and spinning. Student also lacked expressive and receptive language skills, rarely imitated others when playing, lacked emotional response and seldom initiated play with others. Dr. Xie noted that Student had an Autism Quotient score of 91, which is in the average range of probability for autism.

#### Pre-Academic Skills

22. Education Specialist and Autism Coordinator Dooley administered the Psychoeducational Profile-Revised (PEP-R) to measure Student's readiness for preschool on July 13, 2006. Ms. Dooley has worked with autistic children for 25 years in the educational field, and received extensive training regarding the education of autistic children. She has the education, training and experience to conduct the PEP-R, which she

has administered about 600 times in the past seven years. The PEP-R inventories behaviors and developmental skills and compares the child's performance against other children. It examines a student's functioning in the areas of imitation, perception, and fine motor, gross motor, eye-hand coordination, cognitive performance and cognitive verbal skills.

23. The PEP-R results showed that Student's ability to imitate the conduct or verbalizations of others was extremely weak and at the age equivalent of 13 months, as he was 45 months old. His ability to imitate sounds and single step gross motor functions was emerging. Student's perception score, which measured his reaction to noise, visual tracking skills, and awareness of colors, shapes and sizes, placed him at 17 months. Student reacted appropriately to a variety of noises, looked for hidden items, and could track items across the midline.<sup>4</sup> Student was not able to match primary colors, wooden blocks or colored discs.

24. Student's fine and gross motor skills were areas of relative strength, as Student's developmental age was 25 months and 24 months respectively. In eye-hand integration, which involves the ability to stack, scribble and thread, Student had a developmental age of 20 months. Student could stack blocks and put blocks in a box, and could scribble spontaneously, but was not able to copy a vertical line.

25. Student's cognitive performance on tasks such as understanding language and his ability to complete tasks such as sorting and matching, placed Student at the age equivalent of 14 months. Student's verbal performance placed him at 17 months. Student's ability to imitate sounds and single words was emerging, which indicated a significant deficit. However, Student was not able to give his name when requested, was

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<sup>4</sup> Crossing the midline involves the ability to use the left and right brain hemispheres simultaneously. Examples of this ability are picking up a ball on the left side of one's body with the right hand and being able to track a pencil with one's eyes as the pencil goes from left to right and back again without moving one's head.

unable to count and was unable to name pictures of common objects. Student's composite PEP-R scores showed a developmental age of 18 months.

#### Speech and Language Assessment

26. Anne Nakai conducted the District's speech and language assessment on July 13, 2006, when Student was 45 months old. Ms. Nakai has been as a speech-language pathologist for the District for the past nineteen years. From September 1994 through September 2001, Ms. Nakai worked as a teacher in a special day classroom for communicatively handicapped preschool children. Ms. Nakai has been a member of the District's preschool assessment team since October 2001, and has provided direct speech and language services and consultation services to preschool children. She has extensive training and experience in working with and assessing autistic children.

27. Ms. Nakai attempted to administer the Expressive One-Word Picture Vocabulary Test, which is a test of vocabulary that asks the child to name common nouns, action verbs and category within given pictures. Ms. Nakai could not administer this test because Student could not attend or follow directions.

28. To measure Student's expressive language, Ms. Nakai had Parents complete the Rescorla Vocabulary Checklist, which revealed that Student used 49 of the listed words at home. The results placed Student's expressive language ability in the age range between 18 months and two years. Ms. Nakai did not test Student's receptive language because Student lacked the ability to point to the correct picture. Student's Mother reported that Student understood words related to clothing, body parts, dressing and food.

29. Ms. Nakai administered the Preschool Language Scale-4 (PLS-4), which showed that Student had severe delays in understanding and using language. Student could not use enough spontaneous language to complete the sample of 50 sentences. Student used only one-word sentences when children his age should have three- to four-word sentences. In tests of pragmatic and social language, Student did not use facial

expressions or gestures, and made limited eye contact when spoken to or when he made a request. Ms. Nakai noted that Student's speech was fairly intelligible and his voice, pitch and intensity were proper for his age. Ms. Nakai reported that on the auditory comprehension subtests Student's scores placed him in the first percentile, at an age equivalent of 10 months. On the expressive communication subtests, Student was in the first percentile, at an age equivalence of 21 months.

30. Ms. Nakai stated that Student's main areas of need were language comprehension, ability to use language, and pragmatic and social communication skills. Ms. Nakai recommended that Student receive speech therapy in an individual, group and classroom setting due to his significant deficits.

#### Occupational Therapy Assessment

31. Parents did not request that the District conduct an OT assessment or indicate that Student had deficits in this area before the District's assessment plan was developed on June 20, 2006. Mr. Adams first informed the District of Student's possible OT needs in his July 3, 2006 letter to Mr. Bannon, which stated that Parents were unilaterally obtaining private OT services. However, Mr. Bannon did not forward this information to the District's Preschool Assessment Team, which did not know that Student could possibly need OT services until it saw the completed July 13, 2006 Parent Questionnaire. Parents stated on the questionnaire that they were providing Student OT services at home. The District subsequently scheduled an OT assessment for August 30, 2006.

32. Shanti Malladi conducted the District's OT assessment. Ms. Malladi has Bachelor of Science in OT, and has worked as an occupational therapist with the District since 2001. Ms. Malladi has extensive experience in assessing, providing OT services to, and training autistic students. Ms. Malladi's assessment consisted of a parent interview, observation of Student, and administering the Peabody Developmental Motor Scales-Second Edition (PDMS-II) and the Winnie Dunn Sensory Profile (WDSP).

33. Ms. Malladi knew at the time she conducted her assessment that Student had received private OT services from the Pacific Autism Center for Education (PACE) since June 2006. Ms. Malladi requested that Parents fax her reports from PACE so she could include that information in her report. Ms. Malladi did not receive any PACE reports before she completed her report for the September 6, 2006 IEP meeting.

34. Mother told Ms. Malladi that her major concerns were Student's constant need to move around and his fine motor skills. Mother did not tell Ms. Malladi that Student was acutely sensitive to sound and needed a sensory-neutral learning environment due to his auditory distractibility.

35. During her observations, Ms. Malladi noted that Student had deficits in gross motor skills. Student exhibited a slight delay in his equilibrium and protective responses, and in his balance and posture. Ms. Malladi noted that Student's functional skills, such as walking, running, using play equipment and playing catch, were emerging as Student had difficulty with motor planning. Ms. Malladi observed that his fine motor skills in writing with a crayon and stringing one centimeter beads were also emerging. At Student's age, these skills should have been more developed, and not just emerging.

36. Ms. Malladi observed that Student had sensory processing deficits, as he displayed some overreaction to touch. Additionally, Student's proprioceptive processing, which is the ability to process information from one's body about one's body position, where the body is going and the amount of force to be used, was below normal. Student consistently sought out sensory inputs, such as by jumping or crashing into things. In vestibular processing, which is the ability to maintain balance, Student's posture and balance were slightly below normal for his age.

37. The PDMS-II measures a child's gross and fine motor skills, and is normed for children between the ages of three and five. Ms. Malladi administered the PDMS-II to examine whether Student possessed skills needed for school. Student's ability to manipulate objects was in the second percentile, at an age equivalent of approximately 20

months, and Student's ability to grasp items was in the first percentile, at 11 months. Student's visual motor integration skills, which coordinate motor movements with visual inputs, were in the first percentile and at 10 months. Finally, Student's locomotion skills, the ability to move from one location to another, were in the first percentile and at 16 months.

38. Mother's answers on the WDSP questionnaire showed that Student's biggest areas of weakness involved his underresponsiveness to sensations and seeking them out. Based on the WDSP, Student had lesser but still significant deficits in his ability to filter out auditory inputs, and had low energy, which is related to the additional effort Student exerted to process sensory information.

39. Based on their assessment findings, the District's Preschool Assessment Team, recommended that Student qualify for special education services in the category of Autistic- Like Behaviors. Student's manifestations of Autistic-Like Behaviors existed but were not severe. Student did not have an obsession to maintain sameness, as Student reacted well to change and different persons during the assessment. Student also sought out social interaction with his Parents and others when he became comfortable around new persons. Student had a vocabulary of approximately 50 words and could express himself with single words. Student did not excessively perseverate on items during the assessment or according to parental information. Finally, Student did not exhibit significant aberrant behaviors, as he was compliant during the District's assessments, and his temper tantrums were short in length and low in intensity. Student had significant deficits in expressive, receptive and pragmatic language skills, sensory integration and fine motor skills, which were related to his autism spectrum disorder.

40. At the IEP team meeting on September 6, 2006, the parties' assessors presented their findings. The team members agreed that Student was eligible under the criteria of Autistic-Like Behaviors. The District team members presented the proposed goals. The District offered Student a 30 minute individual speech and language session,



twice a week; 45 minutes per week of individual pull-out OT services; and a play group session for 30 minutes once a week. The District's offer of placement was at its preschool class for autistic students at Glankler, five days per week, five hours per day, which included five hours per week of ABA services. The District proposed a two week period to transition Student from his private home ABA provider, Sí Se Puede Behavioral Intervention (SSP), to the District's preschool class.

41. Parents did not consent to any portion of the District's September 6, 2006 IEP offer because they believed that based on their private assessments from Dr. Michael Jones and Felicia Lopez-McCarthy that Student lacked the requisite pre-academic, speech and language and social skills to attend preschool, and instead required one-to-one ABA instruction at home. Parents now assert that due to Student's extreme distractibility to noise, Student required instruction at home where distractions could be minimized. Finally, Parents contend that the only proven methodology to educate a child with Student's deficits was a 35 to 40 hour per week home ABA program.

#### Dr. Michael B. Jones's Psychoeducational Assessment Findings

42. Michael B. Jones, Ph.D., is a licensed clinical psychologist whose practice for the past 25 years has focused on child psychology. Dr. Jones has testified as a court-appointed expert in numerous child protective service, divorce, and juvenile court proceedings. Dr. Jones also assesses children for possible autism spectrum disorder and is a lead clinician for the Early Autism Diagnostic Clinic for Valley Mountain Regional Center.

43. Dr. Jones assessed Student on May 1 and 2, 2006. As part of his assessment, Dr. Jones interviewed Parents and had Parents complete the Conners' Rating Scale-Revised (CRS-R), the Modified Checklist of Autism in Toddlers (MCHAT), and the Pervasive Developmental Disorder Screening Test-II (PDDST-II). Dr. Jones interviewed Mother for the Vineland Adaptive Behavior Scales-II (VABS-II) parental survey. He observed Student and attempted to administer the Merrill-Palmer Scale of Mental Tests (Merrill-Palmer). Dr. Jones also reviewed parental notes regarding Student's development from November

2005 through January 2006, and a home video depicting Student's interaction with family members. Dr. Jones issued a report on May 20, 2006.

44. Dr. Jones could not measure Student's cognitive abilities by administering the Merrill-Palmer to Student due to Student's inability to focus and follow directions resulting from his expressive and receptive language deficits. Of the test portions that Dr. Jones could administer, Student scored in the 18 to 23 month range for throwing a ball and in the 24 to 29 month range for repeating two out of four single words, and repeating four out of four single words. Although Dr. Jones could not obtain an overall score on the Merrill-Palmer, based on the successful portions of his assessment Dr. Jones characterized Student's cognitive level at around 18 months' age equivalency.

45. The MCHAT and PDDST are screening tools for autism spectrum disorder, and examine if a child has behaviors associated with autism spectrum disorder. Both the MCHAT and PDDST results showed that Student had numerous behaviors associated with autism spectrum disorder, such as not making eye contact with others, not responding when spoken to, being uninterested in his surroundings, and not engaging in pretend play. Dr. Jones used the CRS-R to measure different domains of Student's behaviors. He noted that assessors typically use the CRS-R to test for the presence of Attention Deficit Hyperactivity Disorder, but that he used the CRS-R to quantify the levels of Student's behaviors, especially inattentiveness. Student's CRS-R scores were within normal limits. Dr. Jones questioned the validity of these scores due to Student's developmental levels, but did not explain why Student's developmental level created uncertainty regarding the scores.

46. During his observation, Dr. Jones noted that Student engaged in considerable self-stimulatory behavior through repetitive vocalizations, and preferred to play by himself. Dr. Jones noted that Student spontaneously imitated simple, preferred activities with Mother, such as singing part of a song, and attempted to initiate social interaction with Dr. Jones. Dr. Jones saw Student as a social child who sought out social

interactions. He observed that Student had good social imitation skills, but did not make eye contact or engage in joint attention or joint referencing. Dr. Jones did not note in his report or his testimony that Student was extremely distractible by sound or other people.

47. The VABS-II is designed to measure a student's adaptive functioning. Student's overall composite score was 61, which placed him in the low to deficient range. In the communication domain, Student's receptive language skills were at the age equivalence of 12 months and his expressive language skills at 17 months. In tests of daily living skills, Student's personal, domestic and community skills were at 20 months, 22 months and 28 months respectively. In socialization, Student's interpersonal relationship skills were at 13 months, play at 11 months and coping skills at 22 months.

48. Dr. Jones's report stated that Student met the Diagnostic and Statistical Manual of Mental Disorders IV-Revised definition of autism spectrum disorder. Dr. Jones recommended that Student receive an intensive home-based ABA program for 35 to 40 hours per week. Dr. Jones stated that he based his recommendation on Student's lack of the skills needed to learn in a group environment, and the fact that Student required he one-to-one, repetitive teaching that an ABA program could provide.

49. While the District assessors did not have Dr. Jones's report before they finalized their report, the District's findings were consistent with Dr. Jones regarding Student's cognitive abilities, and pre-academic, social skills, and expressive and receptive language deficits. Student did not establish that the District's assessments were not accurate reflections of Student's unique needs, despite not having Dr. Jones's assessment.

#### Ms. Lopez-McCarthy's Report

50. Felicia Lopez-McCarthy is the owner and operator of SSP, a non-public agency which provides ABA services to students in their homes and in school settings. Parents contacted SSP in August 2006 and requested that Ms. Lopez-McCarthy assess Student for private, home based ABA services. Ms. Lopez-McCarthy conducted an informal assessment to determine Student's skills and abilities, but did not prepare a report before

the September 6, 2006 IEP meeting. SSP provided Student one-to-one ABA services at home in August 2006, for 20 hours per week.

51. Ms. Lopez-McCarthy discussed Student's progress at the September 6, 2006 IEP meeting, and on September 21, 2006, prepared a report at the request of the District. At the time of the September 6, 2006 IEP meeting, Ms. Lopez-McCarthy noted that Student was making good progress in acquiring skills and following simple directions. She stated that Student's pre-academic skills were emerging as Student was beginning to match items, imitate actions, attend for longer periods and respond to verbal commands. Ms. Lopez-McCarthy noted that Student did not display significant behavior problems; SSP's ABA instructor easily handled inappropriate behaviors with behavioral management techniques.

52. Ms. Lopez-McCarthy recommended in her September 21, 2006 report that Student receive 30 hours per week of one-to-one home ABA instruction, with 6 hours per week of ABA supervision and 3 hours per week of ABA consultation. She stated that Student required intensive one-to-one, home-based ABA instruction because Student had little educational services until SSP began working with Student. At that time Student lacked the basic skills to succeed in group instruction. Ms. Lopez-McCarthy testified at hearing that outside sounds easily distracted Student, which necessitated a sensory-neutral learning environment that could be more easily created at Student's home. However, Ms. Lopez-McCarthy's September 21, 2006 report did not mention or describe Student's distractibility to sound as being a significant problem.

53. While the District's assessors did not speak to Ms. Lopez-McCarthy while preparing their assessments or observe Student's home ABA program, Student did not establish that there was anything in Ms. Lopez-McCarthy's oral or written reports so significant that it should have caused the IEP team to come to a different result.

## DISTRICT'S PROPOSED GOALS

54. A district must provide a student with an educational program that is reasonably calculated to provide the student with some educational benefit in the least restrictive environment. A district is not required to provide a special education student with the best education available or to provide instruction or services that maximize a student's abilities. A school district need only provide a basic floor of opportunity that consists of access to specialized instructional and related services, which are individually designed to provide an educational benefit to the student.

55. The IDEIA provides that an IEP must contain a statement of current levels of educational performance, measurable annual goals, and a means to measure progress towards the goals. Additionally, the IEP team must take into account the results of the student's most recent assessments in formulating the IEP to determine the student's present levels of performance and the student's unique needs, and to set appropriate goals.

56. The parties' assessors were in basic agreement regarding Student's speech and language, OT, behavior, social-emotional and pre-academic skills deficits. Based on comments from Student's IEP team, the District modified Student's present levels of performance for language use and social language at the September 6, 2006 IEP meeting. After the District made the requested modifications, Dr. Jones, Ms. Lopez-McCarthy and Parents did not identify any further errors in any particular present level of performance.

57. While the parties agreed on Student's present levels of performance, Student argued he lacked the basic skills needed to meet the proposed goals based his present levels of performance and the District overestimated his capability to achieve the proposed annual goals. Dr. Jones testified that the District's proposed goals were too ambitious as Student lacked the needed foundational skills. Dr. Jones opined that the proposed goals needed to focus more on teaching Student more rudimentary skills.

58. Dr. Jones testified that Student did not have the required play skills to

achieve the District's proposed social skills goal, which emerge around the cognitive developmental age of 30 months. Dr. Jones stated that the District's proposed social/behavior, language comprehension and social language goals were unrealistic because Student possessed the cognitive abilities of an 18 month old child. The District did not disagree with Dr. Jones's opinion that Student had the cognitive ability of an 18 month child, but asserted that Student could meet the proposed annual goals in its program.

59. Dr. Jones also testified that the District's pre-academic readiness goals requiring Student to match pictures, sort items by size, shape and color, and understand concepts regarding quantity far exceeded Student's cognitive ability. Dr. Jones also believed that Student's autistic behaviors would complicate Student's ability to meet the proposed goals because Student lacked the attending skills to sit and learn. In criticizing the District's proposed OT goals, that Student catch and throw a ball, appropriately use playground equipment and be able to cross the midline, Dr. Jones did not believe that Student had the foundational skills to meet those goals. He testified that Student simply lacked the basic ability to learn new tasks and skills.

60. Ms. Lopez-McCarthy also stated that District's proposed annual goals were not appropriate for Student because, at the time of the IEP meeting, he lacked the basic pre-academic, attending and behavioral skills the goals required. Ms. Lopez-McCarthy based her opinion on the fact that SSP was working with Student on more basic skill acquisition goals and that Student, while he had made progress, had not yet mastered these basic skills.

61. Lopez-McCarthy's opinions that the District's annual goals were too ambitious were not persuasive because they did not consider that Student and the District would work toward the annual goal through the short-term benchmarks noted in the District's proposed goals. Dr. Jones and Ms. Lopez-McCarthy considered Student's abilities as of September 6, 2006, and whether Student could meet the proposed annual

goals at that time. Dr. Jones and Ms. Lopez-McCarthy did not take into account the progress Student could make during a school year. Additionally, Dr. Jones and Ms. Lopez-McCarthy also did not adequately consider whether Student could meet the goals in a year because they both believed that Student could only make adequate educational progress in an ABA program.

62. Dr. Xie and Ms. Dooley agreed with Dr. Jones's finding that Student's cognitive abilities were at approximately 18 months' age equivalence. Even with Student's cognitive deficits, Ms. Dooley, Ms. Nakai and Ms. Malladi established that the District's proposed annual goals were based on Student's expected progress during the school year, which was derived from information developed by the parties' assessments and information provided by all team members at the September 6, 2006 IEP meeting. In developing Student's proposed annual goals, the District considered that Student had made good progress in his private programs, including his attending skills; that Dr. Jones reported that Student possessed emerging verbal and imitation skills; and that Student sought out social interaction. District witnesses all persuasively described how the District personnel involved with Student coordinate their services and communicate regarding a student's progress in meeting IEP goals, and how they make changes in the classroom to address delays in meeting goals or accelerating goals if a student meets a goal early. Therefore, the District proposed annually goals were reasonably calculated to provide Student with some educational benefit based on Student's present levels of performance and his ability to learn in at Glankler. Dr. Jones and Ms. Lopez-Garcia failed to consider these factors.

63. Student argued that the District's proposed goals are too vague and that a reasonable reader of the proposed goals would not know if Student had met a proposed goal because the goal is too subjective in defining success. Student is incorrect because he looks simply at the annual goal, and not the short term instructional objectives and benchmarks that give it meaning.

64. Student contended, for example, that the District's proposed pre-academic readiness goal was unmeasurable because it states that Student was to participate in a variety of preschool activities, a term that encompasses many possible activities. However, the District's proposed short-term objectives adequately defined that goal by stating that Student would work on matching skills. Further, the short-term objectives adequately described what Student would need to match and the success rate required to meet the objective.

65. The proposed social language goal required that Student respond to verbalizations related to play or small group activities. Student asserted that the term 'verbalization' is unduly vague. To "verbalize," obviously means to put into words. Moreover, the goal's short-term objectives were objective and measurable because they addressed Student's joint attention, ability to take turns and ability to comment to a peer. Finally, the language comprehension goal was objective and measurable, as its short-term objectives required Student to show that he understood sentences by pointing to a named picture and responding to where, who and what questions. Therefore, the District's proposed annual goals were objective and measurable.

#### ABILITY OF THE DISTRICT TO MEET STUDENT'S UNIQUE NEEDS AT GLANKLER

66. Student challenged the District's preschool program because it is eclectic. He argued that only an ABA program is supported by peer-reviewed research showing it to be effective for autistic children like Student. Student asserted that the District's program could not meet his unique needs in a group environment as he lacked the basic pre-academic, speech and language, and attending skills to succeed. The District contended that its eclectic preschool model at Glankler is designed to meet the unique needs of autistic children like Student. Dr. Xie stated that the District's program is supported by peer-reviewed research from the National Resource Center, which in 2001 recommended an intensive, eclectic preschool program for 25 hours per week for autistic



preschool children.

67. For the SY 2006-2007, Evelyne Novello taught the District's preschool class at Glankler. Ms. Novello has taught special education at Glankler for the past 18 years, and has been the teacher of the autism preschool classroom since 1996. Ms. Novello has extensive training regarding the education of autistic children.

68. Ms. Novello and Dr. Xie described the District's preschool as an eclectic program that used different methodologies to teach children based on the child's unique needs. The District's preschool program incorporated ABA methodology during the entire school day, and the ABA technique Discrete Trail Training (DTT) for one hour per day, with the opportunity for additional DTT instruction.<sup>5</sup> The District also employed the Treatment and Education of Autistic and related Communication Handicapped Children (TEACCH) method,<sup>6</sup> the Picture Exchange Communication Systems (PECS)<sup>7</sup> and Floor Time.<sup>8</sup> At the start of the SY 2006-2007, Ms. Novello and three paraprofessionals worked with six children in the Glankler preschool classroom. The Glankler class incorporated speech and language and OT activities into the daily schedule, such as in circle time, by working on verbal imitation skills while reading a book and body movements that go with a song. Ms.

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<sup>5</sup> DTT involves repetitive, one-to-one drills, in which the instructor attempts to teach the student a particular skill or behavior.

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

<sup>7</sup> PECS is designed to develop early nonverbal communication through the use of icons, pictures or photographs to facilitate communication.

<sup>8</sup> Floor Time involves engaging with the autistic child on the floor to work on areas of developmental milestones.

Novello consulted with the speech and language and OT providers on a student's progress in meeting IEP goals and implementing different strategies into the classroom.

69. Dr. Xie is familiar with the Glankler classroom and the results of the methodologies employed there, as she has assessed seven students who have attended Glankler, four of whom had cognitive deficits similar to Student's. Two of those students showed significant improvement in their cognitive test scores, which went from deficient to the average range. The other two students showed significant improvement in their adaptive behaviors, and small cognitive test gains.

70. Dr. Xie stated that Student's deficits were not so significant that he required a home ABA program to learn basic skills. Dr. Xie noted that Dr. Jones' report stated that Student had good vocal imitation skills, sought out social interactions, and could follow set routines and basic instructions, which he needed to succeed in preschool. She stated that Dr. Jones's report acknowledged that Student had good verbal imitation skills, could anticipate and follow set routines and demonstrated the capacity to learn. She also noted that Dr. Jones's report findings showed that Student possessed the ability to learn and succeed in a group learning environment. A comparison of Dr. Xie's and Dr. Jones's assessments findings show that both made similar findings regarding Student's abilities and deficits. However, Dr. Jones' testimony showed a lack of understanding of classroom instruction and the ways an autistic student can benefit from eclectic instruction, due to his belief that an autistic child with Student's deficits could only succeed in a home ABA program.

71. Ms. Novello has never met Student, and only knows of Student unique needs through the District's assessments, Ms. Lopez-McCarthy's reports and the September 6, 2006 IEP. Ms. Novello credibly testified that, based on her personal experience, children with similar deficits have made adequate educational progress in her class. Ms. Novello stated that students for whom assessors could not obtain a score on a cognitive functioning assessment have attended her class and have made adequate

educational progress, including in the SY 2006-2007. She described how her program could teach Student pre-academic skills through an intensive program focused on meeting Student's goals, given its low student to staff ratio. Ms. Novello described how she would incorporate the different teaching methodologies in working on a student's IEP goals, such as working on color and shape recognition with TEACCH methodology.

72. Ms. Novello stated that her classroom at the beginning of the SY 2006-2007 had a mix of children who were verbal, who had emerging verbal skills and could say single words with reinforcement, and were non-verbal. Ms. Novello and Ms. Nakai noted that the District's program incorporated language into all daily activities and the teacher worked with the speech and language therapist to develop educational strategies to meet a student's speech and language goals. Additionally, the class used PECS to communicate with children through pictures and objects. Ms. Novello and Ms. Nakai established that Glankler has been successful with students with similar speech and language deficits as Student.

73. While Mother and Ms. Lopez-McCarthy testified that Student required a home program due to Student's extreme auditory distractibility, no one from Student's IEP team raised this as an issue at the September 6, 2006 IEP meeting. Neither Dr. Jones's report nor Ms. Lopez-McCarthy's report mentioned auditory distractibility, which strongly suggests that the problem, if any, did not seem important to them at the time they wrote. In any event, Ms. Novello persuasively described how her program could address the needs of a student who was easily distracted by noise or the movement of others. She stated that students in the past have worn earphones, and staff sometimes worked with students in screened-off areas of the classroom to minimize auditory and visual distractions. Additionally, the program's low student-to-staff ratio allowed staff to redirect students who became distracted, and to teach students needed attending skills.

74. The District's offer of a weekly, 30 minute playgroup session was reasonably calculated to address social skills deficits, something a home ABA program cannot do.

Lisa Hillman is the playgroup instructor at Glankler. Ms. Hillman teaches students needed social skills in a playgroup that usually consists of two to three special education students and four to five regular education children. The playgroup engages in activities such as playing age appropriate games, working on motor activities and singing songs. The playgroup works on pre-academic, speech and language and OT skills as well.

75. Ms. Hillman has not met Student, and knows of Student's cognitive, speech and language, OT, and social-emotional deficits from reviewing the District's assessment reports and its proposed IEP. Ms. Hillman stated that children with the cognitive and attending deficits identified in the District's assessment of Student have been in her playgroup and have made adequate progress regarding in improving their social, pre-academic, speech and language and OT skills. Ms. Hillman stated that she would have worked with Student on imitating the other students through hand-over-hand instruction and would have redirected Student if he exhibited self-stimulatory behaviors. Student did not have behavioral problems that Ms. Hillman could not handle in the playgroup.

76. Dr. Jones stated at the September 6, 2006 IEP meeting and at hearing that Student could not make adequate educational progress in the District's preschool program because the District used an eclectic model. Dr. Jones based his opinion on a study conducted by Dr. Jane S. Howard, a psychologist also associated with the Valley Mountain Regional Center, concluding that only an intensive ABA program would allow a child like Student to make adequate educational progress.<sup>9</sup> However, Dr. Jones never observed the District's program, and his opinion that Student could not succeed there is based solely Dr. Howard's study and his own view that an eclectic model cannot effectively educate with deficits like Student. Since he never visited the District's preschool program,

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<sup>9</sup> Howard, Sparkman, Cohen, Green and Stanislaw, *A Comparison of Intensive Behavior Analytic and Eclectic Treatments for Young Children with Autism* (2005) 26 Research in Developmental Disabilities, pp 359-383.

Dr. Jones lacks first-hand knowledge of it and could not persuasively establish that the District's preschool program would be ineffective for Student. Additionally, Dr. Howard's study did not prove that an autistic child could not receive some educational benefit in an eclectic program.

77. Ms. McCarthy-Lopez also stated that, based on her previous observations of Ms. Novello's classroom, the District's program could not meet Student's unique needs. However, Ms. Lopez-McCarthy's classroom observations were extremely brief and did not involve an in-depth inquiry into the ways the District's program addresses a student's unique needs. Like Dr. Jones, Ms. Lopez-McCarthy based her testimony that the District's program could not succeed with Student primarily on her belief of the superiority of an ABA-only program, and not whether the District's program at Glankler would allow Student to receive some educational benefit.

78. The District's and Student's assessors all found that Student had similar deficits related to his autism spectrum disorder. The parties' dispute regarding the appropriate program for Student centered on methodology. Parents entered the September 6, 2006 IEP meeting with a predetermined decision that they would only accept an ABA home program. The District designed its program at Glankler to serve children like Student, following the recommendations of the National Resource Center for an intensive, transdisciplinary program. Therefore, the District based its program on research. The District's offer to place Student at Glankler was reasonably calculated to allow Student to receive some educational benefit. Student's experts did not have a clear understanding of the District's program or why it could meet Student's unique needs. Therefore, the District's Glankler program could not provide Student with some educational benefit.

#### The District's Offer of Occupational Therapy Services

79. The parties do not dispute that Student requires OT services to meet his unique needs. They dispute the level of services Student requires to address his gross and

fine motor skills and sensory integration deficits. Student contended that the District's offer of one 45- minute individual, pull-out session per week is not sufficient to meet Student's unique OT needs.

80. Ms. Malladi recommended that Student receive direct OT services for 30 to 45 minutes per week. She recommended that Student have a sensory diet to address sensory integration deficits and to control his sensory seeking behaviors. Parents informed Ms. Malladi that Student had a sensory diet at home, developed by prior occupational therapists, but did not provide her a copy before the August 30, 2006 assessment. Ms. Malladi recommended possibly updating Student's sensory diet after she had a chance to review it.

81. Dr. Jones discussed Student's OT deficits in his report, and recommended two one-hour therapy sessions per week to address Student's fine and gross motor and sensory integration deficits. However, Dr. Jones is not qualified to give an opinion regarding the level of OT services Student requires, as Dr. Jones lacks the necessary education, experience and training in this area.

82. A representative from PACE did not attend the IEP meeting to discuss Student's need for OT services, and the progress he had made with services provided by PACE. Parents did not provide the District with a copy of the September 3, 2006 PACE report even though Ms. Malladi had requested it. A comparison of PACE's September 3, 2006 report with Ms. Malladi's assessment report does not show any significant differences regarding Student's OT deficits or the level of services necessary to address them. Both reports describe the same gross and fine motor skill deficits, and problems with sensory processing. PACE's September 3, 2006 report does not indicate that Student was extremely distractible due to sound, or that was an area of concern when PACE started services.

83. Before founding SSP, Ms. Lopez-McCarthy provided OT to children, including autistic children like Student. Ms. Lopez-McCarthy has a Bachelor of Science

degree in OT. However, she did not conduct a formal OT assessment of Student, nor did she raise any objection to the District's offer of OT services and proposed goals at the September 6, 2006 IEP meeting. Ms. Lopez-McCarthy did not testify that the information in Ms. Malladi's assessment report and PACE's September 3, 2006 report were not accurate reflections of Student's OT deficits and present levels of performance. Ms. Lopez-McCarthy's testimony that the District's offer of OT services and its proposed goals were not sufficient to meet Student's unique needs was not credible, as she did not base her testimony on any formal assessment she conducted to determine Student's unique needs, plus her belief that Student's unique needs, including OT, could only be met in a home based ABA program. Therefore, the District's preschool program and offer of OT services were adequate to address Student's unique needs.

#### The District's Offer of Speech and Language Services

84. The parties do not dispute that Student requires speech and language services to meet his unique needs. They dispute the level of services he requires, based on the information presented by all the assessors.

85. The District offered Student 30 minutes of pull-out, individual speech and language therapy two times per week. The District's proposed speech and language goals focused on expressive and receptive language deficits and pragmatic language skills. The District also incorporated speech and language skills into the Student's proposed daily classroom instruction because he would work on language in the one-to-one DTT sessions, circle time and the other daily class activities. The District's proposed goals were designed to assist Student in speaking more spontaneously, understanding verbal directions, and learning the necessary skills to communicate with his peers and adults. In developing Student's speech and language goals, Ms. Nakai noted that Student had good verbal imitation skills, which demonstrated that Student possessed the ability to learn.

86. Ms. Lopez-McCarthy stated that based on SSP's work with Student he needed assistance with articulation, she is not an expert in this area. Ms. Lopez-McCarthy

did not establish that Ms. Nakai was incorrect in her assessment finding and testimony that Student first needed to work on expanding his vocabulary before any articulation deficits could be worked on because Student did not have a sufficient vocabulary to start articulation therapy. However, in response to Parents' concerns, the District did add a proposed articulation goal requiring Student to make age-level word sounds for the letters, p, b, m, h, w, and n.

87. While not qualified to give an expert opinion regarding speech and language, Dr. Jones recommended that Student receive one hour per week of speech and language therapy, which the District offered. Student did not establish that he required additional pull- out, individual or group speech and language services beyond what the District offered, because the District offered adequate speech and language goals and the Glankler classroom incorporated sufficient speech and language work in its daily routine to meet Student's unique needs. Therefore, the District's offer of speech and language services was adequate to address Student's speech and language needs.

#### PREDETERMINATION OF THE DISTRICT'S OFFER

88. A school district may commit a procedural violation of the IDEIA if it comes to an IEP meeting without an open mind and several options to offer for discussion with all team members. A district fulfills its obligation if it discusses and considers any suggestions and concerns a parent has concerning the child's placement. Student contended that the District predetermined its offer of placement and services before the September 6, 2006 IEP meeting, and did not consider the input from Dr. Jones at the IEP meeting.

89. All of the District witnesses who attended the September 6, 2006 IEP team meeting stated that they did not get together before the IEP meeting to decide the District's proposed offer of placement, services and goals, nor were they told by Mr. Bannon what the District's offer should be. The commonality of the District's witnesses'



opinion that the Glankler preschool was the appropriate placement for Student was based on their knowledge of the Glankler program and their beliefs that Student could succeed in that program.

90. Parents did not give the District a copy of the Dr. Jones's report until the evening before the IEP team meeting. Ms. Lopez-McCarthy did not prepare a report for the IEP meeting. The District did not obtain the OT information from PACE until after the IEP meeting. Although the District assessors did not have Dr. Jones' report before they finalized their own assessment reports, they obtained the same information when Dr. Jones presented his assessment findings at the IEP team meeting. Those findings corroborated the District's findings. Additionally, Student did not establish that the District team members needed to speak with Ms. Lopez-McCarthy about Student's progress in the ABA program before the IEP meeting, as she attended the IEP meeting and presented information regarding Student's present levels of performance. The information that Dr. Jones and Ms. Lopez-McCarthy presented at the IEP meeting regarding Student's unique needs corresponded to the District's findings. Moreover, even though the District did not have information from PACE before the IEP meeting regarding Student's progress in OT, PACE's September 3, 2006 report findings were consistent with the District's OT assessment.

91. The District considered Dr. Jones's, Ms. Lopez-McCarthy's and Parents' recommendation that Student continue in his home ABA program. However, based on Student's private and the District's assessment information, the District IEP team members believed that Student could make adequate educational progress at Glankler. The fact that the District IEP team members did not agree with Dr. Jones, Ms. Lopez-McCarthy and Parents did not mean that the District did not consider their views. It meant only that they had an honest difference of opinion about the appropriateness of the methodology required to meet Student's unique needs and to allow him to make adequate educational progress.

92. The District did not predetermine Student's goals and present levels of performance. Ms. Dooley stated that the District team members listened to information presented by Dr. Jones and Ms. Lopez-McCarthy. The District updated Student's present levels of performance and goals based on information from Ms. Lopez-McCarthy regarding Student's matching goal, as Ms. Lopez-McCarthy felt that Student had progressed from the time of the District's assessment. The District removed the term "independently" from Student's attending behavior goal, as Student's IEP team members were persuaded that Student would not have the ability in a year to "independently" participate in circle time activities. The District added an articulation goal in response to concerns of Dr. Jones and Ms. Lopez-McCarthy. Ms. Malladi created an OT goal for Student concerning crossing the midline, in response to a concern Mother expressed during the August 30, 2006 assessment.

93. Ms. Dooley drafted Student's IEP on a computer during the team meeting, except for the OT goals that Ms. Malladi handwrote. Student argued that the District predetermined its offer of placement and services because the District printed the IEP document toward the end of the meeting and Mr. Bannon handed the document to Parents and their attorney without permitting further discussion. However, by then the discussion had been sufficient as Parents had decided not to accept the District's offer, and nothing that a District team member would have said could have changed Parents' decision.

94. The District did not predetermine its offer of services, placement and proposed goals, or fail to consider the information provided by Student's assessors. The District changed several of the proposed goals based on comments by Student's team members. Additionally, Dr. Jones's and Ms. Lopez-McCarthy's findings regarding Student's deficits were consistent with the District's findings. The District's disagreement with Student's request for a home ABA program was simply based on a difference of opinion regarding the program appropriate for Student.

## CONCLUSIONS OF LAW

### BURDEN OF PROOF

1. Student, as petitioner, has the burden of proof as to the issues addressed here. (*Schaffer v. Weast* (2005) 546 U.S. 49, 62 [126 S.Ct. 528, 537, 163 L.Ed.2d 387, 399].)

FOR SY 2005-2006, DID THE DISTRICT FAIL TO FULFILL ITS CHILD FIND OBLIGATIONS TO IDENTIFY, LOCATE, AND EVALUATE STUDENT?

2. Pursuant to California special education law and the IDEIA, school districts have an affirmative, ongoing duty to identify, locate, and evaluate all children with disabilities residing within their boundaries. (20 U.S.C. § 1412(a)(3); Ed. Code, § 56300 et seq.<sup>10</sup>) The district's duty is not dependent on any request by the parent for special education testing or referral for services. A district's child find obligation toward a specific child is triggered where there is knowledge of, or reason to suspect a disability, and reason to suspect that a student may need special education services to address that disability. (*Dept. of Educ., State of Hawaii v. Cari Rae S.* (D. Hawaii 2001) 158 F.Supp.2d 1190, 1194.) The threshold for suspecting that a child has a disability is relatively low. (*Dept. of Educ., State of Hawaii v. Cari Rae S.*, id. at p. 1195.) A district's appropriate inquiry is whether the child should be referred for an evaluation, not whether the child actually qualifies for services. (*Ibid.*)

3. Pursuant to Legal Conclusions 7 and 8, Student did not establish that the District knew or should have had a reason to suspect that Student may have needed special education services before Father's letter of April 17, 2006. Although the District failed to start the assessment process until May 11, 2006, when Father sent a second assessment request to the District, and then delayed sending Parents a proposed

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<sup>10</sup> All statutory citations to the Education Code are to California law, unless otherwise noted.

assessment plan until June 20, 2006, the District still timely assessed Student and held the initial IEP meeting and made an offer of services and placement. Therefore, the District's failure to timely identify Student as a child who may need special education services in response to Father's April 17, 2006 letter did not deny Student a FAPE because it did not deny him any educational benefit or prevent Parents from participating in the educational decisionmaking process.

FOR SY 2005-2006, DID THE DISTRICT FAIL TO DEVELOP A PROPOSED ASSESSMENT PLAN WITHIN 15 DAYS OF STUDENT'S ASSESSMENT REQUEST AND HOLD A TIMELY IEP MEETING?

4. A parent or a school district may initiate a request for an initial assessment of a student to determine if the student is a child with a disability. (20 U.S.C. § 1414(a)(1)(B), Ed. Code, §§ 56029, 56043.) The school district must prepare an assessment plan and obtain consent to the plan from the student's parents.

5. To start the process of assessment the school district must provide proper notice to the student and his or her parents. (20 U.S.C. § 1414(b)(1); Ed. Code, § 56321, subd. (a).<sup>11</sup>) The notice must consist of the proposed assessment plan and a copy of parental and procedural rights under IDEA and companion state law. (20 U.S.C. § 1414(b)(1); Ed. Code, § 56321, subd. (a).) The assessment plan must appear in a language easily understood by the public and the native language of the student, explain the assessments that the district proposes to conduct, and state that the district will not implement an individualized education program without the consent of the parents. (Ed. Code, § 56321, subds. (b)(1)-(4).) The district must give the parents the proposed assessment plan within 15 days of the referral for assessment. (Ed. Code, § 56321, subd. (a).) The parents have 15 days after receipt of the assessment plan to respond. (Ed. Code,

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<sup>11</sup> An evaluation under federal law is the same as an assessment under California law. (Ed. Code, § 56302.5.)

§ 56321, subd. (c).) An IEP meeting must be held within 60 days of the receipt of parental consent to the assessment plan, not counting days between the student's school sessions and vacations in excess of five schooldays. (Ed. Code, § 56043, subds. (b), (c) & (f)(1).)

Within 30 days of a determination that the student is eligible for special services, the school district must hold a meeting to develop the student's initial IEP. (Ed. Code, § 56344, subd. (a).), 34 C.F.R. § 300.343(b)(2) (1999).<sup>12</sup>

6. In *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 176, 200 [102 S.Ct. 3034] (*Rowley*), the Supreme Court recognized the importance of adherence to the procedural requirements of the IDEIA. However, pursuant to 20 United States Code section 1415(f)(3)(E)(ii), a procedural violation of IDEIA does not deny the student FAPE unless it 1) impedes the student's right to FAPE; 2) significantly impedes a parent's opportunity to participate in the educational decision-making process; or 3) causes a deprivation of educational benefits. (See, *W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

7. Pursuant to Factual Findings 5 through 9, the District failed to timely send to Parents a proposed assessment plan. Father mailed his assessment request to the District on April 17, 2006. Since the District was on Spring Break during the week of April 17, 2006, the District did not receive Father's request until April 24, 2006. The District did not send a timely assessment plan to Parents by May 9, 2006, because the District misplaced Father's letter and then decided to delay preparing a proposed assessment plan due to its workload.

8. Pursuant to Factual Findings 8 through 13 and Legal Conclusions 5 and 4,

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<sup>12</sup> On October 13, 2006, amendments to the Code of Federal Regulations (C.F.R.) to correlate to the reauthorized IDEIA became effective. Unless otherwise specified, the citations herein are to the version of the C.F.R. that was in effect when the IEP that is the subject of this Decision was drafted.

although the District did not send its proposed assessment plan to Parents until June 20, 2006, the District still timely assessed Student and held the initial IEP meeting. Therefore, Student did not lose any educational benefits and the Parents did not lose an opportunity to participate in Student's educational decisionmaking process by the District's failure to timely send to Parents a proposed assessment plan.

DID THE DISTRICT DENY STUDENT A FAPE DURING SY 2006-2007 BY FAILING TO DEVELOP AN IEP THAT CONTAINED APPROPRIATE, OBJECTIVE AND MEASURABLE GOALS, AND WERE RELATED TO STUDENT'S PRESENT LEVELS OF ACADEMIC AND FUNCTIONAL PERFORMANCE?

9. Pursuant to California special education law and the IDEIA, children with disabilities have the right to a FAPE that emphasizes special education and related services designed to meet their unique needs and to prepare them for employment and independent living. (Ed. Code, § 56000.) FAPE consists of special education and related services that are available to the student at no charge to the parent or guardian, meet the state educational standards, include an appropriate school education in the State involved, and conform to the child's IEP. (20 U.S.C. § 1402(9).) "Special education" is specially designed instruction, at no cost to parents, to meet the unique needs of the student. (20 U.S.C. § 1402(29).)

10. Likewise, California law defines special education as instruction designed to meet the unique needs of individuals with exceptional needs coupled with related services as needed to enable the student to benefit fully from instruction. (Ed. Code, § 56031.) The term "related services" includes transportation and such developmental, corrective, and other supportive services as may be required to assist a child to benefit from special education. (20 U.S.C. § 1402(26).) In California, related services may be referred to as designated instruction and services. (Ed. Code, § 56363, subd. (a).)

11. School districts receiving federal funds under IDEIA are required by title 20 of the United States Code, section 1414(d)(1)(A)(i), to create an IEP for each child with a

disability that includes: (1) a statement regarding the child's then-present levels of academic achievement and functional performance; (2) measurable annual goals, including academic and functional goals designed to meet the child's educational needs and enable the child to make progress; (3) a description of how the child's progress will be measured; (4) a statement of the special education and related or supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child; (5) a statement of the program modifications or supports that will be provided; (6) an explanation of the extent to which the child will not participate with nondisabled children in the regular class; and (7) other required information, including the anticipated frequency, location, and duration of the services. (See also, Ed. Code, § 56345, subd. (a).)0

12. In *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. (*Rowley, supra*, 458 U.S. 176, 200.) The Court held that a student's IEP must be reasonably calculated to provide the student some educational benefit, but that the IDEA does not require school districts to provide 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 instructional and related services, which are individually designed to provide educational benefit to the student. (*Id.* at p. 201.) *De minimus* benefit or trivial advancement, however is insufficient to satisfy the *Rowley* standard of "some" benefit. (*Walczak v. Florida Union Free Sch. Dist.* (2d Cir. 1998) 142 F.3d at p. 130.) Rather, a child's academic progress must be viewed in light of the limitations imposed by his or her disability and must be gauged in relation to the child's potential. (*Mrs. B. v. Milford Bd. of Educ.* (2d Cir. 1997) 103 F.3d 1114, 1121.)

13. To determine whether a district offered a student a FAPE, the analysis must focus on the adequacy of the district's proposed program, not the parents' proposed alternative. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1314.) An

IEP is evaluated in light of information available at the time it was developed; it is not judged in hindsight. (*Adams, etc. v. Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.) It must be evaluated in terms of what was objectively reasonable when the IEP was developed. (*Ibid.*) If the district's program was designed to address the student's unique educational needs, was reasonably calculated to provide student some educational benefit, and comported with student's IEP, then the district provided a FAPE, even if the parents preferred another program and even if the preferred program would have resulted in greater educational benefit. (*Id.* at p. 1314.) 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(a)(5)(A); Ed. Code, § 56031.)

14. Student contended that the District's proposed offer of services and placement failed to consider that Student lacked the basic skills to learn in a group environment and that he required a home ABA program to acquire those skills. Pursuant to Factual Findings 42 through 53 and 76 through 78, Student did not establish that the District's IEP was not reasonably calculated to permit Student to obtain some educational benefit. Dr. Xie, Ms. Novello and Ms. Hillman persuasively testified that Student did have the basic skills to learn in a group based on the parties' assessments. Both Dr. Jones and Ms. Lopez-McCarthy improperly presumed that since the District's proposed preschool placement at Glankler used an eclectic methodology, Student could not receive an adequate education there. Also, Dr. Jones opined without observing the Glankler classroom, and with only the support of the Howard Study, that Student, with a cognitive functioning ability of an 18 month old child, could only make adequate educational progress in a home ABA program.

15. Student did not contend that the District incorrectly assessed Student or that



Student's assessment findings were not accurate. Pursuant to Factual Findings 15 through 38, 49, 53, 62, 82, 83 and 87, Dr. Jones's psychoeducational assessment, Ms. Lopez-McCarthy's report concerning Student's progress in the ABA program and PACE's report regarding Student's progress in its OT program were consistent with the District's assessment findings regarding Student's abilities and deficits. While Student now contends that he requires a home ABA program because he is so easily distracted by noise that he needs a sensory-neutral learning environment like that of his home, Dr. Jones and Ms. Lopez-McCarthy did not raise this issue at the September 6, 2006 meeting or in their reports, and Parents did not raise this concern to the District's assessors during the assessment process.

16. Therefore, the District's offer of services, placement and goals were reasonably calculated to provide Student with some educational benefit, based on the information available to the District at the September 6, 2006 IEP meeting.

17. The IEP is a written document for each child who needs special education and related services. The contents of the IEP are mandated by the IDEIA. The IEP must include an assortment of information, including a statement of the child's present levels of academic achievement and functional performance. The IEP must also include a statement of measurable annual goals and objectives that are based upon the child's present levels of academic achievement and functional performance and a description of how the child's progress toward meeting the annual goals will be measured. Finally, the IEP must state when periodic reports of the child's progress will be issued to the parent, and describe the special education and related services to be provided to the child. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. §§ 300.346, 300.347 (1999).)

18. Student contended that the District failed to develop appropriate goals to meet Student's unique needs as the District's goals were too ambitious, and could not be met in the District's preschool program. The parties' assessors agreed that Student's cognitive functioning was at the age equivalence of approximately 18 months, and that

Student had significant deficits in his pre-academic, social-emotional, expressive and receptive language and sensory integration skills. Student did not contend that the District should have developed goals in other areas to meet Student's unique needs. Also, Student did not assert that the District's present levels of performance for the proposed goals were not accurate.

19. Pursuant to Factual Findings 57 through 62, Dr. Jones's and Ms. Lopez-McCarthy's opinions that the District's proposed annual goals were too ambitious were erroneously based on their views of Student's skills as of September 6, 2006. Dr. Jones and Ms. Lopez-McCarthy did not consider whether the District's proposed offer of services and placement could during the year teach Student the skills he needed to achieve the proposed annual goals. Dr. Jones and Ms. Lopez-McCarthy failed to consider the short-term objectives and benchmarks that made up the proposed annual goals and that the District would work in increments to teach Student the foundational skills needed to reach the proposed annual goals. The fact that Student might not have the basic skills on September 6, 2006, to achieve the proposed goals does not mean that the District could not teach Student the needed skills for Student to obtain the proposed annual goal.

20. Also, the fact that Student might not make the projected growth in the proposed goal does not invalidate the goal if the District made a good faith effort for Student to achieve the proposed goal. (Ed. Code, § 56345, subd. (c).) As noted in Factual Findings 68 through 75 and 79 through 87, students with similar deficits have made adequate educational progress at Glankler. Therefore, the District could meet the proposed annual goals.

21. Finally, Student contended that the District's proposed goals were not objective or measurable. Pursuant to Factual Findings 63 through 65, Student's objections to the District's proposed goals focused on the language for the annual goal without considering the short-term objectives and benchmarks that made up the annual goal. Therefore, while a proposed annual goal might have used vague terms, such as

appropriate cooperative play, preschool activities, or verbalizations, the District adequately clarified what these terms meant in the short-term objectives and benchmarks. Therefore, the short-term objectives and benchmarks were objective and measurable.

22. Pursuant to Factual Findings 76 through 78, Dr. Jones and Ms. Lopez-McCarthy based their opinions regarding the goals on the belief that Student could only be adequately educated in a home ABA program. Additionally, Dr. Jones never visited the District's proposed preschool classroom, and Ms. Lopez-McCarthy only briefly visited the Glankler classroom. Therefore, neither had an adequate foundation to state persuasively that the District could not meet the proposed goals for Student.

23. The District's proposed goals were appropriate, as the District's goals were based on accurate present levels of performance and addressed Student's unique needs. Additionally, the District's proposed goals were reasonably calculated to allow Student to receive some educational benefit, as the proposed goals were not too ambitious and could be met in the Glankler preschool program. Finally, the District's proposed goals were objective and measurable.

DID THE DISTRICT DENY STUDENT A FAPE DURING SY 2006-2007 BY FAILING TO MEET STUDENT'S UNIQUE NEEDS FOR AN IN-HOME ABA PROGRAM, OCCUPATIONAL THERAPY TO ADDRESS HIS FINE AND GROSS MOTOR DEFICITS, AND SPEECH AND LANGUAGE THERAPY TO ADDRESS HIS ARTICULATION DEFICITS?

24. The *Rowley* decision established that, as long as a school district provides an appropriate education, methodology is left to the district's discretion. (*Rowley*, 458 U.S. at p. 208.) Subsequent case law confirms that this holding governs disputes about the choice among methodologies for educating children with autism. (See, e.g., *Adams, etc. v. Oregon*, *supra*, 195 F.3d at p. 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.) As the First Circuit Court of Appeal noted, the *Rowley* standard recognizes that 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 (citing *Roland M. v. Concord Sch. Committee* (1st Cir. 1990) 910 F.2d 983, 992-93).) "Beyond the broad questions of a student's general capabilities and whether an educational plan identifies and addresses his or her basic needs, courts should be loathe to intrude very far into interstitial details or to become embroiled in captious disputes as to the precise efficacy of different instructional programs." (*Roland M., supra*, at p. 992 (citing *Rowley*, *supra*, 458 U.S. at pp. 202.)) In *Adams*, the parents of a toddler with autism sought a one-to-one, 40 hour per week ABA/DTT program modeled after the research of Dr. O. Ivar Lovaas, 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. See, e.g., E.R. Tab 9; Dawson & Osterling (reviewing eight effective model programs). IDEA and case law interpreting the statute do 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 v. State of Oregon*, 195 F.3d at pp. 1149-1150 (citing *Gregory K. v. Longview Sch. Dist.*, (9th Cir. 1987) 811 F.2d 1307, 1314).)

25. IDEIA does not mandate that a district use a particular methodology, especially for autistic students. Courts have consistently rejected the proposition that an ABA-only program is the only effective method of instruction for autistic students. (*Deal v.*

*Hamilton County Dept. of Educ.* (E.D.Tenn. 2006) 2006 U.S. Dist. LEXIS 27570, pp. 51-57 [summary of recent cases concerning purported superiority of a ABA-only program for autistic children].) Courts have determined that most important issues are whether the proposed instructional method meets the student's needs and whether the student may make adequate educational progress. In *Deal, supra*, the court noted that the scientific evidence does not support the contention that there is only one correct way to educate an autistic child. (*Deal, supra*, at pp. 65-68.) Finally, the statute regarding the use of peer-reviewed research-supported educational programs and services is qualified by the language "to the extent practicable," and therefore does not require that an educational agency never use an educational program or service not supported by peer-reviewed research. (*Rocklin Unified Sch. Dist. v. Student* (May 25, 2007) OAH Case No. 2006110278, pp. 18-22.)

26. Pursuant to Factual Findings 68 through 75 and 79 through 87, Ms. Novello, Dr. Xie and Ms. Hillman established that other autistic children who had cognitive, speech and language, OT and social-emotional deficits similar to Student's have attended Glankler and obtained some educational benefit. The Glankler program is supported by peer-reviewed research; Dr. Xie stated that the District based its autism preschool program on the 2001 best practices recommendations by the National Resource Council, which recommended an eclectic model. Ms. Novello showed how she and the classroom paraprofessionals use the different methodologies to address a student's particular need, and incorporate speech and language and OT instruction into the daily classroom schedule. Ms. Novello explained how she and the classroom paraprofessionals would work with Student, using different methodologies, on his various IEP goals. Ms. Hillman described how her playgroup session would work on meeting Student's social skills goals, and foster speech and language and OT skills as well.

27. Ms. Novello, Ms. Nakai, Ms. Malladi and Ms. Nakai established that the District's program at Glankler used a transdisciplinary approach designed to provide

speech and language and OT services in the classroom, by incorporating these skills into a child's daily routine. All four noted that the classroom teacher, paraprofessionals and therapists consulted and collaborated with each other to ensure that the student met his or her IEP goals. Ms. Novello has had extensive experience in working with autistic preschool children, and has worked with children with cognitive, speech and language and OT deficits like Student's. Ms. Novello further explained that she would work with Student's speech and language and OT therapists to coordinate their efforts in the classroom. Student did not establish that the District's transdisciplinary approach could not meet Student's unique needs, and provide him with some educational benefit.

28. Pursuant to Factual Findings 76 through 77, Dr. Jones and Ms. Lopez-McCarthy presupposed before entering the September 6, 2006 IEP meeting that Student could only obtain an appropriate education in a home ABA program. The parties' assessment findings and Student's progress in the home ABA program did not show that Student lacked the basic skills to learn in a group environment. Student did not exhibit significant behavioral problems, had good verbal imitation skills, and sought out social interactions.

29. The District and Student were in basic agreement regarding Student's unique needs and present levels of performance, and that Student required an intensive program to meet his unique needs. The District and Student differed on the interpretation of the assessment results and the proper methodology to meet those needs. However, Student did not prove that the District could not meet his unique needs in a group learning environment, and that only a home ABA could provide him a FAPE. Thus, the District's proposed educational program was designed to meet Student's unique needs and reasonably calculated to provide Student with some educational benefit.

DID THE DISTRICT DENY STUDENT A FAPE DURING SY 2006-2007 BY PREDETERMINING THE OFFER OF STUDENT'S PLACEMENT AND SERVICES PRIOR TO THE SEPTEMBER 6, 2006 IEP TEAM MEETING AND FAILING TO CONSIDER THE RESULTS OF AN INDEPENDENT EDUCATIONAL EVALUATION BY DR. JONES, WHICH INTERFERED WITH PARENTS' OPPORTUNITY TO PARTICIPATE IN THE DECISIONMAKING PROCESS?

30. Parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, assessment, educational placement and provision of a FAPE to the child. (Ed. Code, §§ 56304, 56342.5; 34 C.F.R. § 300.501(a), (c).) School officials and staff can meet to review and discuss a child's evaluation and programming in advance of an IEP meeting; that does not constitute predetermination of the IEP. (*A.E. v. Westport Bd. of Educ.* (D. Conn. 2006) 463 F.Supp.2d 208, 216-217; *affd.* (2d. Cir. October 18, 2007) 2007 U.S.App. LEXIS 24472 .) However, when a school district predetermined the child's program and did not consider the parents' requests with an open mind, the school district denied the parents their right to participate in the IEP process. (*Deal v. Hamilton County Bd. of Educ.* (6th Cir. 2005) 392 F.3d 840, 858.) The IDEIA does not give parents a power to veto any proposal or determination made by the school district or IEP team regarding a change in the student's placement; their resort is to a due process hearing. (*DOE v. Maher* (9th Cir. 1986) 793 F.2d 1470, 1489.)

31. Pursuant to Factual Findings 89 through 94, the District did not predetermine its offer of placement at Glankler and the proposed goals. The District's IEP team members did not decide before the September 6, 2006 IEP meeting what the District's offer would be. The fact that the District's IEP team members disagreed with Student's contention that he required a home ABA program to meet his unique needs does not mean that the District walked into the IEP meeting with the fixed intention to offer Student a placement at Glankler. The District considered the information presented by Student's IEP team members, including Dr. Jones's psychoeducational report, which caused the District to update Student's present levels of performance and modify its

proposed goals. Based on the District's experience in educating autistic children who had similar cognitive, OT, speech and language and social-emotional deficits, the District appropriately believed that it could provide Student with an educational program that met his unique needs. Therefore, the District did not interfere with Parents' right to participate in Student's educational decisionmaking process, as the District considered all the information that Student's IEP team members presented on September 6, 2006.

## ORDER

Student's requests for relief are denied.

## PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), this decision must indicate the extent to which each party has prevailed on each issue heard and decided. The following findings are made in accordance with this statute:

The District prevailed on all Issues.

## RIGHT TO APPEAL THIS DECISION

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

DATED: November 9, 2007

A handwritten signature in black ink, appearing to read 'PAC', is written over a horizontal line.

PETER PAUL CASTILLO

Administrative Law Judge

Special Education Division

Office of Administrative Hearings